

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(92)480 final

Brussels, 23 December 1992

PLURALISM AND MEDIA CONCENTRATION

IN THE INTERNAL MARKET

An assessment of the need for Community action

Commission Green Paper

Annexes

ANNEX

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

1. Introduction

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

1. Rules specific to monomedia concentration

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

2. Rules specific to multimedia concentration

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

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

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

3. General competition rules

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

4. Internal structural requirements for licence-holders

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

(1) Council Regulation No 4064/89 on the control of concentrations between undertakings: OJ No L 395, 30.12.1989, p. 1; corrected version OJ No L 257, 21.9.1990, p. 13.

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

5. Measures requiring pluralism in programmes

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

6. Disclosure and concentration

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

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

1. BELGIUM

(A) Preliminary

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

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

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

(B) The French-speaking community

(I) General

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

(II) Monomedia concentration

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

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

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

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

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

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

(iii) Multimedia concentration

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

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

(6) Article 41.

(7) Defined in Article 21.

(8) Article 17.

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

(iv) Restrictions on foreign participation

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

(v) Other restrictions on participation

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

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

(9) Article 21.
(10) Article 31(3).
(11) Article 31(4).
(12) Article 33.

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

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

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

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

(13) Article 17.

(14) Article 16(2).

(15) Article 20(3).

(16) Article 31(2).

(17) Article 31(6).

(18) Article 4(2).

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

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

(vii) Disclosure of concentration

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

(viii) Competition rules

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

(19) Article 16(4).
(20) Article 16(9).
(21) Article 26(3).
(22) Articles 31(1) and 16(1).

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

(C) The Flemish community

(I) General

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

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

(II) Monomedia concentration

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

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

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

(25) Draft Decree of 5 July 1991 on the approval and authorization of radio and television distribution networks and the promotion of the broadcasting and production of television programmes, Article 12.

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

(III) Multimedia concentration

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

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

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

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

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

(29) Cable network operators, however, may not hold a stake of more than 20% in the corporation.

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

(iv) Restrictions on foreign participation

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

(v) Other restrictions on participation

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

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

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

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

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

(32) Article 4(3).

(33) Article 4(4).

(34) Article 4(5).

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

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

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

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

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

(38) Article 4(9) of the Decree of 23 October 1991.

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

(vii) Disclosure of concentration

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

(viii) Competition rules

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

2 DENMARK

a) Background

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

(39) Article 9(1)(5).
(40) Article 2 of the Decree of 11 May 1988.
(41) Article 8(1) of the Decree of 28 January 1987.

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

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

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

(43) Law no. 589 of 1985, now part IIA of Law no. 421 of 1973.

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

b) Principles of Constitutional Law

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

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

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

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

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

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

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

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

(45) Section 15 a. (2) of the 1990 Order.

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

e) Cable Relay

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

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

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

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

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

f) Domestic Competition Legislation

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

(46) Law no. 370 of 7th June 1989.

