

Documento 6: Nota enviada por el EPC (European Publishers Council) a los Comisarios para influir en la discusión de la Comisión sobre la propuesta de Directiva sobre el pluralismo en los medios

EUROPEAN PUBLISHERS COUNCIL

FAX MESSAGE

TO: Please see below
FROM: Sir Frank Rogers, Chairman
DATE: 23 August 1996
RE: EPC Briefing for a Commission discussion on 4 September 1996
Media Ownership - Draft proposals : Protection of Pluralism in the
Control of Media in the Internal Market
PAGES: 7

To:

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EUROPEAN PUBLISHERS COUNCIL

MEDIA OWNERSHIP

The European Publishers' Council (EPC), representing 28 leading newspaper and magazine publishers with major interests in Europe has commissioned some important research (from Hydra Associates) into the regulation of media companies in the European Union. It will be published in the Autumn. Meanwhile, in advance of the Commission discussion scheduled for 4 September 1996, on draft proposals to regulate pluralism and media concentration at the European level, we are making available to you a summary of our findings. Attached you will also find a summary of the first results of our own internal consultation exercise on the actual draft proposals on the protection of pluralism in the control of media in the internal market (DG XV).

SUMMARY OF THE HYDRA RESEARCH FINDINGS

Research Objectives

- To bring together in a compendium all the relevant facts in an historical context;
- To contrast differing approaches to reconciling political and economic issues arising from ownership and control;
- To reinforce the point that current media legislation is reactive and contingent and consolidates the status quo.

Regulatory Intervention in the Media

Media companies - particularly TV and print - are subject to much more regulation than most other industries in Europe. We take for granted intervention in media in a way that we would find unacceptable and unusual in a less conspicuous consumer market. This burden of Regulation stems from both political and economic concerns.

Firstly the political concerns: there is a strong belief that the control of the supply of information, and one assumes, entertainment, is more than simply another business enterprise. It is also a close proxy for the *influence* of hearts and minds and, therefore, by extension, *control*.

Secondly the economic concerns: until recently there has been a perception that unregulated media markets could be prone to "market failure" including complex imperfections in the market and that intervention was needed and justified to secure balance, quality and diversity.

This combination of economic concerns and acute political sensitivity has led to the accumulation of layer upon layer of regulation. Barriers to prevent

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media domination both within media and between media are erected and constantly fortified.

We are now at a cross-roads, if not politically then certainly economically. Most of the assumptions that underlie the possible sources of market failure and dominance are being tested daily. A number of key themes emerged from the study:

1. Technological advances are increasing legislative obsolescence. In particular, the burden of regulation falls almost exclusively on traditional media. This will increasingly discriminate against press publishers.
2. The majority of legislation dealing with media ownership would seem to be intended to promote plurality. The prospect of new delivery channels and lowered barriers to market entry reduces the need to promote plurality artificially: As an integrated information industry emerges, media-specific legislation should be phased out in favour of competition policy.
3. Uncertainty abounds as to the relevant market to which rules actually apply – (local, regional, national or supra-national).
4. There is a perception that there are too many regulatory authorities with a media remit. This could be simplified if dealt with through competition policy.

August 1996

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Mr Gaston Thorn, Compagnie Luxembourgeoise de Telediffusion, Luxembourg
Associate Members: available on request

Comments on effect of the 10% threshold and audience measurement criteria:

Regarding the details of the proposals, the comments from EPC members so far say that:

- The 10% multimedia threshold is far too low. This threshold will affect all the successful companies in the smaller countries where their governments have allowed a concentration in order to foster local business enterprise and local culture. For the rest, the 10% will inhibit the development of strong European-based companies but will, in particular, discriminate against those who have already proved their success in "traditional media" - i.e. newspaper publishing, TV and radio. Success brings jobs, wealth and increased competitiveness - these aspects should not be discounted.
- Companies that have been built up outside these three traditional sectors will be able to expand and take increasing shares of Europe's media-consuming public. For example, computer and telecomms companies, other content producers generally such as magazine publishers, public service broadcasters (who often engage in large-scale commercial activities with sales of TV programming and diversified products which include press publications), record companies, film producers, book publishers and so on. These companies will be able to migrate into traditional media from a very strong financial base which has already been built up without the constraints of pluralism rules; some of these companies will have been producing "news" services (such as Microsoft) thus competing with publishers, but on different terms. These companies will be free to start up a new TV service or invest in an existing one, build up to a share of TV consumption (up to 30%), without being penalised for their existing share of consumers' time watching films, listening to CDs, reading books and magazines etc. Conventional newspaper publishers would thus be unfairly capped from the beginning even though they compete head on with such companies in the market place.
- All EPC members challenge the methodology and criteria for calculating the share of audience. A simple *coverage* figure of a medium can easily give a misleading picture of the medium's power as user experiences and attitudes to media and their content are totally disregarded. Furthermore, you cannot add up apples and pears and get a sensible or fair answer. The proposed criteria for measuring TV and radio share are based on time, i.e. how long any one person spends with a TV or radio station, whilst the press criteria are based on penetration figures which take no account of *time spent* with any one publication. However you look at it, newspaper publishers will be unfairly discriminated against because they can more easily reach say 20% of consumers in a zone than a TV company could, both because of capital costs and because of the way in which the people are measured:
- In more detail:
 1. The data-sets (which at first glance appear relevant) are only "conventions", devised to permit reasonably trouble-free trading (for example in advertising space) than would otherwise be the case without them.

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2. Some media consumption is not measured at all. There is a total lack of systematic auditing of the audience on Internet and other on-line services. Although not covered by the directive, these services do take up share of voice so they should be *counted* (although they should not be regulated), just as public service broadcasting should/will be.
3. Not all publishers subscribe to readership surveys and are thus not included in the survey. Free publications and publications below certain circulation figures are not included.
4. Surveys are conducted either by telephone interviews, people-meter panels or by diary methods; these differences have to be taken into account when interpreting the results, as well as statistical sampling errors.
5. While the measures used for press make no attempt to go beyond exposure to the vehicle (issue), television measurement aims to measure exposure to the content of each channel. (We say "aims" because the assumption is that every person recorded by the people-meter is paying attention. In fact we know from separate research that this is not true. People do all sorts of things - often anything but watch the programme - when the TV is on. They even read newspapers, as well as other activities).
6. If this difference (time spent watching TV versus exposure to a title) is not enough to demonstrate the impossibility of aggregating press and TV data, we would throw in the emotional components as a further problem. How should we equate a minute's reading of text with a minute's sound and picture on the TV screen? And can we assume an equal level of proactivity and reactivity in the viewer/reader's mind across both media? This is surely relevant when considering "share of voice" and influence?
7. We are puzzled by the exclusion of weekly newspapers. Although this exclusion would keep some publishers below the 10% limit, it is probably a distortion. If the directive aims to regulate *pluralism* and control any one person's "influence" over a large section of the media consuming public, it is illogical to exclude publications appearing less than 5 times per week because the majority of the regional and local press would thus be excluded. Again, although this helps some publishers to stay below any limits, it ignores the fact that large-scale concentration can often more easily build up in smaller areas. The *influence* is no less great.
8. As far as national publications are concerned, who is to say what the relevant influence of the weekly '*Economist*' is in comparison to the daily, '*Le Monde*'?
9. Measurement of press - world-wide as far as we know - is restricted to assessing the numbers of people exposed to the 'vehicle' i.e. an average issue of a publication. These surveys merely measure any one publication's penetration, but not its impact. In some cases people are asked if they have "seen" a publication "at all" in the last week, which includes a glance over someone's shoulder on the train. Other surveys require a minimum of 1 to 2 minutes to be included in the figure.
10. Attempts are occasionally made to calibrate the values of such very basic measures by 'page traffic studies'. Such studies ask about *time* spent reading different parts of a publication, but the cost and manifest inaccuracy of such approaches has effectively ruled them out. Furthermore, the inequity of

measuring time would be unacceptable as titles with a very literate readership would be unfairly penalised by a "time" measure.

11. The problem of sampling-error in surveys is familiar. Less familiar will be the specific problems of survey- and model-error in readership surveys. For example, for many years a limited number of publications was measured in the US by the "through the book" method, which used questions about specific issues in order to model average issue readership (AIR). The cost, inadequacies and inability to keep pace with title-proliferation led to its replacement with the virtually universal "readership in issue-period model". Daily paper readers "yesterday"; weekly paper/magazine readers in "the last 7 days"; monthlies' readers "in the last month" are what are counted as the "readership" of a title. Unfortunately, this system is subject to human and conceptual error and over-simplification, and the system suffers from two further errors: "replication" (seeing the same issue over longer than the usual time interval of the survey) and "parallel reading" (seeing more than one issue within one issue interval). The former results in over-estimation, the latter in under-estimation.
12. Another factor that will distort the figures and aggregations is the huge difference between the survey's qualifying criteria. In the UK, national readership is collected for persons aged 15+; in other countries surveys start from the age of 11 or 12. The discrepancies for radio and TV are even more vast. For radio, other countries survey listeners of radio from the age of 7 to 9 and in the UK its from 4+. For TV, surveys start counting viewers from the age of 7 to 10+ whereas in the UK its 4+. All such discrepancies are further compounded when divided by three and added up again to give the multimedia figure across a zone covering more than one survey area. In Finland, the rules of National Readership Study explicitly prohibit inter-media comparisons using their (NRS) figures and those from the TV meter panels because such comparisons are considered misleading.
13. The "concentration/pluralism assessors" would use the figures for a purpose other than for which the measurements were taken in the first place.
14. So, whilst the trader has settled for these well-known inequalities in measurement in order to do his job (e.g. selling/buying advertising space), in a system of measuring pluralism and presumably "influence", a more perfect set of criteria would be a pre-requisite for effective and fair legislation.

August 1996

Documento 7: Nota enviada a la Comisión por la FAEP sobre la idoneidad de la propuesta de Directiva sobre el pluralismo en los medios

FAEP



Media Concentrations Proposal

Some common-sense questions arising from the Commission draft

I. Thresholds and Small Member States

The thresholds for Radio and TV mergers/take-overs have been set at 30% and 10% for multi-media mergers. In practice this will mean that - on the assumption a Member State would qualify as a suitable 'zone' - media companies of small Member States will be faced with the effects of the directive. In none of the smaller Member States including Italy does the directive change anything in the status quo. But preliminary figures suggest the directive would have devastating effects in small Member States such as Sweden, Denmark, Finland, Netherlands and in the E.E.A. context Norway.

Example: Netherlands:

Media Owner	Television <i>share of viewing figures</i>	Radio <i>share of listening figures</i>	Newspapers <i>share of readership figures</i>	Multi-Media Share <i>(TV+Radio+Newspapers) divided by three</i>
VNU	37.5%	7%	22%	22.1%
Telegraaf	9.8%	1%	33%	14.6%
Public TV	25.5%	30%	0%	18.5%

II. What is a 'Zone'?

The directive uses the word 'Zone' which is never defined except to say it is at least a locality. The vagueness of this term with no basis in community law is an invitation to arbitrary decisions. After all if a zone is defined narrowly enough any media company will pass a threshold somewhere.

III. Who's the Controller?

The definition of the controller is very wide it covers virtually anyone having anything to do with a particular medium. Cable companies can be awarded 100% TV shares on the basis of the proposed definition. Banks could be identified as Europe's media barons whereas their real influence will be very small. Our consistent position has been that control must be defined the majority shareholdings and nothing more. Anything else opens the door to fruitless discussions and the paradoxical situation that several companies may be deemed to be the controller of the same medium.

IV. Viewing figures vs. Readership

In the setting of the thresholds DG XV has implicitly decided that Viewing figures and Readership figures are the same type of data. This is not so and all academia will accept this. Viewing figures are quantitative based on the number of sets which are switched on, readership figures are qualitative and indicate actual readership and recall. Comparing the two and/or integrating them into one equation doesn't make sense. Additionally it must be noted that the way to compare and/or integrate these data into one overall reach figure is hotly debated between publishers and broadcasters. Any decision would have immediate impact on the relative strength of advertising from these media. It would be unwise for the Commission to attempt to settle the debate.

Documento 8: Carta enviada a un miembro del Gabinete de Sir Leon Brittan por parte de la Representación Permanente del Reino Unido ante la Unión Europea en la que se detalla la posición informal del Gobierno Británico en contra de la propuesta de Directiva sobre Pluralismo en los medios de comunicación



02 September 1996

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Dea Fernando

DRAFT DIRECTIVE ON MEDIA PLURALISM

On Friday, Martin Jones sent you a briefing note provided by the Department of National Heritage setting out UK's general arguments against a Directive. We have now received some further material from DNH with their specific concerns about details of the proposed Directive. As you see, our main concerns are as follows:

- Application to newspapers. The Directive's proposals, notably its exclusion of those published less than five times a week, could cause severe distortions in the UK, particularly in regional newspapers (see paras 25-28);
- Audience measurement. We doubt it is appropriate to try and impose a common system across the Community given the wide variation in custom and practice (paras 30-36);
- Monomedia threshold of 30% for TV and radio. If applied as a national threshold, this could result in more concentration than at present. Conversely, if applied at regional level, this could cause grave disruption in the UK (paras 42-48). We believe there should be much more flexibility for Member States to determine their own monomedia thresholds taking account of national circumstances;
- 10% multi-media concentration limit. We believe that this is unworkable, particularly if it is applied to regional markets and could act as an unjustified brake on diversification (paras 49 - 53).



I hope this is helpful. Perhaps you could have a word with either Bill Jones (287 8218) or myself after the Commission's discussions to see whether any further briefing would be helpful.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Anne Lambert'.

Anne Lambert

BRIEFING ON PROPOSED EC DIRECTIVE TO PROTECT MEDIA PLURALISM

This briefing represents the informal views of the UK Government.

INTRODUCTION

Competence

The UK Government is opposed to this Directive. Its opposition is based first of all on whether the Commission has competence to act in this area. We note that the objective of maintaining pluralism is not in itself a Community objective. Indeed it would seem that this initiative arose because of concerns in the European Parliament that the increasing internationalisation of the media and transfrontier operations might give rise to undue concentrations in the media throughout the Community. However, this situation should not arise because each member State operates its own system of media ownership controls. The Directive therefore seems to be a solution in search of a problem.

2. The Commission argues that the disparity of national regulations to protect media pluralism goes against the Single Market objectives defined in Article 7a of the Treaty and says that the proposal for a Directive is based on Articles 57(2) and 66 of the Treaty, both of which concern rights of establishment, and Article 100a, as regards the free circulation of newspapers. However, elsewhere in the Commission document there is a tacit admission that national measures taken to protect pluralism may be compatible with Articles 52 and 59 of the Treaty, in that they do not obstruct the rights of establishment of non-domestic media companies in member States. All these Articles are framed with economic objectives in mind, and are not appropriate to delivering objectives which include the legitimate cultural interests of protecting plurality. Such objectives are covered by Article 128(2) of the Treaty, which specifically excludes Community-wide harmonisation proposals.

Subsidiarity

3. We are further concerned that the proposed Directive is inconsistent with the subsidiarity principle in Article 3b of the Treaty. Under the subsidiarity test, the Commission should clearly identify whether it has the power to legislate, whether it should act, and what the intensity and nature of such action should be. We are not satisfied that the Commission has the power to legislate and would call in aid Article 128(2) of the Treaty. Further, we are not satisfied that the Commission has identified a well-founded case for it to act in this area, given that there is no evidence that national rules to protect plurality have been ineffective, or that disparate national rules prevent the investment and expansion of non-domestic media companies into the markets of other member States. Such rules do not prevent the operation of the Single Market and any difficulties over rights of establishment can already be addressed by the proper application of the Treaty. Additionally, we do not consider that the nature and intensity of the action proposed is in proportion to the problems which the Commission perceives, about which they have adduced little evidence.

Main difficulties with the Directive

4. Having considered the draft of the Directive carefully, we consider that it is over-specific and pays little regard to the dynamics of national media markets. In particular we see no reason why the Directive should specify the types of audience measure and thresholds which member States should apply, especially given the different nature of public service broadcasting in various countries.

Disparate national regulations have evolved because of the diverse nature of national media markets and we see a number of areas in which the Directive would fail to protect plurality, and other areas where it would be far too restrictive. For example, in the UK national newspapers and local newspapers are distinctly different products and we should have difficulty with any proposals which treated them as the same. Similarly, weekly national newspapers account for some 16% of all national newspapers and weekly local papers account for some 90% of the local newspaper market, but are excluded from the scope of the Directive. Such an arrangement could provide for easy evasion of the thresholds and serve to hasten the decline of regional daily papers. If the thresholds in the Directive were applied on a regional as well as a national basis, they could prevent the establishment of diverse regional media groups which are provided for in UK legislation. We imagine that other member States will encounter similar problems.

General lines to take

- The UK Government opposes this Directive.
- The Government remains concerned that the Commission lacks the proper competence to act in this area and believes that a harmonizing Directive is against the subsidiarity principle.
- The Commission has failed to demonstrate that the proposed Directive will in any way improve the competitive position of the European media market. The Directive will do little to promote the proper operation of the single market in the European media industry and is likely to restrict the ability of media groups to maintain their existing holdings and develop new markets.
- The Directive is over-specific and pays little regard to the dynamics of national media markets.
- The UK has just put in place new liberalising media ownership legislation. If the Directive as drafted was enacted, it will cut across those arrangements and fail to protect plurality in certain instances and be considerably more restrictive in others.
- UK media industry groups have indicated their opposition to the Directive.

BACKGROUND

Objectives of UK media ownership regulation

5. The UK media industry is subject to general competition law just like other industries. However, the primary objective of competition law, and specifically merger control arrangements, is to promote the proper operation of markets and prevent anti-competitive behaviour. In reviewing the need for media ownership regulation, the UK Government concluded that because of the industry's unique power to influence opinion and engender public debate, there was still a need for specific controls beyond those applied by general competition law to protect the public interest in plurality. The primary role of United Kingdom media ownership regulation is therefore to promote pluralism of ownership as against the economic objectives of competition law.

Action taken in the UK

6. Following an extensive review of media ownership regulation, the Government concluded that there was a need to liberalise such regulations to meet the needs and aspirations of the media industry against a background of accelerating technological change. The Broadcasting Act 1996 will therefore put in place a more liberal regime, which will come into force on 1 November 1996. This provides for holdings in television to be limited to 15% of the total television audience in the British Islands (including the UK, the Channel Islands and the Isle of Man), holdings in radio to be limited to 15% of the available radio points (which are based on the size of the adult population within the area served by the radio licence) and the entitlement of newspaper groups to hold broadcasting licences to be determined by their relevant circulation levels within the coverage area of the licence concerned.

7. The Government has also consulted on options for regulating media ownership in the longer term, which would be based on a more integrated system of ownership control. The approach on which the Government consulted proposed to define the total media market; reflect the levels of influence of different media; and, set thresholds beyond which it would be for an independent regulator to determine whether acquisitions or holdings were in the public interest.

THE NEED FOR COMMUNITY ACTION ON MEDIA PLURALISM

8. The UK Government has yet to be convinced that there is a need for Community action to protect pluralism in the media. The Commission has so far identified two possible reasons why action should be taken. The first is primarily economic, to ensure a proper functioning of the internal market in the media industry, and the second is primarily cultural, to protect pluralism. These two aims are often in conflict, with the economic argument pointing towards a need for restrictions to be lifted, whilst the cultural objective pulls in the other direction. In formulating the draft Directive, it appears that the Commission has now decided to give primacy to the cultural objective of protecting pluralism. The UK considers that the Directive will do little to promote the operation of the Internal Market, and tries to do too much on protecting pluralism, against the subsidiarity principle.

Competence

9. In its August 1995 response to the Commission, the Government raised doubts about the Commission's competence to act in this area. The EC Merger Regulation (ECMR), which subjects all mergers above specified turnover thresholds to EC competition scrutiny rather than member State scrutiny, provides that member States may take appropriate measures to protect their 'legitimate interest' other than those taken into account under the ECMR. 'Plurality of the media' is specifically recognised in this provision as a 'legitimate interest'. This position has been borne out by the European Court of Justice in a number of cases.

10. In its 1992 Green Paper on Pluralism and Media Concentration in the Internal Market, the Commission proposed that it could act under Articles 57(2), 66 and 100a of the Treaty of Rome. These are framed with economic objectives in mind and may not be appropriate for delivering policy objectives which include the legitimate cultural interests of protecting plurality. The UK Government notes that such cultural objects are covered by Article 128(2) of the Treaty, which specifically excludes Community-wide harmonisation proposals. This has been recognised by the European Court of Justice in a number of cases in the European media of which case 23/93 TV 10 SA is a recent example.