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THE CHANGING FACE OF BRITISH BROADCASTING

Michael W. Turner†

I. INTRODUCTION

In the last eighteen months a number of factors have combined in order to significantly change the regulatory framework for all forms of commercial television in the United Kingdom. The most important development has been the enactment of the 1990 Broadcasting Act¹ (“the Broadcasting Act” or “the Act”) which will form the subject matter of this article. To put this major piece of new legislation into proper perspective, it will be helpful to summarize the present state of television broadcasting in the United Kingdom.

A. Terrestrial Broadcasting

The national networks are currently the British Broadcasting Corporation (“BBC”), the Independent Television Network (“ITV”) and Channel Four Television Corporation Limited (“Channel Four”).

The BBC operates two national network channels, BBC1 and BBC2. The BBC currently operates under a Royal Charter² which comes up for renewal in 1996 and is funded by the payment of a license fee. The BBC is firmly in the camp of public services broadcasting and there are no commercials shown on either BBC1 or BBC2. As a result the BBC is largely unaffected by the provisions of the Broadcasting Act.

The ITV network consists of a number of independent companies each of which operates under a regional franchise awarded to it but which co-operates with the other regional franchises in a system of program networking. ITV is firmly in the camp of commercial television and is advertising-supported. The Broadcasting Act replaces the ITV

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2. A Royal Charter is a grant by the Crown to designated persons of specified rights and privileges. The current Charter was granted to the BBC on July 23, 1981 and continues in force until December 31, 1996.
network with a new nationwide system of primarily regional television services which is to be known as Channel 3. In operation the new Channel 3 will be very similar to ITV. However, the Broadcasting Act introduces a radically different system of competitive tendering for the new Channel 3 licenses.4 In addition to the regional ITV franchises, there is also one national service which operates within the ITV network, namely the breakfast television service known as TV-AM.

Channel 4 was established under the 1981 Broadcasting Act ("the 1981 Act") and is also advertising-supported. However, in view of Channel 4's mandate to produce distinctive and innovative programming calculated to appeal to minority tastes and interests (but not necessarily to advertisers), the 1981 Act created funding arrangements whereby, in order to guarantee adequate revenues for Channel 4, the ITV program contractors were charged with selling Channel 4's commercial airtime in return for paying a subscription fee to Channel 4. Although the minority programming remit given to Channel 4 under the Broadcasting Act remains much the same, the Act significantly changes the funding arrangements for Channel 4 and requires Channel 4 to be largely self-financing.

In the field of terrestrial broadcasting, the other principal change introduced by the Broadcasting Act is the creation of a new network, Channel 5. Channel 5 is also required to be advertising-supported but its precise structure remains uncertain.

Until the Broadcasting Act took effect on January 1, 1991, ITV and Channel 4 were regulated by the Independent Broadcasting Authority ("the IBA") under the 1981 Act.10 The Broadcasting Act repeals the 1981 Act in its entirety subject to certain transitional arrangements.12 The Broadcasting Act also creates the Independent Television Commission ("the ITC") as the new regulatory body covering all forms of terrestrial, satellite and cable television.13 The ITC replaces the IBA as the

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4. Id. at §§ 15-17.
6. Id. at § 13.
8. Id. at §§ 26-27.
9. Id. at § 28.
10. Broadcasting Act, 1981, ch. 68, § 1. The IBA was a corporate body established to provide and regulate television and radio broadcasting services additional to those of the BBC.
12. Id. at Sched. 11.
13. Id. at § 1. The ITC is a corporate body established to regulate all forms of television broadcasting and delivery in the United Kingdom.
body charged with regulating terrestrial broadcasting in the commercial sector.

B. Direct Broadcasting by Satellite

Until their recent merger, there were two major players in the direct broadcasting by satellite marketplace in the United Kingdom, namely British Satellite Broadcasting (“BSB”) which broadcasted five channels and Sky Television (“Sky”) which broadcasted four channels.

One factor which served to distinguish BSB and Sky in regulatory terms (a distinction between satellite-delivered services which is preserved in the Broadcasting Act) was the frequency on which each transmitted its service. BSB transmitted on a broadcasting frequency allocated to the United Kingdom Government which the Government subsequently awarded to BSB through the IBA. Accordingly, BSB was regulated by the IBA under the Cable and Broadcasting Act 1984 (“the 1984 Act”). In contrast, Sky did not transmit its service on an allocated frequency and was therefore not directly regulated at all. However, at almost the same time as the Broadcasting Act was passed, Sky and BSB decided to merge and form a joint venture to be known as “British Sky Broadcasting” (“BSkyB”). After an initial transitional period BSkyB intended to transmit its services on the same telecommunications frequency and via the same satellite as that used by Sky prior to the merger. BSkyB (like both Sky and BSB) will be an entirely commercial operation funded by advertising and subscription revenues.

In addition to BSkyB, there are a number of other programming services transmitted via the medium-powered Astra 1A satellite (“Astra”) for reception in the United Kingdom. These tend to be services consisting of specialized programming (e.g. sports, music, movie and lifestyle channels). The essential feature of the Astra satellite is that, because it is medium-powered, services transmitted via Astra can be and are received by viewers direct in their own homes.

Before the passing of the Broadcasting Act, none of the satellite channels (other than BSB prior to the merger) were directly regulated. The Broadcasting Act imposes direct regulation by the ITC on all DBS program providers who uplink their services from the United Kingdom.\(^{15}\)

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C. Cable Television

In the United Kingdom there is a distinction between the providers and the distributors of cable television programming. The operators of television channels provide the programming and cable operators distribute the programming over their cable networks.

The programming available to cable operators includes the terrestrial networks and all of the DBS channels discussed above. In addition, there are a number of satellite-delivered channels transmitted via low-powered satellites which, because of the low power of the signal, can only be received by those possessing sufficiently large receiving equipment (such as cable operators) and are therefore primarily available on cable only. Before the passing of the Broadcasting Act these channels were regulated by the Cable Authority but indirectly in the sense that only channels approved by the Cable Authority could be carried by cable operators in the United Kingdom. Under the Broadcasting Act all of these channels are now regulated directly by the ITC.16

The legislation which established and regulated cable operators previously was the 1984 Act but that Act has been repealed by the Broadcasting Act.17 Under the 1984 Act the Cable Authority awarded licenses to cable operators on a regional basis18 permitting each operator to distribute television programming by means of its cable networks and within its franchise area. The construction of the cable networks was covered by separate legislation, namely the Telecommunications Act 1984.19 The Broadcasting Act abolishes the Cable Authority and creates a new regulatory framework for cable operators which will be administered by the ITC. However, because most of the franchise areas in the United Kingdom have already been awarded by the Cable Authority prior to its abolition, the Broadcasting Act contains detailed transitional provisions20 governing the existing licenses.

II. AN OVERVIEW OF THE NEW LICENSING REGIME

A. Establishment Of The Independent Television Commission

The Broadcasting Act establishes the ITC21 as the new single regulatory body charged with regulating all television services (other than the

16. Id. at § 45.
17. Id. at Sched. 21.
21. Id. at §§ 1-2.
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BBC) provided from within the United Kingdom (including all terrestrial, satellite and cable television programming services). Additionally, the ITC regulates the delivery of those programming services by cable operators by means of cable networks in the United Kingdom. Therefore, whereas regulatory functions were previously divided between the IBA and the Cable Authority, those functions are now all vested in one single body, namely the ITC.

The Broadcasting Act imposes on the ITC certain general duties which stipulate how the ITC should discharge their regulatory functions. The three goals which the ITC should seek to achieve in exercising their regulatory functions are as follows:

1. To ensure that a wide range of television program and local delivery services is available throughout the United Kingdom.\(^{22}\)
2. To ensure fair and effective competition in the provision of such services.\(^{23}\)
3. To ensure the provision of such services which (taken as a whole) are of high quality and offer a wide range of programs calculated to appeal to a variety of tastes and interests.\(^{24}\)

In short, the ITC must seek to achieve diversity, competition and the availability of a variety of high quality programming.

B. Licenses Granted By The ITC

The Broadcasting Act contains certain provisions which apply to all licenses granted by the ITC (in other words local delivery service licenses as well as licenses to provide television program services). The following is a summary of the principal provisions.

1. Cost of Regulation

The ITC have wide powers (and wide discretion as to how to exercise those powers) as to the conditions which they may include in licenses. One of these powers is to include conditions requiring the payment by the license holder to the ITC of a fee or fees of an amount or amounts determined by the ITC.\(^{25}\) Those fees shall be “in accordance with such tariff as may from time to time be fixed” by the ITC and any

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\(^{22}\) Id. at § 2(2).
\(^{23}\) Id.
\(^{24}\) Id.
\(^{25}\) Id. at § 4(1)(b).
such tariff may specify different fees in relation to different classes of license.26 The amount of the license fee (and therefore the tariffs for different classes of license) are to be fixed so as to represent "what appears to the Commission to be the appropriate contribution of the holder of such a license towards meeting the sums which the Commission regards as necessary in order to" secure that the ITC's revenues become at the earliest possible date, and continue thereafter, at least sufficient to enable them to discharge their regulatory functions under the Broadcasting Act.27 In other words, the cost of regulating commercial television in the United Kingdom is to be borne by the broadcasters and program providers in such proportions as the ITC may consider appropriate.

2. Variation Of Licenses

In addition, the ITC have power to vary the terms of any license which it has granted.28 Before making any such variation, the ITC must give to the license holder "a reasonable opportunity of making representations to the Commission about the variation."29 Accordingly the ITC would have the power to vary the license fees payable by a license holder after it has consulted with the license holder about the proposed variation. There is only one type of variation to which the license holder must consent and that is a variation of the period of a license.30

3. Registration On The Holders Of ITC Licenses

The Broadcasting Act also contains a number of restrictions on the ownership of license holders and on the grant of licenses. The first restriction on the grant of licenses is that the ITC must not grant a license to any person "unless they are satisfied that he is a fit and proper person to hold it."31 As an extension of this principle, the ITC must do whatever they can to take away the license of any person who ceases to be a "fit and proper person" to hold that license. In practice, this will no doubt mean that the ITC will include in all licenses a right to revoke the license if, in their view, the license holder ceases to be a "fit and proper person" to hold that license. There is no definition in the Act of a "fit and proper person." Whilst that fact gives the ITC a considerable discre-

26. Id. at §§ 4(3)-4(4).
28. Id. at § 3(4).
29. Id.
30. Id.
31. Id. at § 3(3).
tion, it is unlikely that they would deem someone not to be a "fit and proper person" except in extreme circumstances.

4. Disqualification And Changes In Ownership

The Broadcasting Act contains restrictions which disqualify certain categories of persons from holding certain classes of licenses and which are intended to prevent the accumulation of media interests and excessive cross-media ownership. These restrictions are detailed and are therefore summarized in a separate section of this article. For present purposes, it is sufficient to say that the ITC must not grant a license to any "disqualified person" or allow any person who becomes a "disqualified person" to remain the holder of a license.

In order to avoid a situation in which a license is granted to an applicant which contravenes those ownership restrictions, the ITC has certain statutory powers which it can exercise. In addition to powers to require information as to the ownership and management of applicants and as to any proposed changes in the ownership and management of license holders, the ITC may make the grant of a license to any person conditional on that person taking certain steps specified by the ITC in order to ensure that the restrictions on and requirements as to the ownership of license holders are complied with.

In addition, the ITC must include in all licenses conditions enabling them to revoke a license where a change takes place in the ownership of control of a license holder which "is such that, if the ITC were awarding a fresh license in the new circumstances, they would be induced by the change in ownership or control to refrain from awarding it to the license holder." In other words, if as a result of a takeover of a license holder that license holder becomes a "disqualified person" or ceases to satisfy the restrictions on cross-media ownership or the accumulation of media interests, the ITC must ensure that they are in a position to revoke the license after having given to the license holder a reasonable opportunity of presenting its case to the ITC.

32. Broadcasting Act, 1990, ch. 42, § 5(1) and Sched. 2.
33. See supra note 78 and accompanying text.
35. Id.
36. Id.
37. Id. at § 5(7).
38. Id. at § 5(6).
5. Transferability Of Licenses

The Broadcasting Act does not preclude altogether the possibility of licenses being transferred by a license holder. However, any such transfer requires the prior written consent of the ITC.39 Clearly, the ITC will not give their consent where the transferee is not a “fit and proper person” to hold the license, is a “disqualified person” in relation to that license or in any other way fails to satisfy the requirements for and restrictions on ownership of license holders. In addition, the ITC must satisfy themselves before consenting to any such transfer, that the proposed transferee would be “in a position to comply with all of the conditions included in the license” for the remainder of the license period.40

C. Television Program Licenses

The Broadcasting Act contains a series of provisions relating to programming content and quality, the inclusion of commercials and the sponsorship of programs. These provisions apply to all commercial television program services (whether they are broadcast by terrestrial means, delivered by satellite or available on cable).

1. General Programming Requirements

Before granting a license to any broadcaster/program provider, the ITC must be satisfied that its service would comply with the following program requirements:

(a) Programs must not offend against good taste or decency or be likely to encourage or incite to crime or to lead to disorder or to be offensive to public feelings.

(b) News must be presented with due accuracy and impartiality.

(c) Due impartiality must be preserved by the broadcaster/program providers with respect to matters of political or industrial controversy or relating to current public policy.

(d) Religious programs must not involve either any improper exploitation of any susceptibilities of the viewers or any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination.

(e) Programs must not include any subliminal messages.41

40. Id. at § 3(7).
41. Id. at § 6(1).
Of these requirements, it is the due impartiality requirement which has caused the greatest controversy. The ITC is obliged to draw up a code giving guidance as to the rules to be observed in connection with the preservation of due impartiality and must secure that the provisions of that impartiality code are observed. The Broadcasting Act contains specific provisions specifying the matters which should be covered by the impartiality code. In addition, the ITC must secure that programs do not contain any expressions of the views and opinions of the broadcaster/program provider on matters of political or industrial controversy or on matters relating to current public policy. This provision clearly shows that the preservation of due impartiality requires broadcasters/program providers to do more than simply refrain from expressing their own views and opinions on matters requiring due impartiality.

Not surprisingly, broadcasters and program providers in the United Kingdom campaigned strenuously against the inclusion of statutory rules on due impartiality. They feared a situation in which the provision of news and current affairs programs would be constrained by uncertainty as to how those rules would be applied. However, in order to comfort broadcasters, the Broadcasting Act does state that the rules on due impartiality must indicate that due impartiality does "not require absolute neutrality on every issue or detachment from fundamental democratic principles."

In practice the program requirements will clearly affect different licenses in different ways. The requirements will apply to Channel 3, Channel 4 and Channel 5 licenses as well as to BSkyB. However, not all of the requirements will apply to satellite program providers whose programming is of a specialized nature (for example sports channels which do not include news, current affairs or religious programs). For this reason the Broadcasting Act allows the ITC to make different provisions in its impartiality code for different cases or circumstances.

2. Programming Content

In addition to the impartiality code the ITC must also promulgate a code giving guidance on such matters "concerning standards and practice" for television programs as the ITC may consider suitable. The

42. Id. at § 6(3).
43. Id. at §§ 6(5)-6(6).
45. Id. at § 6(6).
46. Id. at § 6(3).
47. Id. at § 7(1).
code must specifically include rules to be observed with respect to the showing of violence, particularly when large numbers of children and young persons may be expected to be watching.

In formulating the programming code, the ITC must pay special regard to programs shown "in circumstances such that large numbers of children and young persons may be expected to be watching." In other words, the obligation of the ITC to take this factor into account does not just apply to the showing of violence.

3. Advertising And Sponsorship

The Broadcasting Act contains certain statutory rules which relate to the inclusion of commercials and the permissibility of sponsorship:

(a) Political advertising is prohibited.
(b) Any commercial which has any relation to an industrial dispute is prohibited.
(c) There must be no unreasonable discrimination in the acceptance of commercials either against or in favor of a particular advertiser.
(d) Without the prior approval of the ITC a program may not be sponsored by any person engaged in the manufacture or supply of a product or service which the license holder is prohibited from advertising by virtue of the code on advertising drawn up by the ITC.

Perhaps the most significant change in these rules is the absence of any absolute prohibition on religious advertising. The permissibility or otherwise of religious advertising will now be dealt with in the advertising code drawn up by the ITC.

The ITC is obliged to promulgate a code governing standards and practice in advertising and in the sponsoring of programs and prescribing the commercial and methods of advertising or sponsorship which are to be prohibited. In the code the ITC may promulgate different provisions for different kinds of licensed service. This would permit the ITC to make the rules on advertising applying to terrestrial broadcast licensees more restrictive than those applying to satellite-delivered channels. The ITC must also review the code and must carry out any directions which may be given to them by the Home Secretary in respect of the

48. Id. at § 7(2).
50. Id. at § 9(1).
51. Id.
matters covered by the code.\textsuperscript{52}

Before promulgating or reviewing the code, the ITC must consult with all license holders and such other interested parties as the ITC may think fit including any bodies which, in the view of the ITC, represent viewers or advertisers.\textsuperscript{53} In addition to its power to require licensees to comply with its code on advertising and sponsorship, the ITC may also give directions to licensees relating to the times when commercials are to be allowed, the maximum amount of time to be given to commercials in any specified period, the minimum interval which must elapse between commercial breaks, the number of commercial breaks to be allowed in any program or specified period and the exclusion of commercials from any specified part of a licensed service or channel.\textsuperscript{54} The ITC also has power to include in licenses conditions which require the license holder to comply with any direction given by the ITC as to the inclusion of commercials.\textsuperscript{55}

\textbf{D. Unlicensed Television Services}

It is a criminal offense to provide any television service which must be licensed under the Broadcasting Act without first obtaining a license from the ITC.\textsuperscript{56} Any such offense is punishable by a fine. In addition to criminal proceedings, the Crown may also bring civil proceedings against any person who provides an unlicensed television service and may seek an injunction or any other appropriate relief.\textsuperscript{57}

\textbf{E. Enforcement Of Licenses}

Under the Act the ITC have a range of powers which they may use in order to ensure compliance with the conditions of the programming licenses granted by them. These powers apply equally to Channel 3, Channel 4, Channel 5 and satellite and cable program providers; although there are some modifications to those powers which apply only to the holders of satellite and cable licenses.

The first power which the ITC have is the power to direct a license holder to broadcast a correction and/or an apology or not to repeat a

\begin{itemize}
  \item \textsuperscript{52} \textit{Id.} at § 9(4). The Home Secretary is the senior minister in the United Kingdom government with Overall responsibility for broadcasting within the United Kingdom.
  \item \textsuperscript{53} \textit{Id.} at §§ 9(1)-9(2).
  \item \textsuperscript{54} Broadcasting Act, 1990, ch. 42, §§ 9(7)-9(8).
  \item \textsuperscript{55} \textit{Id.} at § 4(2).
  \item \textsuperscript{56} \textit{Id.} at § 13.
  \item \textsuperscript{57} Broadcasting Act, 1990, ch. 42, § 13(5).
\end{itemize}
The power to prevent a program being repeated does allow the ITC to exercise a degree of prior constraint on broadcasters although it is a power which is exercisable only after an initial showing of the relevant program.

The ITC also have power to impose a financial penalty on license holders or to shorten a license period although the power to shorten a license period does not apply to Channel 4. The ITC have a discretion as to which of these powers to exercise but cannot exercise both of them. There are also limits on the exercise of the two powers by the ITC. On the first occasion on which a financial penalty is imposed the amount of the financial penalty must not exceed three percent of the qualifying revenue of the license holder for his last accounting period and on any subsequent occasion the financial penalty must not exceed five percent of qualifying revenue. However, the maximum financial penalty which can be imposed on satellite and cable program providers (other than the holder of a domestic satellite service such as BSB) is £50,000. In addition, the ITC cannot shorten any license period by more than two years.

The ultimate sanction power given to the ITC is to revoke the license of the offending license holder. This power does not apply to Channel 4. Before threatening to revoke a license the ITC must be satisfied that the breach in question is a continuing failure to comply with any condition of the license or any direction given by the ITC to a license holder and would justify the revocation of the license. The license holder must be given a specified period in which to remedy the breach and, if the breach is not remedied within that period, the ITC can then revoke the license if they are satisfied that it is necessary in the public interest to do so.

The ITC may not exercise any of their powers to enforce licenses unless they have first given to the license holder a reasonable opportunity to make representations to the ITC about the matters complained of by the ITC.

58. Id. at §§ 40(1), 40(4).
60. Id. at § 41(6).
61. Id. at § 41(2).
62. Id. at §§ 45(5)-45(6).
63. Id. at § 41(1)(b).
65. Id.
66. Id. at § 42(1).
67. Id. at § 42(3).
68. Id. at §§ 40(2), 41(3), 42(8).
III. TERRESTRIAL BROADCAST LICENSES

A. Features Common To Channel 3 And Channel 5 Licenses

Licenses to provide Channel 3 and Channel 5 services have many common features. In particular, the procedure which must be followed and the hurdles which have to be overcome in order to obtain a Channel 3 or Channel 5 license are almost identical. In the past the IBA have tended to award ITV franchises on the basis of their assessment of the likely quality of the programming which would be provided by each applicant. Under the new licensing regime, both Channel 3 and Channel 5 licenses will be awarded on a competitive tendering basis with the franchise generally being awarded to the highest cash bidder.

1. Procedure For The Award Of Channel 3 And Channel 5 Licenses

First, the ITC must publish their intention to grant a license, specifying such matters as the franchise area, the application fee and the percentage of qualifying revenue for each accounting period which would be payable by the licensee.\(^69\) Applicants for Channel 3 and Channel 5 licenses must first meet additional programming requirements before the ITC may consider their cash bids for the license. Those additional programming requirements ("the additional programming requirements") are discussed below. At the time when the ITC publish their intention to grant a license, they must also give general guidance to applicants which contains examples of the kinds of program which would be likely to satisfy the additional programming requirements.\(^70\)

An applicant must submit a written application accompanied by the application fee specified by the ITC.\(^71\) The applicant must also submit various specific proposals, including his proposals for:

(a) complying with the additional programming requirements;
(b) promoting the enjoyment of his proposed service by deaf and blind people;
(c) training or retraining employees or proposed employees in order to help fit them for employment in connection with the making of television programs.\(^72\)

The applicant would also have to supply to the ITC such information as they may reasonably require as to his present financial position

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\(^70\) Id. at § 15(2).
\(^71\) Id. at § 15(3)(a).
\(^72\) Id. at § 15(3)(b)-(d).
and his projected financial position for the term of the license, as well as any other information reasonably required by the ITC for the purpose of considering the application. An applicant for a regional Channel 3 license would also have to submit his proposals for participating in networking arrangements, as well as his proposals for using offices and studios situated within, and for engaging persons employed within, the franchise area.

Finally, the applicant will have to submit a cash bid for the license. The cash bid is effectively the annual amount payable by the successful applicant to the ITC in return for the grant of the license. The amount actually bid by the applicant would be the amount which he was prepared to pay for the first year and that amount would be increased in subsequent years in accordance with inflation. The cash bid is payable in addition to the application fee, the annual percentage of qualifying revenue and any contribution payable by the license holder towards the ITC's regulatory costs.

Once the closing date for applications has passed, the ITC must publish the name of every applicant, the proposals submitted by each applicant for meeting the additional programming requirements and any other relevant information which the ITC consider appropriate. They must also invite representations to be made to them within a specified time period with respect to the matters published by them (other than the names of the applicants for the license).

Before considering the cash bid made by any applicant, the ITC must first satisfy itself that the applicant's proposed service would comply with the additional programming requirements described below. The ITC must also be satisfied that the applicant would be able to maintain the proposed service throughout the license period, that the applicant is a "fit and proper person" to hold such a license and is not otherwise disqualified from holding a Channel 3 or Channel 5 license under the Act. Of the pre-conditions which an applicant needs to fulfil

73. Id. at § 15(3)(g)-(h).
74. Broadcasting Act, 1990, ch. 42, §§ 14(2), 14(6). A regional Channel 3 license is one entitling the holder to provide a television service within a specific franchise area as part of the national Channel 3 network.
75. Id. at § 39(2).
76. Id. at § 15(3)(e).
77. Id. at § 15(3)(f).
78. Id. at § 15(7).
80. Id. at § 15(6)(b).
81. Id. at § 16(1)(a).
82. Id. at § 16(1)(b).
The expression of "European origin" is not defined in the Act;

(h) In each year not less than 25% of the total time allocated to "qualifying programs" must be allocated to a range and diversity of independent productions. The expressions "qualifying program" and "independent production" have yet to be defined but the Act provides for the definitions to be provided by the Home Secretary by means of a statutory instrument.

The purpose of the additional programming requirements is to try and ensure that it is not sufficient for an applicant merely to submit the highest bid for a license. Before his cash bid can be considered an applicant must convince the ITC that his programming service will cross the quality threshold imposed by the additional programming requirements.

In the case of the applicant for a regional Channel 3 license, there is an additional pre-condition that the ITC must find the applicant's networking proposals satisfactory before they can proceed to consider his cash bid.

2. Award Of Channel 3 And Channel 5 Licenses

After having disregarded the applicants who have failed to satisfy each of the pre-conditions described above, the ITC must award the license to the applicant which submitted the highest cash bid unless there are exceptional circumstances which make it appropriate for the ITC to award the license to another applicant. The Act specifically states that "exceptional circumstances" would include circumstances in which it appeared to the ITC that the quality of the proposed service of another applicant is (a) exceptionally high and (b) substantially higher than that proposed by the highest bidder. However, if the ITC decide that there are "exceptional circumstances" justifying the award of the license to an applicant other than the highest bidder, they must publish their reasons

85. Id. at § 16(2)(h). This provision is also an attempt to incorporate into United Kingdom domestic law one of the United Kingdom Government's obligations under the Directive, namely to ensure "where practicable and by appropriate means" that broadcasters reserve at least ten percent of their transmission time (with the same exclusions as in the case of European works) for "European works created by producers who are independent broadcasters."
86. Id. at § 16(5)(a).
87. Id. at §§ 16(1), 39(2).
88. Id.
89. Broadcasting Act, 1990, ch. 42, § 17(3).
90. Id. at § 17(4).
before his cash bid can be considered, the most important is his ability to satisfy the additional programming requirements. However, the requirement that the applicant should be able to maintain his proposed service throughout the license period is also important. This means that not only will applicants have to convince the ITC that for at least ten years they can fund the payments due to the ITC and the cost of their programming proposals, but also that they will be able to sustain the level of programming quality set out in their proposals.

The additional programming requirements with which an applicant’s proposed service must comply before the applicant’s cash bid can be considered are as follows:\(^8^3\)

\[\text{(a) Sufficient time must be given to news and current affairs programs of high quality which deal with both national and international matters;}
\]

\[\text{(b) Sufficient time must be given to other programs of high quality;}
\]

\[\text{(c) (In the case of a regional Channel 3 license), sufficient time must be given to a suitable range of regional programs and, if a franchise area is sub-divided, to a suitable range of programs of particular interest to those persons living in each part of that franchise;}
\]

\[\text{(d) (In the case of a regional Channel 3 license), a suitable proportion of regional programs must actually be made within the relevant franchise area;}
\]

\[\text{(e) Sufficient time must be given to religious and children’s programs;}
\]

\[\text{(f) Programs should appeal to a wide variety of tastes and interests;}
\]

\[\text{(g) A proper proportion of program material must be of European origin; in this connection the ITC must have regard to the United Kingdom’s international obligations.}\(^8^4\)
\]

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83. Id. at § 16(2).

84. Broadcasting Act, 1990, ch. 42, § 16(4). The international obligations in question are the obligations of the United Kingdom under the European Community Directive on Television Broadcasting ("the Directive") and under the European Convention on Trans-frontier Television ("the Convention") to ensure "where practicable and by appropriate means" that broadcasters reserve for "European works" a majority proportion of their transmission time (excluding the time allocated to news, sports events, game shows, advertising and teletext services). The United Kingdom government is therefore delegating to the ITC the task of implementing the performance of this fundamental but rather vaguely worded international obligation.
for doing so.  

The only other situation in which the Act permits the ITC to award the license to a person other than the highest bidder is if the ITC believe that there are grounds for suspecting that any source of funds which might be available to the highest bidder for the purpose of making any payments to the ITC or otherwise financing the provision of his proposed service is such that it would not be in the public interest for the license to be awarded to the highest bidder.  

In that situation the ITC must refer the highest bidder's application to the Home Secretary and cannot award the license to the highest bidder without the approval of the Home Secretary.  

If the Home Secretary declines to give his approval, then the ITC may either award the license to the next highest bidder or re-advertise the availability of the franchise and invite fresh applications.  

After the ITC have awarded the franchise they must publish the name of the successful applicant and the amount of his cash bid as well as the name of every other applicant whose proposed service would, in the view of the ITC, have complied with the additional programming requirements.  

3. Payments To The ITC  

In addition to the contribution payable by Channel 3 and Channel 5 licensees towards the regulatory costs of the ITC, all Channel 3 and Channel 5 licensees must pay to the ITC in each year: (a) the amount of his cash bid (increased in line with inflation after the first year); and (b) the percentage of qualifying revenue for each accounting period specified by the ITC when they invited license applications.  

The Act defines "qualifying revenue" as all advertising, subscription and sponsorship revenue (including benefits in kind) received by the license holder. Qualifying revenue is to be calculated gross without any deduction except that the license holder is permitted to deduct any commissions charged by advertising agents up to a maximum of fifteen percent.  

The ITC are also empowered to include conditions in Channel 3 and Channel 5 licenses enabling the ITC to estimate before the beginning of

91. Id. at § 17(11)-(12).  
92. Id. at § 17(5)-(6).  
93. Id. at § 17(5).  
95. Id. at § 17(11)-(12).  
96. Id. at § 19(1).  
97. Id. at § 19(2), (6).  
98. Id. at § 19(4)-(5).
an accounting period the total amount of qualifying revenue which may be due to the ITC in respect of that accounting period and to require the license holder to pay the amount so estimated by the ITC in monthly installments throughout the relevant accounting period.\footnote{99}

4. Duration and Renewal of Channel 3 and Channel 5 Licenses

Channel 3 and Channel 5 licenses initially last (unless they are revoked by the ITC in the exercise of their statutory powers of enforcement) for a period of ten years and thereafter will be renewable for consecutive periods of ten years commencing on the date of renewal.\footnote{100}

A Channel 3 or Channel 5 license holder can apply at any time within the last four years of the license for its renewal but no later than the last date during the license period prior to which the ITC would in their view need to advertise the franchise if they were to grant a fresh license.\footnote{101} The application for renewal may only be refused if: (1) the ITC are not satisfied that the license holder would, if the license were renewed, provide a service which would comply with the additional programming requirements and with the conditions included in the license in pursuance of the proposals made by the license holder in his original license application; or (2) the ITC propose to grant a fresh license for the provision of a service, either in respect to a different area from that covered by the current license, or between different times of the day or on different days of the week.\footnote{102} The only other circumstance in which the ITC may refuse the renewal is if they believe that there are grounds for suspecting that any source of funding available to the license holder is such that it would not be in the public interest for the license to be renewed.\footnote{103} In that case, the procedure is the same as that which must be followed by the ITC if they had taken that view at the time the license holder applied for the original license (that is, the ITC must refer the matter to the Home Secretary).\footnote{104}

If the ITC decide to renew the license, it is the ITC which fixes the financial terms of the renewal. After having granted the application for renewal but before formally renewing the license, the ITC must notify the license holder of the percentage of qualifying revenue to be paid by the license holder during the term of the renewal and also of the “cash

\footnote{99}{Broadcasting Act, 1990, ch. 42, § 19(7).}
\footnote{100}{Id. at § 20(1).}
\footnote{101}{Id. at § 20(2), (10).}
\footnote{102}{Id. at § 20(4).}
\footnote{103}{Id. at § 20(5).}
\footnote{104}{Broadcasting Act, 1990, ch. 42, § 20(5).}
bid” payable to the ITC during the term of the renewal (that is, the amount payable during the first year of the renewal which would then be increased in line with inflation during the remainder of the renewal period). The license holder will then have a period specified by the ITC in which to notify them that he consents to the renewal of the license on the financial terms specified by the ITC. The renewal of the license will not take effect unless he gives such consent. In determining the amount of the “cash bid” payable by the applicant during the period of the renewal the ITC must use as their criterion the amount which, in their opinion, they would be likely to raise if they were to grant a fresh license. In other words, the ITC have the power to estimate what the highest bid for a fresh license might be.

5. Takeovers During The First Year

As already mentioned, the ITC have the power to revoke a license where a change in the control or ownership of a license holder takes place which, if the ITC were awarding a fresh license in the new circumstances, would have induced them to refrain from awarding the license to the license holder. In addition, if any change in the control of a Channel 3 or Channel 5 license holder or any “associated program provider” takes place during the period commencing upon the date of the award of the license and ending upon the first anniversary of the date on which the license came into force, and if that change was not approved in advance by the ITC, then the ITC can (if the decision to award the license has been made but the license has not been formally granted) refuse to grant the license or (if the license has been granted) the ITC can revoke the license. The expression “associated program provider” means any entity which is connected with the license holder and appears to the ITC to be, or to be likely to be, involved to any extent in the provision of program for inclusion in the service provided by the license holder.

In most circumstances the ITC have the discretion as to whether or not they approve the change in control. However, the Act sets out certain circumstances in which the ITC must refuse to approve the change, namely if it appears to the ITC that the change would be prejudicial to the obligation of the license holder to comply with the additional programming requirements or to the provision of Channel 3 or Channel 5

105. Id. at § 20(8).
106. Id.
107. Id. at § 20(7).
108. Id. at § 20(1).
(as the case may be) as a nationwide system of television broadcasting services.¹¹⁰

6. Miscellaneous License Conditions

Channel 3 and Channel 5 licenses must include such conditions as the ITC think appropriate in order to secure that the service provided by the license holder accords with the proposals made by him in his license application (that is, his proposals for complying with the additional programming requirements) and for securing the implementation of the other proposals submitted by the license holder in his license application (that is, his proposals for providing programs for blind and deaf people and for training his employees).¹¹¹ In other words, the license will not oblige the license holder to comply with the additional programming requirements as such but will require the license holder to comply with his own programming proposals as set out in his license application. This gives added legal significance to the contents of each license application because the license holder is precluded from arguing that, although he has not fulfilled his programming proposals, he has still satisfied the additional programming requirements.

The ITC are also obliged to include license conditions that: (a) are designed to secure that a suitable proportion of the programs included in Channel 3 and Channel 5 services are programs intended for use in schools; and (b) require the allocation of a minimum amount of programming time to the broadcast of programs with subtitling for the deaf.¹¹²

7. Provision Of News Programs For Channel 3 And Channel 5

Each Channel 3 and Channel 5 license will require the license holder to broadcast news programs of high quality dealing with national and international matters at intervals and at peak viewing times.¹¹³ The provision of Channel 3 news programs is regulated in more detail and this is discussed below.

B. Channel 3 Licenses

Features which are common to Channel 3 and Channel 5 licenses have been discussed above. In addition, the Broadcasting Act contains a number of provisions which are particular to Channel 3 licenses which are discussed below.

¹¹⁰ Id. at § 21(3).
¹¹¹ Id. at § 33(1).
¹¹² Id. at §§ 34-35.
¹¹³ Id. at § 31(1).
1. Regional And National Channel 3 Services

The Act retains the present distinction between the regional franchises which broadcast their services throughout the day and within their franchise area but as part of a national network (at present the ITV network), and between any national service which is broadcast nationwide at particular times of the day (at present only the breakfast television service known as TV-AM). Thus, Channel 3 (like ITV before it) will be structured on a regional basis with each service being provided for such area in the United Kingdom as may be determined by the ITC. The ITC will also have the power to require Channel 3 license holders to provide different programs for different parts of the franchise area or for different communities living within that area.¹¹⁴

2. Provision Of News Programs

In the past, news programs for the ITV network have been provided exclusively by a separate company owned by the ITV program contractors and called Independent Television News, Ltd. ("ITN").

The Broadcasting Act introduces a new regime for the provision of news programs for the network of regional Channel 3 services. The ITC must include in each regional Channel 3 license conditions requiring the news programs broadcast by that license holder to be provided by a "nominated news provider" and also requiring such news programs to be presented live and broadcast simultaneously with the news programs broadcast by other regional Channel 3 licensees.¹¹⁵

The concept of a "nominated news provider" is a new one. The system introduced by the Act is that all providers of news programs for Channel 3 must be nominated by the ITC as being eligible to provide news programs. The procedure is that the ITC invite applications from prospective news providers and must nominate an applicant as a nominated news provider if the applicant appears to the ITC to be both effectively equipped and adequately financed to provide high quality news programs and is not ineligible for nomination because the applicant would be a disqualified person in relation to any description of license granted by the ITC under the Act.¹¹⁶ For example, the BBC could not be a nominated news provider in relation to Channel 3.

In addition, the Act contains certain restrictions on the ownership of nominated news providers. Firstly, no shareholder in a nominated

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¹¹⁵. Id. at § 31(2).
¹¹⁶. Id. at § 32(1), (2), (12).
news provider may have more than twenty percent interest in the company.117 Secondly, when taken together, Channel 3 license holders must own less than fifty percent of the stock in the company and have less than fifty percent of the voting power in the company.118 One possible effect of this provision is that, if all of the present ITV program contractors retain their franchises in the Channel 3 competitive tendering process, they will have to dilute their shareholdings in ITN substantially if ITN is to be eligible to be a nominated news provider.119

The ITC are obliged to review the performance of all nominated news providers and, if they feel that another company qualified for nomination would offer a better service of high quality news programs than an existing nominated news provider, the ITC must terminate the nomination of the existing nominated news provider and nominate the other company in its place.120 The ITC are also obliged to terminate the nomination of any nominated news provider with whose performance they are dissatisfied provided that any such termination would not be prejudicial to the provision of high quality news programs on Channel 3.121 Before nominating, or terminating the nomination of, any nominated news provider the ITC are obliged to consult every holder of a regional Channel 3 license.122

Any nomination of a nominated news provider will remain in force for ten years and may be renewed for a further ten years by the ITC if the nomination has not been terminated by them on one of the grounds described above.123

3. Networking Arrangements

The Broadcasting Act provides for the implementation of networking arrangements designed to enable Channel 3 to operate effectively as a nationwide system of regional services with particular regard to the cost of producing, commissioning and acquiring programming. The Act defines networking arrangements as arrangements applying to all regional Channel 3 license holders which provide for programs by one license holder to be available for broadcasting by all regional Channel 3 license holders and whose purpose is to enable Channel 3 as a nationwide system of regional services to compete effectively with other television program

117. Id. at § 32(9)(a).
118. Id. at § 32(9)(b).
120. Id. at § 32(4).
121. Id. at § 32(5).
122. Id. at § 32(7).
123. Id. at § 32(3).
services in the United Kingdom.\footnote{124}

Every applicant for a Channel 3 license must submit with his application his proposals for participating in networking arrangements.\footnote{125} The ITC cannot proceed to consider any application for a regional Channel 3 license unless the ITC find the networking proposals made by the applicant satisfactory.\footnote{126} This is therefore an additional threshold which each applicant must cross before his bid for the license can be considered. The ITC must also ensure that it is a condition of all regional Channel 3 licenses that the license holder complies with the networking proposals submitted by him as part of his license application and that, so long as the license holder provides his service, networking arrangements approved by the ITC have been entered into by all regional Channel 3 license holders.\footnote{127} Networking arrangements implemented by Channel 3 license holders with the approval of the ITC cannot subsequently be modified by Channel 3 license holders without the approval of the ITC.\footnote{128}

However, if no networking arrangements are in force at the time when Channel 3 is scheduled to commence broadcasting or if networking arrangements are made before the date but cease to be in force at any time before January 1, 1995, the ITC have power to draw up and bring into force such networking arrangements as they consider appropriate.\footnote{129} It is not the end of the matter once the ITC have approved any networking arrangements (or any modifications to such arrangements) proposed by the Channel 3 license holder. Once the ITC have approved any networking arrangements, they must refer those arrangements to the Director General of Fair Trading ("the Director").\footnote{130} And once the ITC have approved any modification to existing networking arrangements, they must inform the Director of that modification.\footnote{131} In other words, the Act makes any networking arrangements implemented for Channel 3

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\begin{itemize}
\item \footnote{124. Broadcasting Act, 1990, ch. 42, § 39(1).}
\item \footnote{125. Id. at § 39(2).}
\item \footnote{126. Id. as § 39(2)(a)(ii).}
\item \footnote{127. Id. at § 39(4).}
\item \footnote{128. Id. at § 39(8).}
\item \footnote{129. Broadcasting Act, 1990, ch. 42, § 39(5).}
\item \footnote{130. The Director General of Fair Trading is appointed by the Secretary of State for Trade and Industry (a United Kingdom government minister). His general duties are to review commercial activities in the United Kingdom which relate to goods or services supplied to consumers in the United Kingdom and to collect information with regard to such practices to ensure that the interests of consumers in the United Kingdom are not adversely affected. In particular, his role is to ensure that consumers are not prejudiced by anti-competitive practices.}
\item \footnote{131. Broadcasting Act, 1990, ch. 42, § 39(12).}
\end{itemize}
expressly subject to any relevant English and European Community anti-trust law.

Schedule 4 to the Act contains detailed provisions dealing with any reference made by the ITC to the Director in relation to networking arrangements. In short, the networking arrangements must satisfy a competition test specifically laid down in the Act. If the Director concludes that the arrangements do not satisfy that test, he must specify the modification(s) to the networking arrangements which in his view would result in the competition test being satisfied and those modifications must be incorporated in the networking arrangements. If the Director does specify modifications which need to be made to the networking agreements, then either the ITC or any regional Channel 3 license holder may subsequently refer the matter to the Monopoly and Mergers Commission which also has power to require modifications to be made to the networking arrangements.

C. Channel 4

The Act provides for the continued provision of Channel 4. Until January 1, 1993, Channel 4 will continue to be provided in accordance with the relevant provisions contained in the 1981 Act. With effect from January 1, 1993, Channel 4 will be provided under a license granted by the ITC for an initial period of ten years whereafter that license may be renewed by the ITC for consecutive periods of ten years each.

1. Programming Requirements For Channel 4

The general programming remit of Channel 4 is virtually identical to that imposed under the 1981 Act. Channel 4's programs must contain a suitable proportion of matter calculated to appeal to tastes and interests not generally catered to by Channel 3; innovation and experiment are not to be encouraged and in general, Channel 4 is to have a distinctive character of its own.

In addition, the license to provide Channel 4 granted by the ITC is to include certain programming requirements which are similar to the additional programming requirements which Channel 3 license holders are required to satisfy. Those requirements are as follows:

132. Id. at Sched. 4, Para. 1.
133. Id. at Para. 4.
134. Id. at § 24, Sched. 11, Part II, Para.1.
136. Id. at § 25(1).
137. Id. at § 25(2)(a)-(f).
(a) Channel 4 is to be provided as a public service for disseminating information, education and entertainment;
(b) Channel 4 programs must maintain a high general standard and a wide range in their subject matter;
(c) A suitable proportion of Channel 4 programs must be of an educational nature;
(d) Sufficient time must be given to news programs and current affairs programs of high quality;
(e) A proper proportion of program material must be of European origin and in this connection the ITC must have regard to the United Kingdom's international obligations;
(f) In each year not less than twenty-five percent of the total time allocated to "qualifying programs" must be allocated to a range and diversity of independent productions, the expressions "qualifying programs" and "independent production" have yet to be defined.\(^{138}\)

2. Funding Of Channel 4

The intention is that Channel 4 will be funded by advertising revenue. However, the Act goes some way towards addressing the distinct possibility that advertisers will not find Channel 4's minority programming remit attractive. Accordingly, the Act sets out a complicated system for Channel 3 license holders to subsidize Channel 4 to a limited extent if Channel 4's revenues fall below a certain level after the new funding arrangements come into force on January 1, 1993.

The ITC must first estimate the amount of qualifying revenue likely to be earned by Channel 4 in any year and the total amount of qualifying revenue likely to be earned by all terrestrial broadcasters other than the BBC but including Channel 4 (the "total television revenues").\(^{139}\) If, according to the estimate of the ITC, Channel 4's qualifying revenue for any year is likely to be less than fourteen percent of the total television revenues of all terrestrial broadcasters for that year, then in order to make up all or part of the deficit the ITC must impose a levy on Channel 3 license holders.\(^{140}\) However, the total amount of that levy cannot exceed two percent of the total television revenues of all terrestrial broadcasters as estimated by the ITC for any year.\(^{141}\) Therefore, if Channel 4 revenues fall below twelve percent of total television revenues for any

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\(^{138}\) *Id.* at § 25(2)(e), (3); see also *supra* note 84.

\(^{139}\) *Id.* at § 26(1).

\(^{140}\) Broadcasting Act, 1990, ch. 42, § 26(3).

\(^{141}\) *Id.* at § 26(4).
year, Channel 4 is likely to be in financial difficulties. The ITC have complete discretion to decide upon the proportions in which any levy is to be imposed on Channel 3 license holders.\textsuperscript{142} On the other hand, if Channel 4's actual deficit is less than the amount of any levy imposed by the ITC on the basis of the deficit estimated by them, then Channel 4 must repay the difference.\textsuperscript{143}

If Channel 4's actual revenues should exceed fourteen percent of total television revenues, then fifty percent of the surplus must be paid to the ITC which is obliged to distribute that amount among the Channel 3 license holders in the same proportions as those in which any levy would be imposed.\textsuperscript{144} With regard to the rest of the surplus, twenty-five percent must be credited to a reserve fund established by Channel 4 and the remaining twenty-five percent may be used for Channel 4's current expenditure.\textsuperscript{145} The Home Secretary may, with the approval of the Treasury, direct Channel 4 as to the management and application of that reserve fund and Channel 4 must comply with any such direction.\textsuperscript{146} In addition, any balance standing to the credit of the reserve fund must be taken into account by the ITC in calculating the amount of any levy imposed by them on Channel 3 license holders.\textsuperscript{147}

\textbf{D. Channel 5}

Although the Act clearly sets forth the regulatory framework for Channel 5, the provisions relating to the structure of Channel 5 are less clearly defined. No specific programming remit is given to Channel 5. However, it is expected to meet substantially the same programming standards and requirements as Channel 3; and therefore presumably to provide a similarly broad spectrum of high quality programming. In addition, Channel 5 is being expected to finance its operations by winning a sufficiently large share of advertising revenue at a time when its own advent and the advent of the new satellite channels (particularly BSkyB) mean that the advertising cake is being divided up into an even larger number of slices.

Another problem is the shortage of transmission wavelengths available for the broadcast of Channel 5. Because of this shortage Channel 5 will have to transmit on a frequency currently used by home video re-

\textsuperscript{142} Id.
\textsuperscript{143} Id. at § 26(7).
\textsuperscript{144} Id. at § 27(1).
\textsuperscript{145} Broadcasting Act, 1990, ch. 42, § 27(3).
\textsuperscript{146} Id. at § 27(5).
\textsuperscript{147} Id. at § 26(3).
corders and the initial availability of Channel 5 will probably be limited to certain areas of the United Kingdom in order to avoid interference with Irish and French frequencies.

For this reason the Act does not state that Channel 5 will be a nationwide service. It stipulates that it will be provided "for any such minimum area of the United Kingdom as may be determined" by the ITC and that, in making that determination, the ITC must have regard to the fact that the service should, so far as is reasonably practicable, make the most effective use of the frequencies on which it is to be provided. The ITC also have a discretion to determine the times of day and the days of the week between and on which Channel 5 is to be provided. In other words, the Act leaves it to the ITC to determine the structure for Channel 5 and, as yet, the ITC have not made that determination.

One particular obligation which will be imposed on any Channel 5 license holder is that he will be required to re-tune at his own cost all video cassette recorders in the transmission area in order to avoid interference caused by the transmission of Channel 5. A wide range of estimates of the likely re-tuning costs have been given but the average is approximately £100 million. However, this obligation will only apply to equipment which is used wholly or mainly for domestic purposes and the people affected must request the re-tuning before a certain (as yet unspecified) date.

IV. LICENSES FOR SATELLITE AND CABLE TELEVISION CHANNELS

There are three categories of satellite and cable television channels which require a license from the ITC. The Act refers to them as "domestic satellite services," "non-domestic satellite services" and "licensable program services."

A. Domestic Satellite Services

A domestic satellite service is one which (a) is transmitted by satellite and uplinked from the United Kingdom, (b) is intended for general reception in the United Kingdom and (c) uses frequencies allocated to the United Kingdom government for satellite broadcasting. The five such frequencies which have been allocated to the United Kingdom have all been awarded by the IBA under the 1984 Act to BSB. However,

148. Id. at § 28(1)-(2).
149. Id. at § 28(3).
151. Id. at § 30(3).
152. Id. at § 43(1).
following the merger between BSB and Sky, the IBA announced its intention to cancel BSB’s license in due course. That intention will presumably be implemented by the ITC. In addition, BSkyB has announced its intention to cease broadcasting on the frequencies allocated to BSB in the spring of this year. Therefore, the likelihood is that the frequencies allocated to BSB will shortly become available. It is another matter entirely as to whether or not there is likely to be any interest in taking over those frequencies if the ITC decide to advertise their availability.

The ITC have discretion to grant such licenses to provide domestic satellite services as they may determine. They are not obliged to ensure that a domestic satellite service is provided and may therefore decide not to invite applications for BSB’s frequencies. If the ITC do decide to award a new license to provide a domestic satellite service, applicants must follow the same competitive tendering process as that which applies to Channel 3 and Channel 5 licenses. The principal difference is that the programming threshold is substantially lower because most of the additional programming requirements do not apply to domestic satellite services. Out of the eight additional programming requirements, only two apply to domestic programs of European origin and for not less than twenty-five percent of certain categories of programs to be allocated to independent productions. Therefore, once this relatively low programming threshold has been crossed by applicants, the ITC proceed to award the license on the basis of the highest cash bid as previously described.

The other major difference between licenses to provide domestic satellite services and Channel 3 and Channel 5 licenses is that domestic satellite service licenses will last for an initial period of fifteen years and be renewable thereafter for further consecutive periods of fifteen years. The actual procedure for obtaining a renewal is virtually identical to that which applies to the renewal of Channel 3 and Channel 5 licenses. One other difference between the two categories of licenses is that there are no requirements for news programs on domestic satellite services to be provided by “nominated news providers.”

B. Non-Domestic Satellite Services

There are two categories of “non-domestic satellite service.” The first is any satellite-delivered television service uplinked from the United

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153. Id. at § 44(1).
154. Id. at § 44(3).
156. Id. at § 44(4)(d).
Kingdom which is transmitted other than on an allocated frequency (that is, using a telecommunications rather than a specifically allocated broadcasting frequency) and for general reception in the United Kingdom and/or any "prescribed country." The second is any satellite-delivered television service which is uplinked neither from the United Kingdom nor from a "prescribed country," which is transmitted for general reception in the United Kingdom and/or a "prescribed country" and consists of programming material provided by a person in the United Kingdom who is able to determine what is to be included in the service. The expression "prescribed country" has not yet been defined but the ITC have stated in the guidelines published by them that the definition is to be linked to the implementation of the European Community Directive on Television Broadcasting and the Council of Europe Convention on Trans-frontier Television. Prescribed countries are therefore expected to be all of the member states of the European Community and those additional member states of the Council of Europe who ratify the Convention on Trans-frontier Broadcasting before October 1991.

If that is correct then there is a potential loophole in the legislation since, if a satellite-delivered service is uplinked from a "prescribed country" (for example any country which is a member of the European Community), then the service is not required to be licensed by the ITC. This is the loophole which BSkyB have threatened to exploit if the ITC seek to impose punitive conditions in their license following the merger. The person who requires a license to provide a non-domestic satellite service is generally the person in the United Kingdom who provides the programming material included in the service and who is in a position to determine the content of the service. If there is no such person in the

157. Id. at § 43(2)(a).
158. Id. at § 43(2)(b).
159. The principal purpose of the Directive is to guarantee freedom of reception within the European Community ("EC") for broadcasts made from within or regulated by any of the twelve countries who are member states of the EC provided that the broadcast complies with the minimum standards laid down by the Directive. As a result, the UK government cannot prevent the reception in the UK of a satellite-delivered channel which is uplinked from any of the other eleven member states unless that channel fails to comply with the minimum standards set by the Directive.

160. The principal purpose of the Convention is essentially the same as that of the Directive. As a result, the UK government cannot prevent the reception in the UK of a satellite-delivered channel which is uplinked from any of the other countries who are members of the Council of Europe and who ratify the Convention unless that channel fails to comply with the minimum standards laid down by the Convention. The members of the Council of Europe include nearly all of the major European Community countries who are not member states of the European Community, including Austria, Finland, Norway, Sweden and Switzerland.
case of a service uplinked from the United Kingdom, then the person providing that uplink must obtain the license.\textsuperscript{161}

The ITC may only refuse to grant a license to provide a non-domestic satellite service if the applicant is not a “fit and proper person” to provide the service, or if the applicant is a “disqualified person” or would otherwise fall foul of the rules on ownership of non-domestic satellite service license holders, or if it appears to the ITC that the service in question would not comply with the general requirements on programming standards and content which would apply to all television channels.\textsuperscript{162} These are the rules prohibiting offensive or inflammatory programming matter and subliminal messages, the rules on news and religious programs and the requirement for the preservation of due impartiality which have been summarized above. A license to provide a non-domestic satellite service will last for ten years and there is no statutory procedure for its renewal.\textsuperscript{163}

\textbf{C. Licensable Program Services}

These are services, other than terrestrial broadcast and satellite-delivered channels, which are provided for the purpose of being sent either by means of a cable network or (where available) by microwave transmission either to two or more dwelling houses in the United Kingdom or for public showing or presentation to an audience who have no common business interest in receiving the program service.\textsuperscript{164} The definition would, for example, cover a tape-delivered service which is relayed over cable networks by cable operators or local delivery operators.

In general, any such service requires a license from the ITC. The only grounds on which the ITC can refuse the license are the same as those in relation to a non-domestic satellite service.\textsuperscript{165} However, if the licensable program service is a local one, the ITC do have a discretion to modify the requirement for due impartiality which is contained in the general programming standards.\textsuperscript{166} A license to provide a licensable program service will also last for ten years.\textsuperscript{167}

\begin{flushleft}
162. \textit{Id.} at § 45(2).
163. \textit{Id.} at § 45(4).
164. \textit{Id.} at § 46(1).
165. \textit{Id.} at § 47(2).
167. \textit{Id.} at § 47(3).
\end{flushleft}
V. THE NEW LOCAL DELIVERY LICENSES FOR CABLE TELEVISION

The Act creates a new licensing regime under which a new "local delivery service" license will be granted to cable operators in franchise areas which have not already been licensed by the Cable Authority under the 1984 Act and in the franchise areas where the ITC decide to grant more than one license. In addition, the Act contains transitional provisions dealing with the effects of the Broadcasting Act on the existing cable licenses granted by the Cable Authority under the 1984 Act. In this article, the expression "cable operators" will be used generally to refer both to the new local delivery operators licensed by the ITC and also the cable operators holding existing licenses from the Cable Authority. The transitional provisions are dealt with in a separate section of this article. This section will deal only with the new local delivery service licenses.

A. Definition Of A "Local Delivery Service"

A local delivery service is one which consists in the use of a telecommunications system for the purpose of delivering one or more types of television or radio service for simultaneous reception in two or more dwelling houses in an area of the United Kingdom which has more than 1,000 dwelling houses in it. The new license is therefore required in order to enable a cable operator to relay television and radio services by means of a cable system and/or by microwave transmissions, but only in an area which has more than 1,000 dwelling houses.

The ITC are empowered to grant such local delivery service licenses as they may determine and for such areas in the United Kingdom as they may determine. There are no rules or guidelines in the Act specifying how the ITC are to determine the franchise areas for local delivery service licenses.

B. Obtaining A Local Delivery Service License

Under the new licensing regime, licenses will be awarded to cable operators on the basis of a competitive tendering process with the franchise generally being awarded to the highest cash bidder. This represents a departure from the previous system under which the Cable Authority tended to award licenses on the basis of a largely qualitative judgment.

Once they have decided to award a franchise for a particular area,
the ITC must publish their intention to grant a license, specifying the franchise area, the microwave frequencies that would be available to the licensee should he wish to use them, the application fee and the minimum tender price calculated as a percentage of the cable operator’s “qualifying revenue” (that is, its gross revenue arising from the delivery of television and radio services during each accounting period).\(^{170}\) The ITC have a discretion to fix the percentage of qualifying revenue at nil or at different rates for different years throughout the license period in order to assist the operator’s cash flow during the early years.\(^{171}\)

An applicant must provide the relevant application fee and submit a technical plan indicating the parts of franchise area which he would propose to cover, the timetable within which the coverage would be achieved and the technical means by which it would be achieved (that is, by cable or microwave transmission or a combination of both).\(^{172}\) In addition, the applicant must submit such information on his present financial position and such financial projections for the period of the license as the ITC may require.\(^{173}\)

Most importantly, the applicant must submit a cash bid for the license. As in the case of Channel 3 and Channel 5 licenses, the cash bid represents the amount which the applicant would be prepared to pay to the ITC during the first year of the license and, if accepted, the amount of the cash bid would be increased in subsequent years in accordance with inflation.\(^{174}\)

Once the closing date for applications has passed, the ITC must publish the name of every applicant, particulars of the technical plan submitted by each applicant and any other relevant information which the ITC consider appropriate.\(^{175}\)

Before considering the cash bid made by any applicant, the ITC must satisfy themselves that the applicant’s telecommunication system is acceptable to the relevant authorities (that is, the Department of Trade and Industry\(^{176}\) and the Office of Telecommunications\(^{177}\)) and would be

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170. Id. at § 74(1).
172. Id. at § 74(3)(a)-(b).
173. Id. at § 74(3)(d)-(e).
174. Id. at § 74(3)(c), (7)(a).
175. Id. at § 74(6).
176. The Department of Trade and Industry (“DTI”) is the UK government department which is responsible for trade and industry matters within the UK. Specifically, it is responsible for regulating the construction of cable systems.
177. The Office of Telecommunications (“OFTEL”) is a body set up by the DTI to regulate and monitor the telecommunications industry, including the provision of telephone services as well as the use and construction of cable networks. Part of OFTEL’s role is to facilitate
capable of being established within the timetable submitted by the applicant. 178 The ITC must also be satisfied that the applicant would be able to maintain the proposed service throughout the license period, that the applicant is a "fit and proper person" to hold a license and is not otherwise disqualified from holding a license under the Act. 179

If these conditions have been met, the ITC must award the license to the applicant who submitted the highest cash bid unless there are exceptional circumstances which make it appropriate for the ITC to award the license to another applicant. 180 Such exceptional circumstances can include cases where another applicant proposes in the technical plan submitted by him as part of his application to achieve a substantially greater degree of technical coverage than the highest bidder. 181 However, if the ITC decide that there are "exceptional circumstances" justifying the award of the license to an applicant other than the highest bidder, they must publish their reasons for taking that decision. 182

The only other situation in which the Act permits the ITC to award the license to a person other than the highest bidder is if the ITC believes that there are grounds for suspecting that any source of funding available to the highest bidder is such that it would not be in the public interest for the license to be awarded to the highest bidder. 183 In that situation the ITC must refer the matter to the Home Secretary in the same way as they must if they have any such suspicion in relation to the highest bidder for a Channel 3 or Channel 5 license.

If the highest bidder is successful, he will not be obliged to provide a service throughout the franchise area but merely in accordance with the technical plan and timetable submitted with his application. 184 Applicants may therefore decide in advance to "cherry pick" the most densely populated regions of a franchise area and inflate their cash bids accordingly, thereby taking the risk that the ITC will decide that there are exceptional circumstances for awarding the license to another applicant.

After the ITC have awarded the franchise, they must publish the name of the successful applicant and the amount of his cash bid, as well as the name of every other applicant whose telecommunications system

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179. Id. at § 75(1)(b).
180. Id. at § 76(1), (3).
181. Id. at § 76(4).
182. Id. at § 76(11)-(12).
184. Id. at §§ 74(3), 81(3).
would have been acceptable to the relevant authorities and would have been capable of being established in accordance with the timetable submitted with his application.\textsuperscript{185}

\textbf{C. Duration And Renewal}

A license will last for a period of fifteen years and thereafter will be renewable for consecutive periods of fifteen years commencing on the date of each renewal.\textsuperscript{186} Renewal can be applied for at any time within the last five years of the license (but no later than an outside date determined by the ITC), and may only be refused if the ITC wish to grant a fresh license for a different area or if the applicant does not, or is unlikely to, achieve the coverage set out in his original technical plan.\textsuperscript{187}

The financial terms of the renewal — both the new percentage of qualifying revenue and the amount of the cash bid for the period of the renewal — will be set by the ITC.\textsuperscript{188} The amount of the cash bid is to be the amount which the ITC determine that they would be likely to raise if they were to grant a fresh license.\textsuperscript{189} In other words, the ITC have the power to estimate what the highest bid for a fresh license might be.

\textbf{D. Other Changes For Cable Operators}

The holder of a local delivery license may (if his license from the ITC so permits) delegate to others the delivery and operation of service, subject to such conditions as the ITC may impose.\textsuperscript{190} This was not permitted by the 1984 Act. However, if an applicant wishes to "sub-contract" in this way, he must specify that at the time of making his license application.\textsuperscript{191} Although this is not expressly stated in the Act, the applicant would presumably also have to specify the name of the person to whom he is proposing to delegate.

Another change is that cable operators with a local delivery service license may (depending on the terms of their license and on the availability of frequencies) now be given greater scope in choosing their preferred means of distribution since, in addition or as an alternative to cable, the Act permits the use of microwave transmission by cable operators.\textsuperscript{192}

\begin{flushleft}
\textsuperscript{185} Id. at § 76(11)-(12).
\textsuperscript{186} Id. at § 78(1).
\textsuperscript{187} Id. at § 78(2), (4).
\textsuperscript{188} Broadcasting Act, 1990, ch. 42, § 78(6).
\textsuperscript{189} Id. at § 78(7).
\textsuperscript{190} Id. at § 73(5).
\textsuperscript{191} Id. at § 74(3)(b)(iv).
\textsuperscript{192} Id. at § 73(2).
\end{flushleft}
Cable operators will no longer be responsible for the content of all programming services distributed by them. Now they will be responsible for the content of, and will need to be licensed to carry, only local advertisements inserted by them in the services carried by them and satellite-delivered channels which are uplinked from countries outside the United Kingdom (other than those countries specified by the Home Secretary) and relayed over their cable system. The same applies to programming provided by the operator himself and relayed over his cable system (assuming always that his license permits him to provide programming).

Restrictions on the ownership of cable operators are summarized later in this article. However, it is worthy of note that the restrictions on the foreign ownership of cable operators have now been dropped so that nationals resident in, and corporations and other bodies established in, countries outside the European Community may now own and acquire shareholdings in local delivery operators.

E. Enforcement Of Local Delivery Licenses

The sanctions available to the ITC for breach of a local delivery license are much the same as those in relation to Channel 3 and Channel 5 licenses. However, there are some differences. The first is that there is no power for the ITC to direct a cable operator to include a correction or apology in any program service carried by it and no power for the ITC to direct a cable operator or to include any particular program or not to carry any particular programming service on any future occasion. In addition, the ITC may not revoke a local delivery license because the license holder has failed to establish his service in accordance with the timetable submitted at the time of his original application unless the ITC are satisfied, after Telecommunications, that it would have been reasonably practicable for the license holder to have achieved that coverage.

VI. OWNERSHIP RESTRICTIONS

The ownership restrictions contained in the Act fall into three main categories; firstly, the disqualification of certain persons from holding

193. See supra notes 158-159. These countries are expected to be the member states of the European Community together with the additional member states of the Council of Europe who ratify the Convention.
195. Id. at § 79(1).
196. Id. at § 81(1).
197. Id. at § 81(4).
licenses or from owning stock or holding voting power in license holders; secondly, restrictions designed to prevent the accumulation of interests in the services licensable under the Act; and thirdly, restrictions on cross-media ownership.

A. Disqualification

The following are the principal categories of persons who are disqualified in relation to any license granted by the ITC (i.e. licenses to provide television programming services of any description and all local delivery licenses):

(1) a local authority;
(2) a political body;
(3) a religious body;
(4) an officer of a political or religious body;
(5) the BBC; and
(6) an advertising agency.\(^{198}\)

In addition to those general categories of disqualified persons, there are also rules which prevent bodies from holding any category of license granted by the ITC. The effect of the most important of those rules is to disqualify:

(1) any company in which a local authority, a political body or a religious body holds more than five percent of the shares or voting power;
(2) any body which is controlled by one or more of the disqualified persons listed above;
(3) any body in which the BBC holds any shares or voting power; and
(4) any company in which an advertising agency or a body controlled by one or more advertising agencies holds more than five percent of the shares or voting power.\(^{199}\)

There are also restrictions on the foreign ownership of holders of Channel 3 and Channel 5 licenses, Channel 4 and the holders of domestic satellite service licenses. Those restrictions would disqualify the following from holding such licenses:

(1) an individual who is neither a national of an EC member state nor ordinarily resident either within the European Community or in the United Kingdom, the Isle of Man or the Channel Islands;

\(^{198}\) Id. at sched. 2, part 2, paras. 1(1), 2(1), 5-6.

(2) a company which is neither formed under the law of an EC member state with its registered or head office or principal place of business within the European Community nor incorporated under the law of the Isle of Man or the Channel Islands; and

(3) a body which is controlled by one or more non-EC nationals or corporations.200

The effect of these foreign ownership restrictions is that North American corporations are free to invest in holders of Channel 3 and Channel 5 licenses and holders of licenses to provide domestic satellite services so long as they do not control, either themselves or in concern with any other disqualified person(s), the license holder.

The expression "control" is expressly defined in the Act and, in relation to a company, arises if (a) a person holds or is beneficially entitled to more than fifty percent of the equity share capital in a company or possesses more than fifty percent of the voting power in that company or (b) a person is able, (whether by the holding of shares or the possession of voting power or by virtue of any powers conferred by the by-laws of the company or any shareholders' agreement) to secure that the affairs of the Company are conducted in accordance with his wishes.201

In addition, the ITC have power to disqualify an applicant for a license if in their opinion, any disqualified person or body is exerting influence, whether financial or otherwise, over the activities of the applicant and that influence is or is likely to be adverse to the public interest.202

B. Restrictions To Prevent Accumulation Of Interest

1. Channel 3 And Channel 5

The Act imposes a limit on the maximum number of terrestrial broadcast licenses which may be held at any one time by any one person. Those limits operate to prevent any one person from holding:

(1) more than two regional Channel 3 licenses;
(2) more than one national Channel 3 license; and
(3) more than one Channel 5 license.203

However, the Act does permit the Home Secretary to amend those

200. Id. at sched. 2, part 2, para. 1(1).
201. Id. at sched. 2, part 1, para. 1(3).
202. Id. at sched. 2, part 2, para. 4.
203. Id. at sched. 2, part 3, para. 2(1).
limits and to impose additional limits if he so wishes.\(^{204}\)

The Act divides terrestrial broadcast licenses into three categories for the purpose of the ownership restrictions, namely regional Channel 3 licenses, national Channel 3 licenses and Channel 5 licences. The holder of a license to provide a terrestrial broadcast license falling within one of those three categories may not: (a) hold a license to provide a terrestrial broadcast service falling within either of the other two categories; and (b) may not hold more than twenty percent of the shares or voting power in any holder of a license to provide a different category of terrestrial broadcast service.\(^{205}\) For example, this would prevent a regional Channel 3 licensee both from holding at all, and also from holding more than twenty percent of the shares in the holder of a Channel 5 license or of a national Channel 3 license. Moreover, the holder of any Channel 3 license or Channel 5 license is not permitted to hold either a license to provide a domestic or non-domestic satellite service or more than twenty percent of the shares of voting power in any company which is the holder of a license to provide a domestic or non-domestic satellite service.\(^{206}\)

The holder of a regional Channel 3 license may not hold either a local delivery service license or more than twenty percent of the shares or voting power in the holder of a local delivery service license if the two licenses in question each cover an area which is to a significant extent the same as the other.\(^{207}\) In other words, a regional Channel 3 license holder whose franchise area covered London could not be licensed as, and could not have more than a twenty percent interest in, a local delivery operator whose franchise area covered a significant part of London.

2. Domestic And Non-Domestic Satellite Services

The holder of a domestic satellite service license may not hold either a license to provide, or more than twenty percent of the shares or voting power in the holder of a license to provide, a non-domestic satellite service and vice versa.\(^{208}\)

The holder of a domestic or a non-domestic satellite service license may not hold more than twenty percent of the shares or voting power in a company which is the holder of a regional or national Channel 3 license or a Channel 5 license or in any company which provides a satellite-delivered television service (which is neither a non-domestic satellite ser-

\(^{204}\) Broadcasting Act, 1990, ch. 42, sched. 2, part 3, para. 2(2)-(3).
\(^{205}\) Id. at sched. 2, part 3, paras. 3, 5.
\(^{206}\) Id. at sched. 2, part 3, paras. 3, 6(1)-(2).
\(^{207}\) Id. at sched. 2, part 3, paras. 3, 6.
\(^{208}\) Id. at sched. 2, part 3, paras. 3, 6(2).
vice nor a domestic satellite service) and is intended for reception in the United Kingdom. As a logical consequence of this restriction, the Act also provides that a holder of a domestic satellite service license or of a non-domestic satellite service license may not hold a national or regional Channel 3 license or a Channel 5 license.

3. Cable Operators

A holder of a local delivery service license cannot hold a regional Channel 3 license if his local delivery service is to be provided for an area which is to a significant extent as that for which the regional Channel 3 service in question is provided. In addition, as stated above, a holder of a local delivery service license cannot have more than a twenty percent interest in a regional Channel 3 license holder whose service is provided for an area which is to a significant extent the same as that covered by the holder of the local delivery service license.

The Home Secretary also has power to introduce restrictions on the extent to which the holder of a local delivery service license may hold shares or voting power in the holder of a license to provide a domestic or non-domestic satellite service, a national Channel 3 or a Channel 5 service.

C. Restrictions On Cross-Media Ownership

These restrictions are primarily intended to prevent the proprietors of newspapers from becoming involved in the UK television industry. The following will illustrate how the restrictions operate.

1. Channel 3 And Channel 5

A proprietor of a national or local newspaper is prevented from owning more than a twenty percent shareholding in the holder of a license to provide either a Channel 3 service (whether regional or national) or Channel 5 and vice versa. A proprietor of a local newspaper is, however, allowed to hold more than a twenty percent shareholding in the holder of a regional Channel 3 service and a regional Channel 3 license holder is allowed to hold more than a twenty percent interest in a local newspaper so long as both the local newspaper and the Channel 3 service

210. Id. at sched. 2, part 3, para. 3.
211. Id. at sched. 2, part 3, para. 3.
212. Id. at para. 6(7).
213. Id. at para. 6(8).
do not serve an area which is to a significant extent the same.\footnote{215}{Id. at paras. 2(2), 3(2).}

A proprietor of a national newspaper which owns more than five percent (but not more than a twenty percent) interest in one Channel 3 or Channel 5 license holder cannot have more than a five percent interest in any other Channel 3 or Channel 5 license holder and vice versa.\footnote{216}{Id. at paras. 2(3), 3(3).}

In the future, the Secretary of State may restrict the extent to which the proprietor of a national or local newspaper may be a shareholder at all in more than one Channel 3 or Channel 5 license holder.\footnote{217}{Id. at para. 2(5).}

2. Cable Operators

The proprietor of a local newspaper cannot own more than a twenty percent shareholding in a local delivery service license holder and vice versa if the two services cover an area which is to a significant extent the same.\footnote{218}{Id. at paras. 1(4), 2(4), 3(4).}

At the present there are no other restrictions although the legislation provides that the Home Secretary may in the future prescribe the extent to which the holder of a local delivery service license may own shares or voting power in the proprietor of a national newspaper and vice versa.\footnote{219}{Broadcasting Act, 1990, ch. 42, sched. 2, part 4, paras. 2(5), 3(5).}

3. Domestic And Non-Domestic Satellite Services

The Secretary of State is empowered to impose restrictions preventing the proprietor of either a local or a national newspaper from holding shares in any one or more domestic or non-domestic satellite service license holder and vice versa.\footnote{220}{Id. at sched. 2, part 5.}

D. National Public Telecommunications Operators

The Act also empowers the Secretary of State to restrict the different kinds of licenses which a national public telecommunications operator may hold.\footnote{221}{Id. at paras. 2(2), 3(2).} At the present time, British Telecom\footnote{222}{British Telecommunications plc ("BT") is a public company which runs telecommunications systems and is currently the principal provider of telephone services throughout the British Isles.} and Mercury\footnote{223}{Mercury Communications Limited is a privately owned company which also runs tele-
made at the time of the writing of this article, it is expected that both entities will, at least, be restricted from holding local delivery service licenses. The purpose of that restriction would be to give smaller operators an opportunity to set up cable television systems without having to compete with public telecommunications operators who already have the existing telecommunications network to enable them to undercut any competition.

E. Extension Of Ownership Restrictions

Any restriction of the holding of shares or voting power in a license holder applies equally to the holding of shares or voting power in any company which controls a license holder.224 In addition, any restriction on the ownership of shares or voting power imposed on a license holder shall apply to the license holder as if the license holder and every person connected with him were one person.225 The following persons are deemed to be "connected" with a license holder:226

1. any person who controls the license holder;
2. an associate227 of the license holder or of any person who controls the license holder; and
3. a body which is controlled by the license holder or by an associate of the license holder.

VII. Transitional Provisions

Since the 1990 Broadcasting Act repeals both the 1981 Act and the 1984 Act it was necessary to include two sets of transitional provisions in the 1990 Act. The first set of transitional provisions deals with the effects of that repeal on the services previously regulated by the IBA under the 1981 Act. The second set deals with the effect of the repeal of the 1984 Act on the services previously regulated by the Cable Authority under the 1984 Act.

A. Broadcasting Services Regulated By The IBA

The television broadcasting services previously regulated by the IBA communications systems throughout the British Isles and is currently the principal competitor of BT in the provision of telephone services.

225. Id. at part 3, para. 8, part 4, para. 4.
226. Id. at part 1, para. 3.
227. The expression "associate" is defined to mean, in relation to a company, a director of that company or of a company which is a member of the same group as that company. Id. at para. 1(2).
were ITV, Channel 4 and BSB. The transitional provisions explain how those services will continue to be provided and regulated during the interim period commencing on January 1, 1991 and ending on December 31, 1992 after which the new regulatory regime introduced by the Broadcasting Act comes into full force and effect.

Following the abolition of the IBA, ITV and Channel 4 will be provided and regulated by the ITC instead of the IBA. However, the ITC will regulate ITV and Channel 4 in accordance with the relevant provisions of the 1981 Act until the end of 1992. Therefore, ITV and Channel 4 will continue to be required to comply with the programming requirements and standards imposed under the 1981 Act until the end of 1992 when all of the contracts with the present ITV program contractors will expire.

Under the 1981 Act the programs broadcast on the ITV network or by Channel 4 were actually transmitted by, or under arrangements made by, the IBA. Following the abolition of the IBA, the transmission of ITV and Channel 4 programs will be effected not by the ITC but by a company nominated by the Home Secretary and wholly owned by the Government. That company ("the nominated company") is to be called National Transcommunications Limited. The arrangements or transmission of ITV and Channel 4 programs will be contained in a contract made between the nominated company and each ITV program contractor or Channel 4 (as the case may be).

The transitional arrangements relating to BSB are likely to prove academic if the ITC carries out the threat made by the IBA to cancel the license granted to BSB under the 1984 Act. However, the theory contained in the transitional provisions is that BSB will continue to operate in the same way as it previously has except that it will now be regulated by the ITC instead of the IBA. Until the end of 1992, the idea is that BSB will be regulated by the ITC in accordance with the relevant provisions of the 1981 Act and that the present contract between the ITC and BSB will be replaced on January 1, 1993 by a license providing a domestic satellite service.

B. Existing Cable Licenses

The transitional provisions dealing with the effects of the Broadcast-
ing Act on the existing cable licenses granted to cable operators by the Cable Authority under the 1984 Act are extremely detailed and complicated. This article will only summarize the most important of those transitional provisions which affect what the 1984 Act called "prescribed diffusion services." Those services were effectively broadband cable systems. Licenses to provide prescribed diffusion services granted by the Cable Authority will continue in force and are not automatically terminated because the 1984 Act has been repealed by the Broadcasting Act. However, because there are differences between the new local delivery service licenses and the existing cable licenses, the transitional provisions give certain choices to cable operators. In short, a holder of a license to provide a prescribed diffusion may have as many as three different options which are described below.

1. Immediate Conversion

If the closing date for his original cable license application under the 1984 Act fell before November 7, 1986, the license holder can request the ITC to grant a new license to provide a local delivery service in exactly the same area as that covered by the existing cable license. In determining whether this option is available to a license holder, it is important to note that the cut-off date is the deadline set by the Cable Authority for the making of applications for that franchise. Any such application to convert an existing cable license into a new local delivery service license must be made before July 1, 1991. In that case the ITC must grant the application (unless the applicant is not a "fit and proper person" or a disqualified person) and the new license will have all of the characteristics of a local delivery service license with certain exceptions. The new license would run for a period of fifteen years commencing upon the date on which the original cable license came into force but could then be renewed on one or more occasions for a period of fifteen years in the same way as a local delivery service license. However, none of the provisions in the Broadcasting Act relating to the making of cash bids and the payment of percentages of "qualifying revenue" will apply to the new license until such time as it is renewed.

233. Id. at sched. 11, part 3, para.1.
235. Id.
236. Id. at para. 2(9).
237. Id. at para. 2(5).
2. Retention Of Existing License

The license holder can simply keep his existing cable license until it expires and apply to the ITC for a new license to provide a prescribed diffusion service which would come into effect upon the expiration of the existing license.238 In general terms, any such new license would still be a cable license and not a license to provide a local delivery service under the new licensing regime. The ITC have a general discretion as to whether or not to grant any such application and, if it is granted, the replacement license can only run for a maximum of eight years after the expiration of the existing cable license.239 The ITC also have a general discretion as to the amount of the payments due under any such replacement license.240

3. Subsequent Conversion

The license holder can retain his existing cable license and apply to the ITC for a new license to provide a local delivery service for the same area as that covered by his existing cable license.241 If granted, the new local delivery service license would come into force upon the expiration of the existing cable license.242 The ITC have a limited discretion to refuse an application for a local delivery service in these circumstances.243 In addition, the application will be treated in the same way as an application for the renewal of an existing local delivery service license so that the ITC can require the payment of and fix the amount of a cash bid as well as a percentage of qualifying revenue during the period of the new license.244

Although the transitional provisions do contain certain restrictions on the ownership of holders of existing cable licenses, they do not contain any restrictions preventing non-EC nationals or bodies from holding cable licenses or from acquiring shareholdings in companies holding cable licenses. In view of the repeal of the 1984 Act, the effect is that foreign ownership restrictions have ceased to apply to holders of existing cable licenses.

238. Id. at para. 2(4).
240. Id. at para. 3(2), (5).
241. Id. at para. 3(3)(b).
242. Id. at para. 4(1).
243. Id. at sched. 12, part 2, para. 4(6).
VIII. ADDITIONAL REGULATION

In addition to the powers and duties of the ITC, the Broadcasting Act also gives a statutory role in the regulation of broadcasting within the United Kingdom to two other bodies, namely the Broadcasting Complaints Commission and the Broadcasting Standards Council, and gives certain powers to the Home Secretary which, on paper at least, appear quite sweeping.

A. The Broadcasting Complaints Commission

The Broadcasting Complaints Commission ("BCC") was first established in 1981 under the 1980 Broadcasting Act. Its role is to consider and adjudicate upon complaints of unjust or unfair treatment in television programs and of unwarranted infringement of privacy in obtaining material for such programs. That function extends to programs broadcast by the BBC as well as programs broadcast as part of any terrestrial, satellite or cable television service regulated by the Broadcasting Act.

Once the BCC have adjudicated upon a complaint, they may direct the broadcaster or program provider to publish a summary of the complaint and the BCC's findings on the complaint (or a summary of their findings) in such form as may be approved by the BCC. In the case of a program broadcast by the BBC, the BCC may give any such direction direct to the BBC. In the case of any other program, the BCC will require the ITC to direct the relevant broadcaster or program to comply with the direction given by the BCC. That is the extent of the powers given to the BCC in relation to complaints.

B. The Broadcasting Standards Council

The Broadcasting Standards Council ("the Council") was established in May 1988 on a non-statutory basis. The Broadcasting Act put the Council on a statutory footing. The principal duties of the Council are:

(1) To draw up a code of guidance in connection with the portrayal of sex and violence and the maintenance of standards of taste and decency in all television programs

245. Id. at sched. 12, part 2, para. 4(7).
246. Id. at § 143(2).
247. Id. at § 143(2), sched. 11, part 2, para. 10.
248. Id. at § 146(1)-(3).
broadcast both by persons licensed by the ITC and by the BBC.\textsuperscript{250}

(2) To monitor all television programs capable of reception in the United Kingdom so that the Council can make reports on the portrayal of sex and violence and the standards of taste and decency in those programs and can determine whether to issue complaints in respect of those programs.\textsuperscript{251}

(3) To consider complaints made to the Council relating to the portrayal of sex or violence in any television program or to alleged failures of any programs to attain standards of taste and decency, and then to make findings on such complaints. The powers of the Council in relation to complaints are the same as those given to the BCC (i.e. they may give directions requiring the publication of a summary of the complaint and the Council’s findings).

(4) To represent the United Kingdom Government on international bodies concerned with the setting of standards for television programs.

(5) To prepare an annual report of their proceedings and activities for each year and send that report to the Home Secretary as well as to the BBC, the ITC and every broadcaster and program provider licensed by the ITC.\textsuperscript{252}

C. Obscenity And Defamation

The Broadcasting Act extends the law of obscenity to cover television and radio programs. Thus, it is now a criminal offense to record and include obscene matter in a television or radio program service.\textsuperscript{253}

The Broadcasting Act also makes it clear that the publication of words in the course of any television or radio program shall be treated as publication in a permanent form and therefore, if such words are defamatory, they will constitute a libel.\textsuperscript{254}

D. Powers Of The Home Secretary

The Broadcasting Act confers certain quite extensive powers on the Home Secretary. These include:

\begin{itemize}
  \item \textsuperscript{250} Id. at § 152(1).
  \item \textsuperscript{251} Id. at § 153.
  \item \textsuperscript{252} Id. at § 154.
  \item \textsuperscript{253} Id. at § 146(1)(b).
  \item \textsuperscript{254} Broadcasting Act, 1990, ch. 42, § 149.
\end{itemize}
(1) The power to require the ITC to direct holders of ITC licenses to publish in their services such announcement as the Home Secretary may specify.\textsuperscript{255}

(2) The power to require the ITC to direct the holders of ITC licenses not to include in their program any matter or classes of matter specified by the Home Secretary.\textsuperscript{256} This power was contained in the 1981 Act but is nevertheless a potentially sweeping power exercisable by the Government.

(3) The power to proscribe foreign satellite services (i.e. any satellite-delivered television channel which is uplinked from outside the United Kingdom and which is capable of being received in the United Kingdom). The procedure for the exercise of that power is that, if the ITC consider that the quality of any foreign satellite service is unacceptable and that it should be proscribed, they must notify the Home Secretary. Before notifying the Home Secretary, the ITC must be satisfied that the programming content of the service offends repeatedly against good taste or decency or repeatedly contains material which is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling. Upon receiving such a notice from the ITC, the Home Secretary may only make an order proscribing the foreign satellite service in question if he is satisfied that it would be in the public interest and also compatible with the international obligations of the United Kingdom.\textsuperscript{257}

\textsuperscript{255} Id. at §§ 152(1)-(2), 153(1), 154(2), 158, 160(1).

\textsuperscript{256} Id. at § 162.

\textsuperscript{257} Id. at § 166.