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Regulation of Television Advertising in the United Kingdom

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Thesis submitted for the qualification of Doctor of Philosophy

City University London
Department of Sociology

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This thesis is dedicated to my mother

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ABSTRACT

The purpose of the thesis is to examine the current state of regulation of television advertising in the UK, chiefly in the light of its historical background. A number of general theories of regulation are also used to analyse both developments in regulation policy and some of the events and processes in the practical activity of regulation.

The thesis seeks to demonstrate that the present structures have not simply arisen haphazardly, nor do they represent anything especially new, but are the result of a long process of evolution during which continuity rather than change has been the dominant theme. Broadcasting in the UK has enjoyed a much longer period of stable independent development than most countries of continental Europe, which has enabled it to establish strong and effective regulatory traditions. The advantage of a historical perspective is that it shows how these traditions were built up, who was responsible for the primary regulatory structures and what motivated them, and what were the causes of change in the system. It has an important explanatory value for an understanding of the present. My argument is that television advertising regulation cannot be divorced from broadcasting regulation as a whole, and although advertising has only been part of the broadcasting system since the inauguration of commercial television in 1955, the form and methods of its regulation cannot be divorced from their roots in television and radio's non-commercial past.

The fact that broadcasting started as a private enterprise subject, in the words of one government minister, to "drastic" regulation, was soon re-constituted as a non-commercial public corporation acting as trustee for the national interest, and that business and advertising interests were only permitted a role in the broadcasting system after thirty years of operation, under similarly drastic regulation, has an important bearing on how advertising regulation is done today. Political, social and cultural influences on broadcasting and broadcast advertising regulation policy and its implementation are traced by looking at the Committee system of policy-making, and by examining numerous published and unpublished (confidential) reports and documents dealing with a variety of aspects of broadcasting and television advertising regulation. The extent to which public interest theory and other theories of regulation are relevant to broadcasting is also assessed. I have therefore sought to explain the present in terms of the past and with reference to several wider theoretical frameworks.

General Introduction

In the introduction to his book *Governing the BBC*, broadcasting historian Asa Briggs claims that "it is impossible to understand the current structure of British broadcasting, a unique structure within the world context, without...tracing its origins back to the 1920s"[1]. This study of British television advertising regulation, also a unique structure, takes the same approach. Although advertising has only been a part of the broadcasting system since 1955, the regulatory structures governing commercial television were closely modelled on the existing constitution of the BBC. The same line of reasoning which had excluded advertising from the BBC for thirty years lay behind the original provisions for control of advertising within these structures and still informs advertising regulation policy today.

British broadcasting is at present undergoing a period of upheaval as a result of developments in media technology and change on the political front. At the same time that the new media of Cable and Satellite began to make spectrum scarcity as a justification for regulation obsolete in the 1980s, a shift to the political right in Britain and America brought the whole concept of state regulation of the economy under critical scrutiny. The 1990 Broadcasting Act deregulated the economic side of Independent Television in order to promote competition and bring broadcasting into line with the prevailing free market ideology. Advertising, as part of the economic structure of ITV, has been subject to deregulation, but the regulatory apparatus for the control of advertising content has remained remarkably intact. Traditional concepts of social responsibility in broadcasting, which went against the individualistic and enterprise-oriented mood of Thatcherism in the 1980s, have survived in advertising regulation policy and the current procedures for copy control, although considerably enlarged, are not significantly different from how they were at the time of the 1964 Television Act.

So in order to gain a better understanding of the current situation in the regulation of television advertising it is essential to look at the conditions and circumstances in which it has its roots. By examining the origins and development of the broadcasting system in this country, particularly the attitudes which influenced its regulatory arrangements, it is possible to learn about how the present

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[1] Asa Briggs, *Governing the BBC*, British Broadcasting Corporation, 1979, p. 1

control structures for television advertising assumed their shape. Regulatory arrangements do not arise in a vacuum, but evolve over a period of time, and within the context of a particular set of political, economic, social, and cultural determinants.

Despite the huge increase in the scope of its operations and in its technical capabilities, the story of broadcasting in Britain is mostly a case of 'plus ca change, plus c'est la même chose.' Although in the last seventy years radio and television services have expanded far beyond the expectations of even the most optimistic early pioneers, many of the same fundamental issues they had to deal with are still alive today. Much the same questions are being asked and the same anxieties are being voiced.

Some of these issues are connected to larger political, economic and social concerns: state control versus free enterprise; monopoly versus competition; the public interest in broadcasting; freedom of expression, accountability and access; regulation - what form and how much or how little ; methods of finance - licence fee, government assistance or advertising? Some are more specific to broadcasting: particular aims and objectives; public service ideals and obligations; programming policy; detailed guidelines for advertising control and so forth. The relationship between advertising and broadcasting cannot be considered in isolation from this background or apart from the broader relationship between broadcasting and society.

Theoretical Framework.

There is a very extensive literature on regulation from numerous different perspectives, and a number of general studies which bring all these perspectives together for comparative purposes. Differences in terminology and different ways of defining regulation sometimes cause confusion. I have followed John. G. Francis's inclusive definition of regulation as "state intervention in private spheres of activity to realise public purposes"[2]. Francis extends the traditional view of regulation as restrictions on choice to include the notion of regulation as actually strengthening choice by protecting people from undesired choices, particularly in the area of social regulation. This interpretation is especially relevant to broadcasting regulation, the primary purpose of which has always been social rather than economic. The initial regulatory decision to exclude advertising as an undesired choice was crucial to

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[2] John G. Francis, *The Politics of Regulation*, Oxford: Blackwell, 1993, p. 5

the future direction of the broadcasting system[3]. It strongly influenced the way in which the advertising option was presented once policy-makers had come to the conclusion that audiences no longer needed protection from having to decide whether they wished to be exposed to broadcast advertising or not.

As the theoretical framework for analysing television advertising regulation, including the "negative" period when regulation policy ruled that advertising and broadcasting were a socially unacceptable mix, I have used Robert Horwitz's classification of five general categories of regulation theory[4]. These five categories - public interest theory, "perverted" public interest theory, conspiracy theory, capitalist state theory and organisational theory - cover most ways of looking at regulation, and this study explores to what extent any of them throw light on the empirical history of broadcast advertising control. I have also made use of Dennis McQuail's definition of the public interest in communications, and some general approaches to regulation outlined by Kenneth Dyson[5].

Methodology.

In reviewing the historical context, I have drawn on contemporary reports and documents including policy recommendations, statements of intent, pleas by special interest groups, prescriptions for actual regulation - rules and guidelines, and descriptive records of regulatory activity such as the Annual Reports of the commercial television regulatory authorities. Government White Papers and the relevant Broadcasting Acts have been examined in detail and general background has been provided by published historical accounts of broadcasting and television advertising.

The evolution of certain structures, and of British attitudes to regulation and to advertising, can be quite clearly traced in the reports of a succession of Committees of Inquiry appointed by the government of the day to investigate various aspects of broadcasting and recommend appropriate courses of action. I have relied heavily on these reports, together with their memoranda of evidence,

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[3] *Note:* The negative aspects of decision-making, i.e. the impact on subsequent policy of excluding certain options from the process, has been explored by Steven Lukes in *Power: A Radical View,* British Sociological Association, 1974, pp. 16-20

[4] Robert Britt Horwitz, *The Irony of Regulation Reform: The Deregulation of American Telecommunication,* New York: Oxford University Press 1989

[5] D. McQuail, *Media Performance,* London: Sage 1992 *and* . Kenneth Dyson, *The Politics of Regulation in Germany,* Dartmouth: 1992

not only because they were extremely influential in determining regulation policy, but because nowhere else is there such a concentration of vivid detail which reveals what people with an interest in broadcasting really felt about it. It is these subjective feelings and opinions that continue to influence the regulatory mode and style even when objective political, economic or technological developments force radical structural changes. And in the committee reports these opinions are delivered directly rather than filtered through the perspective of an historian or commentator.

In dealing with the present situation in advertising control, and with the recent past, I conducted an extensive series of taped interviews with leading figures in the television regulatory authorities, past and present, the television companies, the advertising industry (which term I have used to cover both advertisers and agencies) and from consumer organisations. This has been particularly illuminating because regulation is not just a matter of drawing up a fixed set of rules which then operate automatically like clockwork; it is an activity carried out by individuals with their own convictions, ideals and prejudices. Within the broad parameters of the job, what people think and feel about the purpose of regulation and the practical difficulties of implementing it has an important effect on the process. Regulation involves numerous interactions between the various participants which help to shape its development. The interviews were all conducted on the record and comments have been attributed to named individuals. A full list of interviewees is given at the end. I was also allowed access to the unpublished confidential minutes of the Independent Television Commission's Advertising Advisory Committee on condition that no individuals were named and no specific attributions were made. I have therefore included general information obtained from the minutes in the Case Study on regulation of female sanitary protection (San-pro) advertising, which gives a real insight into the decision-making process of regulation, without identifying particular Committee members.

In order to clarify the way in which regulation works in practice, I have made a methodologically useful typological distinction between measures designed to affect the processes of the enterprise to be regulated, i.e. its form and structure, and those intended to deal with what the enterprise produces. In broadcasting, this distinction corresponds roughly to that between regulation governing the economic, technical and administrative aspects of the system, and regulation bearing on programming. The same distinction can be made with respect to television advertising: regulation of

advertising within the commercial television system deals with it both as part of the financial structure and as a series of broadcast messages with a content. Process regulation also includes determining the amount and distribution of advertising.

In broadcasting, this is a vital distinction because it is a basic premise of British broadcasting policy that the quality of the product is dependent in an essential way upon regulation of the process. Regulatory arrangements have always been based on the assumption of a causal link between the form, or process, of the broadcasting system and its content, or product. This was, until recently, one of the main reasons behind having regulation at all, since it was believed to be the best way of providing the right structures for good programmes to be made. But the impact of the process on the product has been reinforced by specific regulatory requirements for programming as well. The quality of the broadcasting product is a function of the interaction between regulation determining the process and regulation bearing on the product.

The relationship between process and product in the non-commercial sector of the UK's public service broadcasting system is relatively unproblematic. Here, the sole purpose of programmes is to inform, educate and entertain the audience. They are ends in themselves. Although there are many conceptions of what makes quality programming, most include the notions of range and diversity as regards the package as a whole, and creativity and innovation in the case of individual programmes. Regulation of the broadcasting process in the UK was designed from the outset to enable programme makers to achieve the highest standards possible for the benefit of the public.

Advertisements, on the other hand, serve quite a different purpose. They are a means to an end - the promotion of goods and services - and the dependence of a broadcasting service on advertising revenue inevitably means that programmes also become, to an extent, a means to this end. Advertisers will pay for programmes to be made only if they deliver audiences who are potential consumers of what is being advertised.

Regulation of television advertising has two main aims. The first is to protect the interests of the consumer, both as a viewer of programmes and as a potential buyer of the goods and services

advertised. The second is to ensure that the trading practices of the two regulated industries are fair and that competition, within the permitted parameters, is not distorted.

Protecting the viewer, as buyer, from misleading, harmful or offensive advertising on the air does not pose too many problems for regulation if a strict supervisory regime is set up and enforced. Fair trading and competition problems which occur after regulation has been drawn up are an industry matter and do not have a direct bearing on the quality of the television service. But the inclusion of advertising in the broadcasting system as an integral part of its structure has always been considered to be potentially damaging to the service in terms of programming. From the start, a link was identified between broadcast advertising and programme standards, and it was assumed that advertising in the system would have a negative impact on programmes precisely because the service would then have the "ulterior motive" of supplying audiences to advertisers[6]. This assumption has been modified over the years, but the fear that the need to satisfy advertisers would undermine public service broadcasting ideals of quality, range and diversity, along with related concerns such as the influence of sponsors on programme content and scheduling, and the spoiling of audience's enjoyment by excessive amounts of advertising, have made process regulation a difficult and sometimes controversial operation. It is process regulation which protects the interests of the consumer as a viewer of programmes.

The relationship between the broadcasting process and the broadcasting product is a complex one and distinguishing between regulation governing the former and that governing the latter has proved useful. The same distinction has been made throughout with respect to advertising regulation. Broadcasting regulation is unique because, unlike the regulation of industries such as gas, electricity or airlines, it operates to a large extent with intangibles and immeasurables. It attempts to promote cultural and social values and benefits about which there are strong feelings but which are difficult to evaluate objectively. The primary goal of advertising regulation in the UK has been to try and ensure that the introduction of market forces into broadcasting - and television was the test bed for this endeavour - did not destroy the social purpose of the service which had been so well served by the previous non-commercial system.

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[6] One of the reasons why the Beveridge Report came out against broadcast advertising was that it introduced an ulterior motive into broadcasting and represented "an abdication of broadcasting for its own sake". Report of the Broadcasting Committee 1949: Appendix H : Memoranda Submitted to the Committee (Cmnd 8117) London : HMSO, 1951

Chapter 1 sets out the theoretical framework for an analysis of broadcasting and broadcast advertising regulation over the seven decades of its existence. Robert Horwitz's five categories of regulation theory are summarised along with four general approaches to regulation outlined by Kenneth Dyson. This chapter focuses in particular on public interest theory of regulation and ways in which the concept can be adapted to suit broadcasting.

Chapter 2 describes broadcasting's earliest years and the events which led to establishment of the British Broadcasting Corporation. It looks at the role of the first two Committees of Inquiry into broadcasting, and their influence on regulation policy, and analyses some of the factors behind the decision to exclude advertising from the BBC and constitute it as a non-commercial public service monopoly - the first paradigm of broadcasting regulation.

Chapter 3 follows the progress of regulation once the principle of unified control of broadcasting had been put into operation, and looks at what the next three Committees of Inquiry have to say about the connection between broadcasting, advertising and the public interest.

Chapter 4 deals with the Report of the Beveridge Committee, the first official report to give extensive coverage to the pro-advertising lobby and to discuss in detail the arguments for and against broadcast advertising. McQuail's concept of the public interest in communications is applied to the field of broadcasting.

Chapter 5 describes the circumstances leading up to the inauguration of ITV under the 1954 Television Act, and the regulatory arrangements for commercial television which resulted in the heavily regulated BBC/ITV duopoly - the second regulatory paradigm. It outlines some of the early problems encountered by the regulator in implementing advertising regulation.

Chapters 6 and 7 trace the development of advertising regulation from the 1960s to 1980, taking in the Pilkington and Annan Reports and the 1980 Broadcasting Act. They analyse some of the failures and successes of advertising policy and its implementation.

Chapter 8 deals with broadcasting during the 1980s when Thatcherite ideology and the new media of Direct Broadcast Satellite and Cable began to challenge the traditional assumptions behind regulation. It assesses the influence of the Hunt and Peacock Reports on the deregulating 1990 Broadcasting Act which ushered in the third paradigm - a plurality of services with different regulatory regimes.

Chapters 9, 10 and 11 describe in detail the new regulatory structures for commercial television, concentrating on the current machinery for advertising control. The effects of deregulation on standards of television advertising and programming are also discussed, particularly with reference to sponsorship.

Chapter 12 is a Case Study which shows how the category of female sanitary protection has been treated by the television regulating Authority. It explores the role of the Advertising Advisory Committee in policy-making and gives a detailed insight into the actual practice of regulation.

Chapter 13 is devoted to the development of European Community policy on advertising regulation and its impact on the UK. It looks at some of the issues surrounding the potentially conflicting objectives of consumer protection and freedom of commercial speech.

Chapter 1

Some General Theories of Regulation

1. 1 Introduction.

The concrete exercise of television advertising regulation is best examined against the theoretical background of regulation in general. Control of television advertising in the UK is, for the most part, an aspect of broadcasting regulation, although independent domestic and EC consumer protection and competition legislation also play a significant role. Broadcasting regulation, in turn, is framed with reference to wider policy issues, political, economic and social, and is just one of various ways in which the state seeks to control industry.

No single theory or approach wholly explains every event in the history of broadcasting regulation in Britain, which has evolved over time, but all have at least something to say about the most salient features of British regulatory structures and operations over the years. A useful classification of theories of regulation has been made by Robert Horwitz in his book *The Irony of Regulation Reform*. He groups them into "five general, ideal typical categories: public interest theory, regulatory failure or 'perverted' public interest theory, conspiracy theory, organisational behaviour theory, and capitalist state theory"[1]. These categories are not mutually exclusive and overlap to some extent.

1. 2 Horwitz's Fivefold Classification of Regulation Theories.

1. 2. 1 Public Interest Theory.

Public interest theory, oldest of the theoretical perspectives on government regulation of private business, holds that "regulation is established in response to the conflict between private corporations and the general public. The creation of regulatory agencies is viewed as the concrete expression of

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[1] Robert B. Horwitz, *The Irony of Regulation Reform: The Deregulation of American Telecommunication*, New York: Oxford University Press 1989, p. 23

democratic reform"[2]. According to this view, the state intervenes in the economy to protect the community from the undesirable effects of either outright monopoly, or of the concentration of economic power in too few hands. This happens because free markets are inherently unstable. Left to their own devices they fail to provide a mechanism for ensuring that their benefits are distributed equitably among all sections of society. The theory's earliest formulation, made in the last century, equated the public interest with the interests of the individual small producer struggling to survive in competition with increasingly dominant national corporations. With the twentieth century came the mass market, the concept of the mass consumer and the accompanying realisation of the importance of advertising. As the public utilities such as gas, electricity and telecommunications reached more and more homes, the number of consumers of the services they provided increased. Regulation was then designed to curb the power of private interests in the management of these 'natural monopolies' and to safeguard the citizen's right to benefit from the development of a national infrastructure.

This later 'progressive' version of public interest theory shifts the emphasis from producers to consumers. Based on the notion of market failure, progressive public interest theory maintains that it is necessary for the state to intervene in the economy, not just to look after the interests of those who are vulnerable to exploitation in specific areas, but to introduce rationality and fairness into the system generally. Regulatory agencies are able to do this because they represent "impersonal, non-partisan, scientific expertise vested in a body which is continually in session"[3]. As independent administrative apparatuses they act as counterbalances to the partisan interests of private business.

According to public interest theory, regulation combines an economic response - promoting efficiency and consumer welfare by anti-monopoly and fair competition measures - with the political goal of promoting democratic rights. This view is based on a pluralist theory of power which conceives of political power as a coalition of numerous competing interests. The political system functions best when it is able to balance these different interests and cater for a wide range of social needs. And as markets cannot adequately respond to many legitimate social needs, regulation is necessary to ensure that the needs of society, as a group of consumers, are served.

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[2] ibid. p. 23
[3] R. B. Horwitz, op cit. p. 24

According to Horwitz, the weakness of public interest theory is that it does not sufficiently recognise the importance, in practice, of economic power and, as a result, it cannot account for many of the features of regulation as it is actually carried out. It also confuses two distinctly different aspects of regulation: genetic and operational. Horwitz believes that "the origin of an institution is different from the set of reasons and structures by which that institution operates or is maintained over time"[4]. So, although some regulatory agencies may originally be set up by the state to serve the public interest, commercial realities dictate that a great deal of regulation ultimately benefits industry not the consumer. Regulatory agencies may even be established in the first place as a response to industry pressure, and as a means of protecting the regulated parties' commercial activities rather than the interests of the buying public.

Public interest theory, therefore, is only a partial explanation of the genesis of regulatory institutions and does not have enough to say about the operation of an agency once it has been established. It also suffers from the fact that it is not always easy to identify the public interest in any given set of circumstances. The term is often loosely used and only vaguely defined. The International Encyclopaedia of Social Sciences says that the notion is "elastic and relative....(and) has no a priori content waiting to be revealed...(It) serves to remind parties concerned that there are considerations extending beyond their goals"[5]. While noting its centrality to discussions of public policy, political action and social value, Virginia Held, writing in 1970, admitted that "there is at present no agreement as to what we mean when we use the term"[6].

Given the difficulty of defining the public interest objectively, it is hardly surprising that vested interests often simultaneously propose completely opposite solutions to policy problems, each one claiming to be acting in the wider public interest. In fact, it would be difficult to find anyone who claimed otherwise. Traditional public interest theory relies on the somewhat simplistic assumption that a clear-cut judgement can easily be made between policies which are in the interests of the community and those which are not. Such a judgement can only be made in a relatively simple situation, with a limited number of factors to be taken into consideration - a rare occurrence in the

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[4] ibid. p. 9
[5] P. L. Sills, *Public Interest,* in International Encyclopedia of Social Sciences, New York: Macmillan, 1986, pp. 170-174
[6] V. Held *The Public Interest and Individual Interest* New York: Basic Book, 1970, p vii

context of regulatory decision-making. But in spite of the problems surrounding its interpretation the concept has nevertheless been widely used in the sphere of public policy and is the cornerstone of much theory of regulation[7].

1. 2. 2 "Perverted" Public Interest Theory : Instrumental, Structural and Capture Models of Influence.

By the 1960's, it was becoming quite clear that public interest theory was unable to account for many of the dynamic aspects of regulation, and its frequent failure, despite an enormous increase in its scope during the post-war decades, to achieve what it set out to do. This led to the development of various forms of regulatory failure, or "perverted" public interest theory[8]. These are attempts to explain the behaviour of agencies once they have been established which offer critiques of the empirical facts of regulatory operation. They are highly critical approaches because their proponents feel that the public interest has in reality been betrayed and not advanced by government regulation. Richard Posner, for example, claims that agencies "are established for 'public interest' purposes but subsequently become the tools of the industry they regulate"[9]. Such critiques do, however, accept the basic premise on which the public interest model is based, that regulation is originally in the interests of the general public, and seek to modify the model rather than overturn it.

According to these theories, the public interest becomes perverted when, after a while, the regulator comes to identify itself too closely with the industry it is supposed to control. The industry is then able to influence the decision-making process to its advantage. There are three basic types of "influence" model: "instrumental", "structural", and "capture"[10]. Although Horwitz makes them distinct and gives them equal weight, capture is really the broadest notion and the other two often just serve to explain why agencies may become captured.

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[7] *Note:* Even such a relatively fierce critic of regulation as James. Q. Wilson, speaking of US laws which explicitly stated that an industry was to be regulated in the public interest, admits: "we may, in hindsight, dismiss such language as vague or even meaningless, but it was not meaningless at the time such laws were passed." If the law was to be used to make behaviour conform to general standards of rightness, then "elaborate justifications" would be needed to get support for such use. (J. Q. Wilson, *The Politics of Regulation,* New York: Basic , 1980, p. 370) It is only more recently that the notion of public interest itself has come under critical scrutiny.

[8] R. B. Horwitz op cit. p. 27

[9] Richard A. Posner, *Theories of Economic Regulation,* Bell Journal of Economics and Management Science 5/2 (Autumn 1974), pp. 335-358

[10] R. B. Horwitz, op. cit. p. 9

The first type - instrumental - focuses on the role of individuals, and the second - structural - on the role of institutions in explaining why the regulatory function is thought to have failed. Instrumental influence occurs when agency officials and industry personnel are drawn from the same social, educational and working background, and share the same basic outlook on state - business relations. This is likely to be the case when regulators are chosen from within the regulated industry, as having the relevant expertise, and see things from an industry rather than a consumer perspective. The regulators and the regulated meet frequently and after a while a good working relationship descends into something too cosy for tough decisions to be made. A weakness of the instrumental approach is that it places too much emphasis on personal motivation and behaviour. Apart from the fact that many agency staff are not drawn from industry but are professional civil servants and do their job competently, purely individual characteristics would not be sufficient to explain the systematic regulatory failure of entire institutions[11].

The structural model analyses how institutions are put together and their relations with each other, and with the state, in accounting for regulatory failure. Factors which are outside the direct control of individual decision-makers within the agency limit and shape the options available to them. The political processes which determine the composition of agencies; their level of resources, which are often comparatively poor; the problem of information asymmetry, where the regulator depends largely on industry for the information and expert advice it needs in making decisions; the relative power, economic clout and political influence in general of the regulated industry and its access to the media may all contribute towards regulatory failure at the structural level[12].

Capture theory has a number of variants and has been very influential in the analysis of regulatory breakdown. It asserts that for whatever reason an agency was set up, it will eventually be taken over or "captured" by the industry it is supposed to regulate. The best known treatment of capture theory is Marver Bernstein's *Regulating Business by Independent Commission*. Bernstein conceives of the genesis and operation of a regulatory agency in terms of a life-cycle with periods of gestation, youth, maturity and old age. At the beginning, the agency may have a dedicated and enthusiastic staff and wide public support, and during the first two phases the public interest is dominant. There is an

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[11] ibid. p. 27
[12] ibid. p. 28

adversarial relationship with the industry and regulation is innovative and effective. But gradually the distance between the two parties decreases and regulation starts to rely too much on precedent and routine. With the approach of old age bureaucracy rules and the regulatory function degenerates[13].

As Horwitz stresses, Bernstein's picture is rather too uniform in its presentation of the development of agencies, ignoring crucial differences in purpose and circumstances. It tends to overemphasise their "natural" cyclical behaviour, without explaining the precise reasons for the cause and effect processes which result in the four stages. Bernstein does, however, allow for possible interruption of the cycle by some political upheaval which returns it to the beginning or abruptly introduces a new paradigm. Regulation is part of a wider political context and a sudden change in the political agenda interferes with the evolution of the cycle. Political power relations have their effects on regulatory practice[14].

Bernstein makes the important point that regulatory agencies are often trying to achieve conflicting policy objectives; on the one hand to facilitate and to promote, and on the other to control and to restrict[15]. He also notes the "formalism" inherent in institutional procedures. Personnel may become institutionalised (and so increasingly inflexible and bureaucratic) and the burgeoning amount of 'case law' contributes to conservatism in making the rules. Career officials obviously have a vested interest in maintaining the system, and are reluctant to make controversial or unpopular decisions which upset the status quo. They also have a natural tendency to expand regulatory activity, adding to the number of petty restrictions imposed for their own sake rather than any legitimate regulatory objective, and to oppose any attempt to scale down their activities[16]. As Dyson has perceptively remarked, "they are unlikely to support radical deregulation"[17].

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[13] Marver Bernstein, *Regulating Business by Independent Commission*, Princeton: Princeton University Press, 1985, pp. 74-102

[14] R. B. Horwitz, op cit. p. 30

[15] Marver Bernstein, op cit. pp. 253 -258

[16] ibid. pp. 86-95

[17] Kenneth Dyson, *The Politics of Regulation in Germany*, Dartmouth: 1992, p. 22. *Note*: With respect to the UK commercial television regulator he was quite right. The Independent Broadcasting Authority strongly opposed the Thatcher government's plans to liberalise the broadcasting system which would result in a significant reduction of its formal regulatory powers.

1.2.3 Conspiracy Theory and its Variants.

Horwitz's third category, conspiracy theory, also takes a very negative view of the effectiveness of regulation. It goes further than perverted public interest theory, though, in disputing the validity of the public interest justification even at the genetic stage. According to its main proponent, Gabriel Kolko, regulation is initiated from the very start as a result of a conspiracy between powerful business interests and the state. For Kolko and other conspiracy theorists, in the case of the public utilities a concept of the need to protect the public from the high prices and discrimination associated with private monopoly might once have existed, but this notion had soon been hijacked by capitalist industrialists who used it to serve their own ends[18].

In Kolko's view, the chaotic and unstable nature of the market has always been regarded by big business as much more of a threat to itself than to consumers, but attempts by businesses to decrease competition and rationalise operations by merger have not, historically, been particularly successful[19]. While consumers and their supporters in government might perceive certain producers of essential goods, or controllers of vital services as too big and powerful, from an industry perspective they were not big and powerful enough. Only government has sufficient power to introduce order into the market through its legislative capability. The tool of regulation was therefore actively sought by big business for its own protection, and its leading representatives have traditionally been close enough to the political machine to influence policy-making to their own advantage.

Although it concentrates on the genesis rather than the operation of regulation, conspiracy theory correctly identifies regulation a new political institution designed to regularise the economy[20]. But whether this institution always offers greater value as a system of protection to industry than to the consumer is open to question. So is the theory's complete rejection of the public interest explanation of the origin of regulation. While industry may also benefit from state intervention, and this may be a factor in the setting up of particular agencies, it is too one-sided to suggest that this is the sole genetic cause.

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[18] R. B. Howitz op. cit. p. 32, and Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916*, New York: Free Press, 1963, p. 286

[19] G. Kolko op. cit. pp. 4, 5, 55

[20] R. B. Horwitz, op cit. p. 34

Building on Kolko's analysis, and the work of Anthony Downs,[21] free market economists of the `Chicago' school, led by George Stigler, developed an "economic capture-conspiracy" theory. They argue that regulation is a crucial mechanism by which industries try to control entry into the market and construct artificial cartels. It amounts to a form of government-sponsored producer protection which works by restricting competition and thereby reducing the threat to profits. Of the various regulatory measures that contribute to this end - direct subsidy, price-fixing, for example - control over entry is the most effective in preventing potential competitors from getting a share of the cake[22]. If outright monopoly cannot be achieved, then regulation at least provides the framework for effective cartel management, and agencies are both established and continue to operate to that end. Stigler sees regulation as an embodiment of the "rational egotism" strategy of public choice theory. The parties involved who stand to benefit most from regulation pursue it most intensely. This does not, however, tend to be the consumer who does not normally have the means or the level of organisation available to producers.

Sam Peltzman and Richard Posner, again using the rational egotist model, argue that self-interest, either by industry, key bureaucrats or even by coalitions of industry and organised customer groups is the motivation for the economic capture of regulation. Contenders seek a redistribution of wealth or resources by regulation, and are able to "pay" for it to favour them, at the expense of others, by promising political support. Only the highly organised will have the lobbying power to obtain the regulatory rewards. The disorganised, such as consumers, will not gain access to the policy formation process[23].

Economic capture-conspiracy theories are also mostly concerned with the genesis of regulatory legislation and agencies and not their operation. They ignore, as does most capture theory, the fact a regulatory agency may not always be in charge of a single industry representing a homogeneous set

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[21] *Note:* The central notion underlying most economic capture theory derives from the work of Anthony Downs....Economic capture theory posits a government run by individuals who try to maximise a private, rather than public, utility function. Public officials are seen not as bureaucrats concerned with public matters, but rather as private individuals trying to maximise their own "utility" (staying in office, allocating more power to themselves) in much the same way that a firm maximises profit "In effect, regulation....is just another commodity which obeys the laws of the market" (R. B. Horwitz op. cit. p. 36)

[22] George J. Stigler, *The Theory of Economic Regulation*, Bell Journal of Economics and Management Science 2/1 (Spring 1971), pp. 3-21

[23] ibid. pp. 221-40

regulatory agency may not always be in charge of a single industry representing a homogeneous set of interests. In the case of commercial broadcasting in Britain two major industries are affected by one regulatory body, (not to mention at least one sub-industry)[24] . These different sets of interests are often at loggerheads with one another making capture a more complex issue. Conspiracy theories also downgrade the importance of the state as an actor, and as a positive force for social good, exaggerating the extent to which it can be co-opted as the vehicle of various interest groups.

1. 2. 4 Organisational Theory.

In contrast to conspiracy theory, the organisational approach is not concerned with the origins of regulatory arrangements but looks at the operation of agencies, focusing on their behaviour as institutions. It recognises that these bodies also have a life of their own as semi-autonomous structures and follow internal organisational imperatives as much as any other. This may mean that organisations "guard their autonomy, and are not influenced by any party...(or) it may mean that agencies, buffeted by a myriad of complex demands and conflicts, and possessing limited resources to deal with complexity", seek for safe and satisfactory rather than optimal outcomes[25] . Professional staff in the regulatory agencies believe that any problem can be solved by more and better regulation, and seek to perpetuate their own activities in ways which make them regulation oriented, rather than consumer (or industry) oriented. Rules and regulations proliferate as an end in themselves and regardless of the costs involved in an ever-increasing bureaucracy.

For Robert Chatov and Paul Janskow an important organisational imperative which dictates the behaviour of regulatory agencies is the need to lower levels of conflict. In day-to-day operation, agencies have to deal with many different, and often mutually exclusive, demands made on them by competing sets of interests[26] . They develop strategies for avoiding conflict and for reducing the complexity of their responsibilities. Such strategies usually involve constructing "consensus

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[24] *Note:* The commercial television authority regulates both the main television broadcasting industry and the advertising industry. Its decisions also bear on the independent television programme supply business whose interests have sometimes conflicted with the licensed broadcasters. The details of this conflict and the implications for capture theory that the complex regulatory structure of UK television are dealt with in Chapters 10 and 11 on the structure and dynamics of television advertising regulation.

[25] R. B. Horwitz op. cit. p. 39

[26] Robert Chatov, *Government Regulation: Process and Substantive Impacts*, and Paul. L. Joskow, *Inflation and Environmental Concern: Structural Change in the Process of Public Utility Price Regulation*, Journal of Law and Economics 17/2 (October 1974), pp. 291-327

goals"[27]. James. Q. Wilson also notes the tendency of government agencies to be "risk averse". Their desire for stability and autonomy and to be free from blame gives them a strong incentive to "proliferate rules to cover all possible contingencies"[28]. Aversion to risk and reluctance to confront controversial issues leads to the adopting of a "regulation as usual" attitude, which protects the both the agency and balance of power in the regulated industry. Such a response is essentially a conservative and formalising one: existing structures and procedures are preferred to innovation and change is to be feared. This ties in with Bernstein's life-cycle picture in its later stages..

A number of theorists from the right, such as Paul MacAvoy, Eugene Bardach and Robert Kagan, have used organisational theory to provide a counter balance to the anti-industry standpoint of capture-type critiques. They have pointed out that the mass of rules and restrictions imposed on industry, far from promoting consumer welfare, has actually worked against it. It has acted as a brake on profitability and growth which, in turn, has had a damaging effect not just on the regulated industry, but on the economy as a whole, slowing the rate of growth of the nation's GNP. By preventing business from functioning effectively, government regulation has neither rationalised the market nor increased efficiency, but has succeeded in doing just the opposite[29]. It was this reasoning that was behind the deregulatory trends of the 1980s and 1990s. The dismantling of restrictive regulatory apparatuses was an important priority of governments, led by the US and the UK, who moved sharply to the right in the early 1980s.

Although they are varied in their conclusions about the causes of regulatory failure, organisational approaches share the conception that institutions have their own rationale and their behaviour cannot be explained solely in terms of their stated purposes and goals, or in terms of external pressures from government, industry or consumer groups.

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[27] R. B. Horwitz op. cit. p. 40
[28] J. Q. Wilson (ed.), op. cit. p 377
[29] Eugene Bardach and Robert. A. Kagan *Going by the Book: The Problems of Regulatory Unreasonableness*, Temple University Press, Philadelphia, 1982, pp. 58-92, and Paul W. MacAvoy, *The Regulation-Induced Shortage of National Gas*, Journal of Economics XIV (April 1971) pp. 167-199

1. 2. 5 Capitalist State Theory.

Horwitz's last category, capitalist state theory, focuses on regulation as structuralist Marxists analyse it, i.e. as part of "a wider political theory of state intervention in the period of advanced capitalism"[30]. Regulatory agencies are seen as one of several types of state apparatus designed to safeguard the accumulation of capital, towards which the state is structurally biased, when the market fails to do the job. They are a means of social control which enables the state to maintain market order on behalf of industry, but which also makes it possible for it to distribute social benefits. According to structuralist Marxist theory, the state as an actor is bound by the constraint of capital accumulation, but also by a second major constraint, that of "legitimation". The democratic system obliges it to persuade the electorate to legitimise its activities in support of capital, and a healthy economy and growing prosperity is crucial to this[31]. Regulation is a mechanism whereby business can be "induced" to perform well, and social objectives can also be seen to be being pursued.

Vincent Mosco, a political scientist who has written widely on regulation policy in telecommunications and broadcasting in the US, approaches the problem from this perspective. Discussing the new era of deregulation, he acknowledges the importance of economic analysis but emphasises that "deregulation is additionally a political instrument, one that "unleashes" new instruments of social control"[32]. Mosco identifies regulation as one of four main types of governance in developed capitalist societies, the other three being private competition, expert boards and corporatism.

Another political scientist, Stephen Elkin, has criticised the way most theory of regulation over emphasises the economic aspects of regulation at the expense of the political. In Elkin's opinion, much recent debate on regulation rests on a view of public policy-making as an exercise in the logic of efficient choice and in particular as an exercise in economising[33], using McKean's definition of economising: "all decision making persons or groups.....try to make the 'most' as they conceive

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[30] ibid. p. 43
[31] ibid. pp. 42-43
[32] Vincent Mosco, *Towards a Theory of the State and Telecommunication Policy*, Journal of Communication 38, 1988, p. 120
[33] Stephen. L. Elkin, *Regulation as a Political Question*, Elsevier Science Publication B. V, 1985, p. 96

of the 'most' of whatever resources they have"[34]. This is an instrumental view of regulatory agencies as passive entities, potentially substitutable for one another, since each one is merely a tool for fulfilling certain separately defined goals. If the goal is to satisfy consumer preferences, agencies are judged according to whether they make any contribution to grand or 'Pareto' efficiency, i.e. "a situation where change in a distribution designed to make someone better off will make at least one person worse off"[35]. Economisers within the more recent schools of liberal, pluralist economic thinking favour markets over government as devices for achieving Pareto efficiency, and where markets fail 'market-like' institutions should be set up rather than continuations of the old command and control systems of regulation.

Elkin proposes, however, that under the political perspective, institutions are not mere passive instruments divorced from the political community, they are formative of areas of a nation's political life. So to view regulation politically is to "understand it as a problem in governing"[36]. "Governing", here, means "choosing among regulatory formats on the basis of an understanding of the connection between these institutional alternatives and the larger political regime"[37]. In emphasising the political dimension Elkin focuses on the relationship between the citizen and the state. To judge between regulatory alternatives is to make judgments about the meaning of citizenship[38]. The regulatory institutions, like any political institutions, are not just a neutral means to achieve certain objectives but the outcome themselves of wider decisions about the kind of society in which people wish to live.

1. 3 Four General Approaches to Regulation.

In addition to Horwitz's classification of theories, Kenneth Dyson has identified four main general approaches in the literature on regulation: institution-centred, culture-centred, coalition-centred and international-centred. These are meant to be seen as complementary to one another in the attempt to

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[34] Ronald N. McKean, *The Role of Analytical Aids,* in Lewis Ganthrop (ed.), *Administrative Process and Democratic Theory,* Boston: Houghton Mifflin, 1970, p. 253
[35] Stephen. L. Elkin, op cit. p. 96
[36] ibid. p. 97
[37] ibid. p. 97
[38] ibid. p.105

build up a fuller picture of the complex phenomenon of regulation in different countries. Two of these approaches also overlap with a number of Horwitz's theories.

1. 3. 1 The Institution-centred Approach.

It is clear, for instance, that an institutional approach is employed by those who put forward organisational theories of regulation, and by some "perverted" public interest models. This approach focuses on the technical and formal aspects of all the activities surrounding rule-making and interpreting by a highly professional class of specialists in an institutional setting. Whatever the reason for its genesis, and to an extent regardless of the external circumstances which influence its continued existence, the regulatory body develops a micro-culture of its own and establishes professional autonomy from the state, the regulated industries and other vested interests, albeit within certain structural constraints.

1. 3. 2 The Culture-centred Approach.

Dyson maintains that the type of institution a country develops is largely determined by its historical and cultural inheritance. Institutions embody a set of cultural, social and political norms that form the background to particular structures. These structures both reflect and, in turn, shape and reinforce the normative ideas that gave them legitimacy in the first place[39].

Regulatory bodies are the agents of a whole network of multidirectional aspirations, expectations, obligations and responsibilities. A given society has a way of doing things, and an established pattern of behaviour in its political, social and economic life of which public policy-making is a significant part. Cultural values and even personal style are very influential in creating and maintaining regulatory institutions. It is possible to speak of a particular country having a particular 'regulatory culture'. The theories considered so far largely ignore the specifically cultural dimension of regulation, although they may make some reference to the influences social expectations may have in determining regulatory arrangements. This study attempts to fill the gap by focusing on some of the cultural features peculiar to Britain which have contributed to the making of broadcasting and broadcast advertising regulation.

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[39] Kenneth Dyson, op cit. pp. 8 - 9

1. 3. 3 The Coalition-centred Approach.

The coalition-centred approach concentrates more on the political dynamics, i.e. on the power relations that operate not just between regulators and their immediate contacts in industry and the relevant government department, but in a broader context. The formal nature of regulation represents its static, or at least more persisting, aspect. This is counterbalanced by the need for policy-makers, and especially policy implementers, to be continually adjusting and adapting decisions to suit a variety of interests, public and private, within existing structural boundaries. According to Dyson, the outcomes of regulation "are not determined in advance. They are the product of the characteristics of complex policy networks and coalition activities which reflect the ability of policy actors to formulate and choose regulatory actions and to make use of ideas to guide the development of regulation"[40]. Public debate and the involvement of the media in providing a forum for competing sets of interests also add to the pressure on regulatory agencies as rule-bound institutions to allow flexibility in drawing up and interpreting the rules.

Capture theories, including economic conspiracy ones, are coalition-centred being based on a pluralist view of the state. They see the formation of different alliances - agency bureaucrats/industrialists, legislators/regulators, businessmen/large customer groups and so on - as an important factor in obtaining the rewards of regulation, usually at the expense of the general public. Nowadays, however, consumers are more organised, occupy a much more powerful position in the policy network and are capable of forming effective partnerships in the pursuit of a consumer agenda[41].

1. 3. 4 The International-centred Approach.

The effects of the international economy on national markets and regulation of those markets has been the focus of the international-centred approach. As the developed countries participate more closely in the world economy, their economic interdependence has increased. National frontiers mean less and less to large multi-national companies conducting operations on a global scale. The costs of industrial research and development, especially in high-tech fields, are such that nations find joint

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[40] ibid. pp. 2 - 3

[41] The political dynamics of television advertising regulation and the role of coalitions is explored in detail Chapter 10

ventures the only way of meeting them[42]. Economically, the recent trend has been towards breaking down national trade barriers and expanding free trade areas, culminating in Europe with the move to the single European market. Politically, too, the European Community has moved towards greater integration, becoming the European Union, with pan-Union harmonisation of legislation in many areas high on the agenda.

All this has far-reaching implications for regulation. The domestic regulation of individual Member States has been added to or superseded by EC directives. And while deregulation has sought to ease the burden of economic restrictions on business, it has been accompanied by a rise in socially inspired consumer protection legislation. Cultural measures, such as compulsory quotas of national programming production in broadcasting have also been introduced to counterbalance the integrationist agenda. As rules and regulations proliferate, reflecting the complexity of the pan-European situation, their implementation on the domestic front becomes potentially more difficult. There is a constant tension between the demands of the developed regulatory culture of a nation, with its existing aims and methods, and the need to comply with international regulation which may have requirements incompatible with those aims and methods.

None of the theories discussed so far have taken an explicitly international-centred approach. The empirical situations they analyse occur at a national, rather than an international, level. Nevertheless, the internationalisation of the economies of nation states, and the political implications of this, raise questions in the study of regulation which can be addressed by reference to these theories.

Public interest arguments, for example, have been used in forming internationally agreed regulation of broadcasting and broadcast advertising in the EU and countries belonging to the Council of Europe. The concept of the "general interest" has been used by the European Court of Justice in its judgements on the legal scope of domestic broadcasting regulation. The various types of capture and conspiracy models of regulatory failure can be applied to trans-national regulation. The potential for industry to pervert the original intentions of trans-nationally agreed regulation, or conspire in its establishment are, arguably, even greater when so much more is at stake[43].

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[42] ibid. pp. 5 - 7

[43] The international dimension of regulation is dealt with mainly in Chapter 13.

1. 4 The Public Interest in Broadcasting.

As the concept of the public interest is central to so much theory of regulation, and the notion is continually being invoked by makers of UK broadcasting regulation policy, including advertising control, a closer look is needed at what the concept might mean in the context of broadcasting. The problem has already been explored by Denis McQuail in his book, *"Media Performance"*, in the chapter entitled *"The 'Public Interest' in Communication."* He introduces a typology suggested by Held which classifies the three main variants of general public interest theory into preponderance theory, common interest theory, and unitary theory.[44]

The first refers to the majoritarian approach where the sum of individual interests is held to be paramount. The public interest is defined as the majority choice, or whatever maximises individual preferences. If it is defined in this way, however, the public interest can never be "demonstrably contrary to the interest of a majority"[45], or identified with a minority. Essentially a populist approach, the majoritarian way is strong on means of discovering what the public want - popular vote, indices of consumer demand etc. - but weak in that it is an extremely blunt instrument. It can lead to tyranny of the majority and ignores the possibility that the public interest may transcend the sum of individual preferences.

Common interest theories are based on the kinds of individual interests all members of a community are presumed to have in common, e.g. security and defence, a monetary system, and a system of governance[46]. A basic national infrastructure of power, water, transport, telecommunications etc. may also be included in the list. This approach moves away from the simplistic notion that providing what the majority of people explicitly demonstrate that they want at a given time necessarily constitutes acting in the public interest.

A common interest interpretation of the public interest accepts that it is not always served simply by implementing the popular will as soon as it has been identified by majoritarian means. In British politics, for example, opinion polls consistently show a majority of people in favour of

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[44] V. Held *The Public Interest and Individual Interest* New York: Basic Book, 1970
[45] D. McQuail, *Media Performance*, London: Sage 1992, p. 23
[46] V. Held. op. cit. p. 99

restitution of the death penalty, but this demand is regularly rejected by Parliament as not being in the public interest more widely conceived. Even in a democracy, much decision-making in public policy, let alone in specialised areas such as monetary policy takes place at a level far removed from the general public. The concept of a policy-making class equipped with specialist knowledge and expertise that members of the public lack is an important one in this context. Problems with this theory can nevertheless arise when significant numbers of people object to what is presumed to be good for them, or challenge the right of policy-makers to make decisions on their behalf[47].

Unitary theories are those which espouse one absolute normative principle or standard of value to which everyone must aspire in their own eventual best interest. Individual preferences are submerged in the name of the general good which is decided by the ruling elite on purely ideological grounds. Platonic, Hegelian, Marxist and Fascist philosophical systems belong to this category, as, arguably, do some recent libertarian economic theories which give an absolute value to the idea of the market [48].

Clearly, no single category covers all mass communication/broadcasting issues. It is possible to think of examples which fit into each of these theoretical perspectives. Populist, consumer-driven media policies which advocate 'giving the public what it wants' are preponderance oriented. In television, for example, the public interest would be equated with what a majority of the public is interested in, resulting in a solely ratings-based programming policy[49]. But this definition relies on measuring public satisfaction through audience research and opinion polling, which, as McQuail has pointed out, are not only notoriously manipulable and hard to interpret but are time- and place-bound[50]. Important broadcasting issues, such as technical standards, frequency allocations, methods of

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[47] McQuail op. cit. p. 23

[48] ibid. p. 25

[49] *Note:* Held takes as an example of preponderance theory the arguments used by the US television industry in resisting the Federal Communications Commission's 1961 attempt to subject the network stations to regulation of programming content. The Chairman of NBC, Robert. W. Sarnoff, claimed that "the power to license stations does not give a government agency the responsibility of raising viewers' tastes or broadening their interests to conform to its own views of what those tastes and interests should be"; only the audience should decide what is in the public interest. He further explained that network television was so constituted as to appeal "to the majority who seek primarily entertainment and relaxation", and, spurred on by advertisers economic interests, to captivate and woo audiences. (V. Held op. cit. p. 89) British broadcasting policy has consistently avoided this kind of majoritarian concept of the public interest.

[50] ibid. p. 24

finance, and control of advertising cannot be dealt with on this basis, nor can long term overall aims and strategies. The preponderance view of the public interest is antithetical to the public service ideal of broadcasting, which has range and diversity of programming, i.e. catering for a variety of tastes including minority ones, among its goals. These considerations fit more comfortably into the collectivist notion of a common interest which transcends individual preferences in the most accessible end-products of the broadcasting industry - programmes. This approach gives more weight to specialist expertise and tradition than crude measures of public opinion.

Two completely opposite unitary ideological positions falling within the last category have, at various times, both claimed to represent the public interest in the area of mass communications. In recent years the advocates of maximum market freedom in communications and total private ownership of the media, with no, or the bare minimum, of regulation have been influential[51]. Historically, total public ownership of press, radio and television has been the preferred system in a number of countries. In the UK, the broadcast media were in public hands, but at arms length from the state, for the first thirty years of their existence.

Although unitary theory is obviously not suitable as an overall account of the public interest in UK broadcasting policy, McQuail believes that there have nevertheless been strongly normative impulses behind much regulation, which was designed not to satisfy some immediate consumer demands but to serve various ultimate ideals or values, not all of them consistent with one another, such as freedom of expression and information; education of the public taste upwards towards some ideal standard; protection of children and the vulnerable; and promoting national language and culture[52]. These might just as well be taken as common interests, however, rather than absolute values.

Rejecting both preponderance and unitary approaches to defining the public interest in broadcasting, and taking common interest theory as a starting point, McQuail proposes a compromise based on some ideas of Held[53]. In *The Public Interest and Individual Interests*, Held suggests a way of

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[51] M. S. Fowler and D. L. Brenner, *A Marketplace Approach to Broadcast Regulation*, in E. Wartella et al. (eds.) *Mass Communication Review Yearbook* , vol. 4. pp. 645-695. Beverly Hills, CA: Sage, 1982. *Report of the Committee on Financing the BBC* (Chairman: Professor Alan Peacock) (Cmnd 9824) London : HMSO, 1986. and C. Veljanovski, *Freedom in Broadcasting*, London: Institute of Economic Affairs, 1989.

[52] Denis MacQuail op. cit. p. 25

[53] ibid. p. 25

resolving the difficulty that the concept of a wider public benefit can be introduced to support almost any particular partial interest without any a priori means of deciding which version is justified. As McQuail puts it, she proposes "thinking in terms of competing claims: public interest claims are normative assertions that something (e.g. an action or goal) is justifiable on grounds of wider benefits, within the terms of a given political system and framework of norms"[54]. For Held, "the meaningful use of the term "public interest" presupposes the existence of a political system, however primitive or complex"[55]. Bearing this in mind, a claim that a certain course of action is in the public interest is a claim that it *ought* to be done, i.e. that it is justifiable. But to assert that a particular claim is justifiable, and ultimately to have it politically validated, is not to say that it is justified in a final sense, or that other claims are invalid[56]. So, claims regarding the public interest in broadcasting, for example, merely need to be prima facie justifiable relative to the particular political and legal system which validates the claim.

With reference to broadcasting, McQuail recommends treating "various statements of public interest concerning communications as a set of competing claims or proposals with a normative component,"[57] leaving it to the political and legal systems to provide the framework for adjudicating conflicting claims. This may include the creation of regulatory bodies to work out the detailed interpretation of broad legislative structures dealing with broadcasting. Such bodies would have to bear in mind some fundamental communication "goods" such as freedom of expression, access to communication media, education and information, promotion of cultural values and national identity, artistic endeavour and entertainment and so on, and decide on priorities among them. They would make the make day-to-day decisions on behalf of claimants with different, and possibly competing, interests in the broadcasting process.

What is useful about McQuail's treatment of the public interest in communications is that it is able to deal with the complexity of the situation and sees this as something positive. Classical public interest theory of regulation has difficulty in explaining situations more complicated than those that can be characterised as a simple dichotomy of interests between producers and consumers. Regulatory

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[54] ibid. p. 26
[55] V. Held op. cit. p. 168
[56] ibid. p. 186
[57] Denis McQuail. op. cit. p.26

failure and organisational theories take into account complexity, but tend to perceive the numerous competing and conflicting demands made on regulatory bodies as entirely negative and detrimental to the regulatory function. I have chosen to use McQuail's common interest based version of public interest theory, not just because it is particularly appropriate to the middle and late stages of broadcasting regulation in Britain, but also because it allows for some normative content, and British broadcasting and broadcast advertising regulation possesses a strongly normative tone. The numerous different policy documents issued over a seventy year period contain very definite visions of how their authors believed broadcasting in this country *ought* to be .

Chapter 2

The Origins of British Broadcasting Regulation: Development of a Model.

2. 1 Introduction.

Regular licensed broadcasting began in England in January 1923 as a commercial enterprise, but one whose operations were strictly limited under the terms of its license. The creation of a new and official broadcasting organisation at this time was the government's response to requests for it to sanction the use of the radio frequencies for entertainment. These requests came from the early producers of radio equipment and from a growing band of amateur wireless enthusiasts, both of which were eager to benefit from the new technology[1].

Telegraphic communications and wireless telephony, strictly controlled during World War I, were the province of the Post Office, under the Telegraph Act of 1869 and the Wireless Telegraphy Act of 1904[2]. In planning the peacetime development of radio technology, the British government first made the crucial decision to reserve for itself a considerable degree of control on the grounds that it was not in the public interest to allow a potentially extremely powerful medium of communication to fall into the wrong hands. This was partly for reasons of national security; the war had resulted in a period of international political instability. But a few more far-sighted observers had already realised that broadcasting possessed the potential to offer social and cultural benefits beyond the mere amusement of a small number of enthusiasts, and the competitive free market approach followed by the Americans was not considered an appropriate one for the development of this potential in Britain.

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[1] Burton Paulu. *British Television Broadcasting,* University of Minnesota, 1956, pp. 8-9

[2] *Note:* "The 1904 Act was the first of its kind in the world, laying down that no person should establish a wireless telegraph station nor 'install or work any apparatus for wireless telegraphy' without securing, as a necessary condition, a licence from the Postmaster-General. Thus was established the basis of British broadcasting regulation." (Stephen Hearst, *Broadcasting Regulation in Britain* in Jay. G. Blumler (ed.) *Television and the Public Interest,* London : Sage, 1992, p 61).

In fact, the course of events in the United States was an important factor in the British Government's decision to keep a close eye on the development of commercial radio services in this country. In America, between the founding of the Radio Corporation of America as a private enterprise in 1919, and the end of 1924, hundreds of commercial radio stations had started up causing chaos on the airwaves. The scarcity of frequencies meant constant interference and great difficulty in getting good reception[3]. The first broadcasting committee set up in the UK, the 1923 Sykes Committee, believed that "the regulation of the power and wavelength of each transmitting station must necessarily be undertaken by the Government, in order to avoid chaos"[4].

As commercial enterprises, the American stations, led by AT&T were soon deriving income from "toll broadcasting" i.e. advertising and sponsorship, despite fierce opposition to this from such people as Herbert Hoover[5], at that time Secretary of the Department of Commerce, and David Sarnoff, first commercial manager of RCA and one of the great names in broadcasting history[6]. But hostility to advertising in Congress and elsewhere because it conflicted with the ideals of public service did not prevail against actual practice for the simple reason that alternative methods of finance such as royalties on sets, or licensing (which were adopted in Britain) were unpopular with vested business interests and the public alike[7].

2. 2 From Company to Corporation: The Experiment Begins.

In the UK, determination to avoid the difficulties created by the American free-for-all led to the introduction of a radically different model for the operation of broadcasting services from the American one. The design eventually decided upon was partly a pragmatic solution to the financial

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[3] *Note:* The Postmaster-General gave his opinion of this situation in a reply to a Parliamentary Question in April 1922: "It would be impossible to have a large number of firms broadcasting. It would result only in the sort of chaos, only in a much more exaggerated form, than that which arises in the United States, and which had compelled the United States, or the Department over which Mr. Hoover presides and which is responsible for broadcasting, to do what we are doing now at the beginning, that is, to lay down very drastic regulations indeed for the control of wireless broadcasting." (Hansard, Vol. 152, Col. 1869, 3 April 1922)

[4] *The Broadcasting Committee: Report,* (Chairman: Sir Frederick Sykes), (Cmd. 1951), London: HMSO, 1923, para 21, p. 12, (Sykes Report)

[5] *Note:* Hoover complained to broadcasters in a 1924 address that "if a speech by the President is to be used as meat in a sandwich of two patent medicine advertisements, there will be no radio left." (J.C. Young, *How will you have your advertising? Radio Broadcast*, December, 1924, 6, p 248)

[6] Vincent Mosco, *Broadcasting in the United States*, Ablex Publishing Corporation, New Jersey, 1979, p. 9

[7] Asa Briggs, *History of the BBC: The First Fifty Years.* Oxford University Press 1985, p 19

problems of the prototype privately owned broadcasting company, and partly the result of particular political and socio-cultural beliefs about the nature of the new medium and its implications for the nation. Apart from anti-Americanism, another important factor was the traditionally paternalistic attitude of the English governing classes, who believed that trusteeship of public interest in cultural matters should be left in the hands of the educated elite and not sacrificed to commercial interests[8].

But first, as an experimental means of providing a weekly programme "of telephony (speech and music) for the benefit of the Wireless Societies"[9], the British Broadcasting Company was incorporated as a privately owned monopoly in December 1922 and received its licence on January 18, 1923. Its constitution was an anomaly in business terms; the Post Office had made it clear to all commercial interests who had expressed a wish to enter broadcasting that, in order to avoid "confusion, congestion, and mutual interference on the air",[10] it "preferred co-operation to competition"[11]. The arrangement it eventually imposed represented a forced marriage between a number of firms who, outside their broadcasting function, were in competition with one another for the production of radio equipment. Although the Company, referred to as a "muddle up"[12] by its first General Manager, John Reith , differed in some ways from, the Corporation, "it nevertheless influenced both the legal structures and the programming policies of its successor"[13].

£100,000 of stock was issued, and any manufacturer could join by buying one or more shares and agreeing to abide by the conditions laid down by the Post Office and the companies who had negotiated with it. The six largest manufacturers were given control of the enterprise. In addition to the original stock, it was financed by royalties on the radio sets (British made only) sold by company members, and by part of the ten shilling licence fee radio owners were obliged to purchase from the Post Office as the regulating authority[14]. In return for its licence the company had to set up eight

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[8] *Note:* After disapproval of the American commercial system, "the second factor which profoundly influenced Britain's course was distrust of what British opinion-forming classes called 'commercialism'. Even the manufacturers of broadcasting equipment, who were shareholders in the British Broadcasting Company, expected their profits to come from the sale of receivers, not in any shape and form from the programmes". (Stephen Hearst op cit. p. 63) See also the discussion in Brian Young's *The Paternal Tradition in British Broadcasting 1922-?*, Edinburgh: Heriot-Watt, 1983.

[9] Asa Briggs, *History of the BBC: The First Fifty Years*, op cit. p. 20

[10] Asa Briggs. *The History of Broadcasting in the United Kingdom.* Vol. I: *The Birth of Broadcasting*, London: Oxford University Press, p. 103. (Briggs I)

[11] ibid. p. 105

[12] Hansard, Vol. 152, Col 1869, 3 April 1922

[13] Burton Paulu, *British Broadcasting op cit.* p. 9

[14] Asa Briggs, *History of the BBC: The First Fifty Years*, op cit. p. 30

regional stations and provide "a programme of broadcast matter to the reasonable satisfaction of the Postmaster General"[15].Provision was also made for any department of the government to require the Company to transmit "communiques, weather reports or notices issued thereby as a part of any programme or programmes of broadcast matter"[16]. The Postmaster General could also require it to "refrain from broadcasting" any matter specified by him.

So, from the start, the state retained the power to initiate and to veto broadcasts. Restrictions were placed on news coverage: the Company could only broadcast news material bought from news agencies such as Reuters approved by the Postmaster General; and, crucially, on advertising: the Company could not "without the consent in writing of the Postmaster General receive money or other valuable consideration in respect of the transmission of messages by means of the licence apparatus, or send messages or music constituting broadcast matter provided or paid for by any person other than the Company or person actually sending the message."[17] Under this scheme, even though the Company was intended to function as a business, it was denied the ability to obtain an income from the most natural source, advertising, unlike its rival communication medium, print. The Company, however, interpreted the words of the licence as a prohibition on direct or 'spot' advertising but not on sponsorship, where an advertiser supplies a programme in return for a credit on the air. It took advantage of this vagueness and broadcast eight sponsored programmes in 1925, and one in 1926, the sponsors being various London newspapers [18].

The British Broadcasting Company commenced business as a de facto, though never de jure, monopoly. The Post Office retained the option of licensing other broadcasting agencies; it simply chose not do so until the advent of Independent Television in 1954. In the beginning, the decision was more one of expediency than ideology; having made the initial political decision to regulate broadcasting, the government considered it easier to regulate a single organisation than many. It was

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[15] Wireless Broadcasting Licence: Copies of (1) Licence by the Postmaster-General to the British Broadcasting Company, Ltd., for the establishment of eight radio-telephonic stations and the transmission therefrom of broadcast matter for general reception; (2) Agreement with respect to the broadcasting of news and general information (Cmd. 1822), 1923, p. 2, (1923 Licence)

[16] ibid. p. 5

[17] ibid. p. 3. *Note:* Interestingly enough, while several firms challenged the Post Office's refusal to allow news not previously published in the press to be broadcast, no-one disputed the ban on advertising. (Briggs I. op. cit. p. 106)

[18] Burton Paulu, *Television and Radio in the United Kingdom,* Macmillan 1981, p. 24

only later that what had started out as a practical solution - monopoly, or 'unified control' - became an article of faith, although one that was by no means accepted by everyone.

While the government saw a need for general control, it regarded it as impractical for the department exercising the technical functions of regulation, the Post Office, to involve itself in matters of detail such as programming. This was the business of the manufacturer's co-operative it had set up, subject to the terms of its licence. So the concept of the state regulating, but keeping its distance from internal matters of day-to-day operation came into being, forming one of the central planks of all subsequent broadcasting policy, including advertising control.

Clearly, the decision to place the general conduct of broadcasting firmly within the sphere of state control and influence from the very outset was a vital one in shaping its future development. Equally important was the conception of broadcast programming first and foremost as a public service rather than a market commodity produced with the aim of making profits for broadcasting companies and advertisers. The public interest rationale was used from the beginning to justify a measure of state intervention. And once the intention to regulate in this way had been established, most of the other essential elements of broadcasting policy in the UK - the principle of monopoly, the restrictions on commercial methods of funding, and the compromise between retaining state power over broadcasting and preserving the broadcaster's independence in matters programming and general administration - fell into place.

Within a few months of going on air the Company was in trouble[19]. The financial arrangements proved inadequate - people simply built their own sets or avoided buying a license - smaller members felt at a disadvantage, and the Press, who were deeply suspicious of the powers of broadcasting, strongly opposed the existence of a rival private monopoly. The Postmaster General's answer was to set up the first in a long line of broadcasting committees, chaired on this occasion by Major-General Sir Frederick Sykes. The seven man committee, which presented its Report to Parliament in August 1923, addressed itself chiefly to the company's financial situation, but it also considered a number of

[19] Burton Paulu. *British Broadcasting*, op cit. p. 11

other important issues. Since it set the tone for much of the subsequent discussion on broadcasting and broadcast advertising in the UK it is worth looking at in some detail.

2. 3 Advertising in the Sykes Committee Report

One of the Committee's terms of reference was that it should consider "the restrictions which may need to be placed on (broadcasting's) use or development"[20]. Correctly foreseeing the new medium's "social and political possibilities as great as any technical achievement of our generation", the eventual universal demand for "this inexpensive service", and the establishment of "imperial and international services", the Report had this to say: "....We consider that the control of such a potential power over public opinion and the life of the nation ought to remain with the state, and that the operation of so important a national service ought not to be allowed to become an unrestricted commercial monopoly"[21].

Apart from the power of radio as a means of communication to be used both for good and for bad ends, national control was believed to be necessary from another angle: the wavebands used by each broadcasting station constituted a scarce, and therefore valuable, public resource. The right to use them should only be granted after careful consideration, and "subject to the safeguards necessary to protect the public interest in the future"[22]. This argument has been employed to justify first monopoly, and then duopoly, in British broadcasting right up to the 1980's, when it began to be seriously undermined by the widespread introduction of new technology vastly increasing spectrum availability.

Paragraphs 8 and 9 of the Report deal with the broadcasting product - the type and content of broadcast matter. Its educational value is pointed out, and it is stressed that in respect of programmes "it is obviously of importance that a high standard should be maintained"[23]. The need to maintain programming standards has continued to dominate the argument for non-commercial public service

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[20] Sykes Report op. cit. p. 5
[21] ibid. para 6, p. 6
[22] ibid. para 7, p. 6
[23] ibid. para 9, p. 7

broadcasting, first as the only appropriate model for the UK, and then as a necessary alternative to services funded by the private sector.

The Committee provided definitions of direct and indirect advertising: An example of direct advertising is given as "a speech by a representative of a Motor Company extolling the virtues of his Company's cars. An example of indirect advertising (i.e. sponsorship) would be an announcement before a broadcast concert that it was given free through the generosity of a specified firm"[24].

The Report goes on to say that serious objections to any form of advertising on the air had been raised by the Press who feared that their dependence on this source of revenue made them vulnerable to competition by a powerful "quasi monopoly". The newspapers continued to reproduce this argument before all subsequent Committees of Inquiry, lobbying with particular intensity against the introduction of commercial television, which was awarded a monopoly of airtime for advertising. Events have proved the fears of the Press that broadcast advertising would take away a significant proportion of their revenue to be groundless, however. The huge growth of the advertising industry as a whole, stimulated by commercial television, has actually benefited the print media.

The Committee considered three alternatives with regard to advertisements:

(1) that they should be the main source of revenue;

(2) that they should be banned completely;

(3) that they should be permitted as supplementary funding.

The conclusions it came to, based in part on a study of broadcasting in the United States, Canada and Australia where commercial funding was permitted, closed the door firmly on direct advertising in the broadcasting system in the UK for the next thirty years. Since the arguments put forward by Sykes to support these conclusions form the bedrock of all subsequent opposition to broadcast advertising, were the basis for its regulation when eventually introduced, and were even supported by many advertisers themselves, the paragraph of the Report containing them is quoted below almost in full.

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[24] ibid. para 40, p. 19

"We attach great importance to the maintenance of a high standard of broadcast programmes....and we think that advertisements would lower the standard. The broadcasting of advertisements on a large scale would tend to make the service unpopular, and thus to defeat its own ends. In newspaper advertising the small advertiser as well as the big gets his chance, but this would not be the case in broadcasting. The time which could be devoted to advertising would in any case be very limited, and, therefore, exceedingly valuable; and the operating authorities who would want revenue, would naturally prefer the big advertiser who was ready to pay highly, with the result that only he would get a chance of advertising. This would be too high a privilege to give to a few big advertisers at the risk of lowering the general standard of broadcasting"[25]

The Committee, therefore, recommended that only indirect advertising in a limited form be allowed, i.e. "the gift of a concert" in return for broadcasting a "preliminary announcement giving the name of the donor"[26]. Also to be permitted were the mentioning of the price of a piece of music to be broadcast together with the publisher's name. The introduction of a system of coded commercial information and prices broadcast for a few minutes per hour during business hours, intended for the use of subscribers to the service, was also recommended[27].

In this seminal passage, the Sykes Committee anticipated most of the major concerns of those involved in policy-making on broadcast advertising throughout the history of British broadcasting. It explores the relationship between advertising and broadcasting, emphasising the need to set and maintain the high programming standards expected of a public service, and assuming that dependence on advertising would lead to a decline in standards. It considers the question of how much advertising can be broadcast before it becomes self-defeating, which is still being debated by broadcasters, regulators, and especially advertisers to this day. Attention is drawn to the dangers of an organisation being given a monopoly of a scarce resource which would be available for sale only in very limited quantities. Monopoly enables the operating agency to charge large sums of money for its airtime, favouring big advertisers who can afford to pay and discriminating against smaller

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[25] ibid. para 41, p. 1
[26] ibid. para 41, p. 19
[27] *Note:* Sykes was ahead of his time. The technology for this information service was not fully developed until the 1970's, when the Ceefax and Oracle teletext services commenced operation on television.

companies, thereby threatening the principle of fair competition which benefits both producers and consumers alike. Measures to ensure that competition in the airtime sales market was fair to advertisers became an integral part of the regulatory framework for commercial broadcasting in later years.

In the context of the period, the Sykes Committee's arguments are for the most part legitimate ones. The possibility of a connection between advertising and low programming standards has been hotly debated, and few people nowadays would claim that any sort of commercial input necessarily threatens standards. It has been for some time a question of degree. But the task of policy makers at the start of a new venture was to provide the right conditions for their chosen aim, that of ensuring good programming rather than maximum profits, to succeed. Experience in other countries has indeed shown that unregulated commercial broadcasting, particularly television, with no strong non-commercial public service alternative, does not produce quality programming. Interestingly, Sykes came to the conclusion that sponsorship, in the early days of the British Broadcasting Company, offered a less obtrusive, and thus more acceptable, way of financing broadcasting than direct advertising. But the more essential question of editorial freedom from the control of advertisers, a central point of principle in later policy, was not discussed. The sponsorship option was nevertheless rarely exercised by either the Broadcasting Company or the BBC, even though it was given lukewarm support by subsequent committees until Beveridge[28]. After that it was not to become available again for terrestrial broadcasting until the Broadcasting Act of 1990, nearly seventy years later.

Sykes remarks about the drawbacks of granting a single broadcaster, or a cartel of broadcasters, a monopoly of airtime were also to the point; the difficulties attached to such a system became apparent as soon as the popularity of commercial television became thoroughly established in the 1960s. Advertisers, who had initially been delighted to have access to the television medium on any

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[28] *Note:* The Crawford, Selsdon, Ullswater and Hankey Committees all regarded limited sponsorship as harmless, if not particularly desirable. Beveridge took a different view: "Sponsoring....puts the control of broadcasting ultimately in the hands of the people whose interest is not broadcasting but the selling of some other goods or services....if the people of any country want broadcasting for its own sake they must be prepared to pay for it as listeners or viewers; they must not ask for it for nothing as an accompaniment of advertising some other commodity."{*Report of the Broadcasting Committee 1949: Appendix H :Memoranda submitted to the Committee* (Cmnd. 8117), Vol. 1, London : HMSO, 1951, p. 194. (Beveridge II)}

terms, became increasingly resentful that the lack of competitive opportunities offered by the ITV Network's regional monopoly put them at a considerable disadvantage. This caused persistent problems for the regulator until the deregulating 1990 Broadcasting Act opened up competition in television airtime sales.

In the section on 'Controlling Authority', the Sykes Committee, in line with its view that while "ultimate control of broadcasting must....rest with a Minister responsible to Parliament"[29], its internal matters were too complex and technical to be dealt with in detail by the Postmaster General or his department, recommended that the operations of the British Broadcasting Company be overseen by a Broadcasting Board set up by statute "to assist the Postmaster-General in the administration - technical, operational and general - of broadcasting, and to which the Postmaster-General should refer important matters concerning the control of broadcasting for advice"[30].

This Board (forerunner of the British Broadcasting Corporation's Board of Governors, and the model for the commercial television regulator when it eventually came into being) would deal with such questions as who should broadcast, how many stations there should be, how they should be financed, programming policy and some form of complaints procedure. It would have 12 unpaid members composed of representatives of various interested groups[31]. Sykes foresaw the time, however, when broadcasting became "so great a national responsibility as to demand the creation of a small paid body of experts to whom...its control should be entrusted"[32], a suggestion soon taken up with the founding of the British Broadcasting Corporation, and again with the creation of the Independent Television Authority, a more classical regulatory body with responsibility for overseeing private business..

The first Board was duly set up in 1924, under the Chairmanship of Sykes himself, and met only a few times during that year. It was opposed by John Reith, who considered it "a ghastly waste of

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[29] Sykes Report para 21, p. 12
[30] ibid. para 22, p. 12
[31] *Note:* Sykes suggested the Department of Scientific and Industrial Research, the County Councils' Association, the Association of Municipal Corporations, the Trades Union Congress, the Post office, the Wireless Societies, the operating Concerns, the Manufacturers, the press and the Entertainment Industry. (ibid. para 23, p. 13)
[32] ibid. para 24, p. 13

time"[33], and was abolished by the Post Office in 1925, when the next Committee of Inquiry, chaired by the Earl of Crawford and Balcarres, was appointed to make further recommendations for the re-structuring of broadcasting[34].

2. 4 Advertising in the Crawford Committee Report

The Committee's remit was "to advise as to the proper scope of the Broadcasting service and as to the management, control and finance thereof after the expiry of the existing license on 31st December, 1926"[35]. After only two years of operation the potential for broadcasting to play a major role in national life had become much more obvious[36], and the need for some revision of the status of the British Broadcasting Company was recognised, not only by politicians, but by the Company itself. General Manager John Reith told the Committee that the Company was, in effect, acting as a full public service and not as a commercial enterprise, and that this situation needed some formal expression[37].

The Crawford Committee accepted without debate that the monopoly should be continued, since "it is agreed that the United States system of free and uncontrolled transmission and reception, is unsuited to this country, and that broadcasting must accordingly remain a monopoly"[38]. It therefore recommended that broadcasting should be controlled by a single authority, and that "the broadcasting service should be conducted by a public corporation acting as trustee for the national interest, and that its status and duties should correspond with those of a public service"[39]. This body

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[33] Caroline Heller. *Broadcasting and Accountability,* London : British Film Institute, 1978, (BFI Television Monograph 7), p17

[34] Nicholas Garnham, *Has Public Service Broadcasting Failed?* in Proceedings of the 20th University of Manchester Broadcasting Symposium, *Life After the Broadcasting Bill,* Manchester Monographs, 1989, p. 19

[35] *Report of the Broadcasting Committee 1925, (Chairman: The Earl of Crawford and Balcarres)* (Cmd. 2599) London : HMSO, 1926, para 1, p. 4. (Crawford Report)

[36] *Note:* Crawford, paragraph 3 stated: "Broadcasting has become so widespread, concerns so many people, and is fraught with such far-reaching possibilities, that the organisation laid down by the British Broadcasting Company no longer corresponds to the national requirements or responsibility. Notwithstanding the progress which we readily acknowledge, and to the credit of which the company is largely entitled, we are impelled to the conclusion that no company or body constituted on trade lines for the profit, direct or indirect, of those composing it can be regarded as adequate in view of the broader considerations now beginning to emerge".

[37] Burton Paulu. *Television and Radio in the UK* op cite p 8 and J.C.W. Reith. *Into the Wind* Hodder and Stoughton, 1949 pp. 102-103

[38] Crawford Report op cit. para 4, p. 5

[39] ibid. para 20, p. 14

would enjoy freedom and flexibility; it would hold the license of the Post Office and be invested with full authority to carry out the duties of a public service.

In considering the composition of the Board of the Corporation, the Committee rejected the proposal that it should be composed of people representing various interests, such as music science, drama, education, finance, manufacturing etc., "since compromise and even conflict might ensue owing to division of allegiance"[40]. The Committee felt that members should be independent persons, free of commitments, preferably "men and women of business acumen and experienced in affairs"[41]. Board members would have a duty to appoint a series of Advisory Committees to consider in detail particular aspects of the broadcasting service.

Ultimate control would continue to rest with the government, but the Crawford Report made the first explicit statement of the need for a separation of powers between the state and the broadcasting agency, a need which has defined their relationship ever since. The Committee also made a statement on the style of regulation that it thought should be encouraged: "the progress of science and the harmonies of art will be hampered by too rigid rules and too constant a supervision by the State. Within well-defined limits the Commission should enjoy the fullest liberty.....It would discourage enterprise and initiative....were the authority subjected to too much control"[42]. This liberal approach was instrumental in setting the general pattern for broadcasting regulation in the UK, where, theoretically, a delicate balance is maintained between the demands of the state and the freedom of broadcasters and regulators to run their own affairs with the minimum of interference.

Regarding finance, the Committee recommended the continuance of the license fee method, leaving the question of advertising to be considered by the Board of Governors in the normal course of their duties. Opinions both for and against the acceptance of broadcast commercials were, however, considered as evidence[43]. The Wireless Society believed that "a considerable income could be obtained from some kinds of advertisement without lowering the tone of broadcasting. The listener is

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[40] ibid. para 8, p. 7
[41] ibid. para 8, p. 7
[42] ibid. para 16, p.13
[43] Asa Briggs, *History of the BBC: The First Fifty Years*, op cit. p. 88

free to cut off the wireless, just as the newspaper reader may disregard the printed advertisements"[44]. The philosopher, Bertrand Russell, on the other hand, opposed the acceptance of advertising in order to preserve "an amateur spirit". John Reith, somewhat surprisingly, was not at this stage opposed to an injection of funds from the private sector and was dissatisfied that at least the option to take advertising was not written into the Corporation's 1927 Charter. He wrote at the time: "should not the BBC have liberty with regard to advertising as a supplementary source of revenue in case of need?"[45].

However, he took a stand against it later, particularly with reference to commercial competition to the BBC, pointing out the antipathy of the press to advertising on radio, and reiterating Sykes' position that only the richer firms would be able to afford it. Reith's resistance to direct advertising on the BBC, as its first and enormously influential Director General, was a major factor in keeping the broadcasting service as a whole advertising - free until the battle was finally lost in 1954.

The Crawford Report formed the basis of the reconstitution of the British Broadcasting Company as a fully fledged public corporation, incorporated by Royal Charter and authorised to broadcast through a License issued by the Postmaster General. Both Charter and License were renewable after a period of ten years.

The fact that the BBC was empowered by Charter, and not by statute, was supposed to reassure the public that it was "not a creature of Parliament and connected with political activity"[46]. The Charter and License are, however, formidable instruments of state control, in principle at least. According to the Charter, the government retains the power to veto or initiate broadcasts, to dismiss the Governors (who legally constitute the BBC) at will, or to revoke the Charter.

The License contains more detailed obligations and restrictions. The prohibition on receiving "money or any valuable consideration from any person"[47] in respect of transmissions, without the written

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[44] ibid. p.88
[45] Asa Briggs I, op. cit. p. 359
[46] Asa Briggs, *History of the BBC: The First Fifty Years*, op cit. p. 90
[47] Wireless Broadcasting: Drafts of (1) Royal Charter ..... for the incorporation of the British Broadcasting Corporation; and (2) Licence and Agreements ....between H.M. Postmaster General and ....the British Broadcasting Corporation (Cmd. 2756). 1926, para 3, p. 2. (1927 Charter and License.)

consent of the Postmaster General remained, provided that this was not construed as precluding the BBC from receiving matter without payment, with or without acknowledgment, or receiving a "consideration" for broadcasting publishers' names and prices of material used[48]. The License and Agreement must be approved by the House of Commons before it becomes operative and, like the Charter, it may be revoked - in this case by the Postmaster General - if the Corporation does not discharge its duties satisfactorily. .

Crawford's case for re-constituting the broadcasting system in the form of a public corporation rests on assumptions similar to those of Sykes. Broadcasting involves the national interest; American style uncontrolled transmission and reception is unsuited to the UK and so trusteeship of the national interest should be vested in the hands of an independent group of qualified and experienced persons and not with the state or with private business (although such persons should have "business acumen").

2. 5 Conclusion.

Of Horwitz's five categories, outlined in Chapter 1, public interest theory seems to be the most applicable as a theory of the origin of British broadcasting regulation. There is a clear sense in which the broadcast medium - the radio spectrum - can be, and was, treated as common property, and the broadcast message contained in programmes as part of the nation's cultural and social infrastructure. The Sykes Committee Report explicitly refers to broadcasting as a "public utility"[49], and at a time of spectrum scarcity its 'natural monopoly' characteristics made it a suitable candidate for regulation and ultimately public ownership.

The circumstances under which the regulatory system for broadcasting was created in Britain nevertheless differ from those which gave rise to progressive public interest theory. The industry in question (broadcasting) originated at the same time as its regulatory arrangements, and so the state was in a position to influence its course of development from the start, rather than intervening in an existing relationship between producers and consumers and attempting to impose structures post

[48] ibid. para 3 (2), p. 3
[49] Sykes Report. op cit. para 3, p. 4

hoc. In the UK, the public interest was used as a justification, not just for instituting regulation to oversee the broadcasting industry, but for taking it out of private hands altogether.

With respect to McQuail's' definition of the public interest as "competing claims with a normative component", the situation in the early years of broadcasting was not sufficiently complex for it to be relevant. The various different interested parties - radio equipment manufacturers, consumers of radio, and people involved in programme production - all shared a common objective in getting the government to authorise and arrange a broadcasting service of some sort or other, rather than nothing. There were no serious challenges to the decision that the public interest in broadcasting lay first in co-operation not competition, and then in public ownership and not private control. The only other possible public interest claim at the time - that it was in the interests of listeners that advertising should be allowed in sufficient quantity to provide routine rather emergency revenue - was ruled prima facie unjustifiable by the political system, and was not actually made by anyone[50]. The 1951 Beveridge Report, reflecting a much more developed and diverse broadcasting situation, was the first document to consider a range of organised and forcefully articulated competing claims to represent the public interest, including the claim that broadcast advertising was in the public interest[51].

The framework of norms within which the broadcasting and regulatory systems were starting to develop is nevertheless clearly visible in both the Sykes and the Crawford Reports. The opinions and recommendations of the two Committees rely on a number of assumptions about the nature, actual or potential, of broadcasting which are rooted in a particular set of values. The primary assumption was that broadcasting, with a unique role to play in the shaping of national life, should not take the form of an unrestricted commercial monopoly. It was presumed that such a valuable public asset should remain in the hands of the public and not be handed over to vested interests, state or private, to use for their own ends. Behind the reluctance to give private business a hold over broadcasting lay a distaste for commercialism, and an attachment to the "amateur spirit" promoted by the public school system. These values deeply influenced the both the structure and style of British broadcasting and its regulation for the greater part of its history[52]. The connection made between the acceptance

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[50] See: *Note 17*

[51] See Chapter 4

[52] *Note:* Nicholas Garnham has described the set of attitudes which were so potent a force from the very beginning in moulding public service broadcasting, and by extension advertising regulation, as representing "the anti-entrepreneurial

of broadcast advertising and the deterioration of programme standards is a natural consequence of the anti- commercial stance taken by makers of regulation policy. The notion of "fair play" was also part of the same ethos and one of Sykes' most influential arguments against allowing direct advertising on radio was that it would be unfair to smaller advertisers who would not be able to afford such an expensive medium. Regulation of commercial television has always included provisions directed at preventing the programme companies from discriminating unfairly between advertisers.

The British Broadcasting Corporation as a regulatory institution very clearly played a constitutive role in the political life of the UK from its inception[53], and those responsible for its structure were consciously aware that broadcasting regulation had a formative and not merely an instrumental function[54]. Political and social questions concerning the relationship between the citizen and the state were at the forefront of the decision-making process. In choosing the particular regulatory format for broadcasting that they did, the government and its advisors opted for a system with as much independence from both the political and private business spheres as they believed possible at the time. Their choice successfully determined, for the last seven decades, the relationship between the citizen and the state politically, with respect to the democratic right to freedom of expression via the broadcast medium, and socially by defining and promoting the social purpose of the service. With the arrival of commercial television, regulation of advertising mediated relations between the government, the general public and commercial undertakings by means of statutory consumer protection measures. Broadcasting regulation has always been very much concerned with governance and "the kind of society in which people wish to live".

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cultural values of the British intelligentsia". (Nicholas Garnham. op cit. p. 19); Burton Paulu records that "the upper classes (who, of course, were in a numerical minority) opposed...commercial broadcasting". (Burton Paulu, *Television and Radio in the United Kingdom* op. cit. pp. 15-16) The same author reveals that an analysis of the membership of the Board of Governors of the BBC between 1927 and 1955 indicates that "they tended to be people who had attended such schools as Rugby, Eton and Harrow, and then had gone on to Oxford or Cambridge". (ibid. p. 133)

[53] *Note:* Stephen Elkin's view of regulatory bodies as constitutive of areas of a nation's political life, rather than merely fulfilling a passive functional role, has been outlined in Chapter 1

[54] *Note:* The significance of the BBC as a regulatory institution is explicitly recognised in the 1936 Ullswater Committee. Paragraph 30 states that "as the BBC is one of a number of new and recently created forms of public institution standing between Government departments on the one hand and commercial undertakings on the other, its practice may have some influence in each of these directions and be looked upon as a pattern for future institutions".

Another feature characteristic of the public interest approach is the use of "expert boards" to implement regulation. The Board of Governors of the BBC was set up with the intention that it should represent non-partisan, scientific expertise vested in a body which is continually in session[55]. Statutorily appointed specialist advisory committees, (independent "expert boards" par excellence), covering such areas as education, religion, health and advertising, have always been an important part of the regulatory arrangements for broadcasting in the UK.

The decision by regulation policy-makers to reject advertising as a method of finance and insist on the license fee only, overruling the opinion of the Wireless Society, was based on common interest considerations; the anticipated long term benefit to the service was given greater weight than the immediate desires of consumers.

As the situation described so far represents the origination phase of both regulatory system and industry, regulatory failure theories, such as capture, are obviously not relevant at this stage. The only point at which a critique such as conspiracy theory might have been applicable was when the original request was made by radio equipment manufacturers for the government to authorise a service, which they knew would entail some form of regulation. But they did not ask for a monopoly; the Post Office itself, when "confronted with 24 applicants for licenses, persuaded them to go away and form a single company in order to avoid the unpleasant task of choosing between them"[56]. The monopoly granted to the British Broadcasting Company certainly protected its individual members from the unwelcome effects of all-out competition, but other regulatory restrictions soon made their business unviable. This can hardly be counted a great success for the manufacturers. What they received from regulation was neither an effective monopoly, mainly due to the prohibition on advertising, nor even a proper cartel, but a hybrid institution which lasted less than four years before being dismantled.

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[55] Robert B. Horwitz, *The Irony of Regulation Reform: The Deregulation of American Telecommunication*, New York: Oxford University Press 1989, p. 26

[56] Burton Paulu, *Television and the Radio in the United Kingdom*, op cit. p. 14

Chapter 3

1927 - 1947: A Period of Consolidation.

3. 1 Introduction.

Over the next twenty years, the broadcasting system developed and expanded. The BBC as an organisation grew hugely both in size and in reputation. During this period, three more Committees of Inquiry made their contribution to broadcasting policy, and each had advertising on its agenda. Committee attitudes to commercial funding, apart from limited sponsorship, remained on the whole negative, with some qualifications. Technical advances, however, particularly the invention of television, started to raise a number of questions about how regulation might be adapted to take into account the changing situation.

3. 2 Advertising in the Selsdon Committee Report.

An experimental television service was first introduced in 1932 from Broadcasting House, using a low definition system developed by James Baird. By 1934, technical improvements in television transmission elsewhere in the world, and the realisation that television would definitely form an important part of the future of broadcasting prompted the British government to set up another committee, chaired by Lord Selsdon, to "consider the development of television and to advise the Postmaster General on the relative merits of the several systems and the conditions under which any public service of Television should be provided"[1].

The Selsdon Report was largely concerned with technical matters, but it also had to look at regulatory options and ways of financing television. The Committee concluded that as far as regulation of television was concerned, in view of "the close relationship which must exist between sound and television broadcasting"[2], the BBC should also be entrusted with television. The

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[1] *Report of the Television Committee 1934* (Chairman: Lord Selsdon) (Cmnd 4793), London: HMSO, 1935, section 1, para 1, p. 4 (Selsdon Report)

[2] ibid. para 39, p.12

alternative of allowing a television service to grow up under private enterprise until it was sufficiently developed to be taken over by a public authority had also been considered, but the Committee had decided against it. This was, firstly, because "it would involve a departure from the principle of having only a single authority broadcasting a public sound service on the air"[3], and secondly, because of certain practical difficulties surrounding the granting of licences.

By this time, then, it had become virtually axiomatic to policy-makers that all forms of broadcasting were best run as a public service, controlled by a single non-commercial organisation. According to Selsdon, even if private enterprise had been allowed an initial role in the development of a television service, following the pattern of radio, the service would need to be adopted by a public authority as soon as possible. And once again, the decision that the state should control broadcasting of whatever kind as trustee for the public interest rather than leaving it to the marketplace brought with it problems of implementation. The amount of work involved in regulation, which includes licensing decisions, technical considerations, copyright and patent matters, programming production, advertising control if relevant, much of it quite specialised, made it unsuitable for a government department to take on. Besides, in a liberal democracy, apart from ensuring the overall quality of the service, or the application of exceptional circumstances such a national emergency, what people see on their screens or hear on the air is not the business of the state.

The British government's solution with television, as with sound broadcasting, was partly a matter of convenience. Any commercial input to the system, let alone complete dominance by the private sector, would be more costly and far more difficult to regulate[4]. This practical insight has been amply confirmed by the experience of commercial television regulation since its inception. A great deal of time and effort has had to go into devising and adapting regulatory structures with enough power and flexibility to deal with all the potentially harmful effects of market forces in television.

The Selsdon Report, having recommended placing the infant television service under the wing of the BBC, considered "selling time for advertisements" as a means of finance. A distinction was made, following Sykes, between direct advertisements and sponsored programmes. The former were again rejected, but the Committee saw "no reason why the provision concerning sponsored programmes in

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[3] ibid. para 40, p.12
[4] ibid. para 40, p.12

the existing licence should not be applied also to the television service"[5]. This idea was opposed by the Newspaper Proprietors' Association, who hoped that there would be no "forms of advertising by means of what are known as sponsored programmes"[6]. John Reith, however, was still in favour of retaining the option. He told the Committee that he had "no objection in principle to the sponsor system, and that (the BBC) do in fact do something near to that, and might do it in the future"[7].

Gerald Cock, the BBC's new Director of Television, also envisaged the new service as having, in the short term, to take "provided" or "sponsored" programmes, with brief acknowledgements at the beginning and end, but with no "selling of time on the USA or Luxembourg model." He felt that suppliers of ladies' hats, dresses and jewellery, and motor car and aeroplane manufacturers would be interested "in mutual co-operation without strings"[8]. Briggs records that there was strong opposition to this inside the BBC because sponsoring was bad in principle and reasons of economy should not be used to justify it[9].

Finally, the Selsdon Committee recommended that an Advisory Committee should be set up to "plan and guide the initiation and early development of the television service"[10].

As the BBC's Charter and Licence were due for renewal on 1st January 1937, the government appointed a fourth Committee of Inquiry, chaired by Lord Ullswater, to review "the constitution, control, and finance of the broadcasting service in this country and advise generally on the conditions under which the service, including broadcasting to the Empire, television broadcasting, and the system of wireless exchanges, should be conducted after 31st December 1936"[11].

3. 3 Advertising in the Ullswater Committee Report.

The longest and most wide-ranging investigation to date, the Ullswater Committee recognised the achievements of the Corporation and broadly recommended maintaining the status quo. Its Report

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[5] ibid. para 65, p 21
[6] Memorandum of the Newspaper Proprietors' Association, Asa Briggs Vol. II p. 587
[7] Evidence of Sir John Reith, 30 Nov. 1934. (ibid. p 589). *Note:* As an example of limited sponsoring, Briggs cites the occasion in 1936 when new car models were driven slowly along beside BBC Television headquarters at Alexandra Palace followed by a camera. Even this provoked protests. (ibid. p. 600)
[8] ibid. pp. 599-600
[9] ibid. p. 600
[10] Selsdon Report op. cit. para 74 (4), p. 25
[11] *Report of the Broadcasting Committee, 1935,* (Chairman: Viscount Ullswater) (Cmnd 5091) London: HMSO, 1936, para 1, p. 5 (Ullswater Report)

contained some firm opinions about advertising. The Committee advised that the ban on direct advertising be retained, giving as the reason members' anxiety "that the intellectual and ethical integrity which the broadcasting system in this country has attained should be preserved"[12]. A clearer statement of the view that this form of advertising represents a threat to the ethos of public service broadcasting would be hard to find. For the first time, the problematic nature of the relationship between the editorial content of programmes and their source of finance is referred to in a policy document, albeit implicitly. The Committee was evidently aware that the intellectual and ethical integrity of the system as a whole depended on the fact that individual programmes remained editorially independent of external commercial interests.

It was still spot advertising and not sponsorship, which unlike spot advertising establishes a direct interest by an advertiser in a particular programme, that was seen as potentially damaging to the service. Sponsorship of the restricted Sykes variety continued to be seen as harmless because, as Ullswater noted, "discreet judgement" had been shown in its use[13]. In all probability, at that stage, policy-makers were more concerned about the potentially harmful effects of surrendering the entire system to operation by commercial criteria. But Ullswater, while recommending the continuance of the power to use sponsorship[14], hoped that "any increase in its use (would) be limited to the initial stages of Television broadcasting. There is an obvious danger that if Television should become more and more a usual accompaniment to sound broadcasting, sponsored items might come to occupy a considerable part of the BBC programmes"[15]. The Report, however, goes on to recommend that Clause 3, sub-clause (2) of the Licence - permission to receive a consideration in return for broadcasting names of publishers and prices of broadcast matter - should be omitted in the new Licence.

This strong warning about the dangers of increased dependence on revenue from commercial sources, or at least the temptation to obtain a significant number of programmes free, reflects not only disquiet about the degrading effects of advertising on standards of service, but also an awareness that television was a potentially far more expensive medium than sound broadcasting and correspondingly posed greater funding problems. In fact, Noel Ashbridge, Chief Engineer of the

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[12] ibid. para 109, p. 33
[13] ibid. para 111, p. 34
[14] *Note*: Three members of the Committee did not "agree that the admission of "sponsored" items..... (was) either necessary or desirable", and proposed instead that the costs of television should be met out of public funds.(ibid. p 48)
[15] ibid. para 111, p. 34

BBC (and so, perhaps, more in tune with the financial realities of the new medium than the creative establishment) had submitted a memorandum to the Selsdon Committee warning of possible serious financial difficulties, which could only be resolved by relying on sponsorship. He classified television as a luxury service, initially at least, which had never been the case with sound broadcasting.

Neither Selsdon nor Ullswater dealt adequately with the question of finance, as Asa Briggs has pointed out[16], leaving the matter still unsettled by 1939 when war broke out. According to Briggs, there is some evidence that if the war had not intervened, in spite of the negative reactions of the Committees of Inquiry, commercial television might have arrived sooner. Sir John Cadman, who became Chairman of the Television Advisory Committee in 1939 after Selsdon's death, was a keen supporter of advertising via this medium. So, not surprisingly, was the Treasury who could not understand why the BBC was so unwilling to take advantage of this extra source of revenue. Gerald Cock, the BBC's first Director of Television, was equally determined that the Corporation should not go down this path, which he considered would be a "disaster"[17].

The Ullswater Committee also considered the problem of commercial broadcasts from abroad. They decided that the practice of excluding advertisements from broadcast programmes was to the advantage of listeners, and deplored the fact that the policy of retaining a unified control of broadcasting had been undermined in recent years by "the transmission of advertisements in English from certain stations abroad, which are not subject to the influence of the British authorities except by way of international agreement and negotiation"[18]. They added that steps were being taken by the Post Office and the Foreign Office to prevent the beaming of programmes in English which include advertisements, and to which "objection had been taken"[19].

The chief objectors were, of course, the BBC who were extremely annoyed about the activities of these stations - Radios Luxembourg and Normandy[20]. These were commercial stations which devoted a good part of their output to English language programmes containing advertisements paid for by British firms. The Corporation was not only opposed to commercial broadcasting in itself, but

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[16] Asa Briggs, *History of the BBC, The First Fifty Years.* Oxford University Press 1985, p 168
[17] ibid. p. 168
[18] Ullswater Report op cit. para 113, p. 34
[19] ibid. para 114, p. 35
[20] *Note:* The BBC complained again to the Beveridge Committee that "broadcasts in English from Luxembourg do not in any way represent the people or government of Luxembourg, they represent advertisers responsible to no-one but themselves". (*Report of the Broadcasting Committee 1949: Appendix H : Memoranda Submitted to the Committee* (Cmnd 8117) London : HMSO, 1951, p. 106 (Beveridge II)

resented any competing influences on its programming policy. The strong emphasis under the Reith regime on serious and educational programmes, however, and the bias against broadcasting used for amusement interest only, did not satisfy the appetite of some sections of the listening public for lighter material. This was clear from the number of people who tuned in to Radios Normandy and Luxembourg, abandoning the BBC. They were especially popular on Sundays as the "Reith Sunday" did not start until 10.15 a.m. and offered nothing in the way of light entertainment[21].

The commercial stations were able to take advantage of this demand and their popularity with audiences suggests that the advertisements were not entirely unwelcome[22]. On the contrary, the fact that by 1938 approximately 300 companies considered themselves justified in spending £1,700,000 on promoting their products through the commercial stations shows that a reasonable amount of advertising did not alienate a significant minority of people in Britain[23]. And if as many as 300 firms found radio airtime within their budgets then the old Sykes argument, that only a small number of very large enterprises would be able to afford it, was gradually becoming less relevant to sound broadcasting, which was relatively inexpensive in comparison with television. Some of these advertisers were in the forefront of the campaign to break the BBC monopoly after the war and submitted evidence to the 1949 Beveridge Committee to support their case.

Apart from the foreign commercial stations, another source of irritation to the BBC were the relay exchanges, which were a system of receiving and distributing broadcast programmes to subscribers over a local wire network, run by private companies. Although these exchanges were closely regulated, not permitted to originate programmes, and required by their licences to transmit a substantial majority of BBC programmes, there was still scope for them to transmit some foreign commercial programmes which contained advertising. The Ullswater Committee reported the Corporation's anxiety that the balance of its programming might be upset and that the system might increasingly be "used to disseminate advertisements". A recommendation that the exchanges should be taken over by the Post Office and their programming provided by the BBC was not followed, however, and the BBC eventually accepted them when commercial television became a much more serious rival.

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[21] Ronald H. Coase, *British Broadcasting: A Study in Monopoly,* Cambridge: Harvard University Press, 1950, pp. 102 - 103

[22] *Note:* Radio Luxembourg claimed to have 4,000,000 listeners by 1949. (Beveridge II op cit. p. 568)

[23] Burton Paulu , *British Broadcasting* University of Minnesota, 1956, p. 29

It is also interesting to note that among Ullswater's recommendations was one which would transfer "responsibility for the cultural side of broadcasting .....to a Cabinet Minister in the House of Commons, preferably a senior member of the Government"[24]. Although responsibility for overall policy was moved to the Home Office in 1974, this sensible plan was only really put into effect some sixty years later by the appointment in 1992 of a Minister for National Heritage who includes broadcasting in his department.

In spite of the Ullswater Committee's qualified support for discreet sponsorship, the government decided that the BBC's new Charter, effective from the beginning of 1937, should prohibit this activity. The Postmaster-General, in a note to Reith on March 15 1937, indicated that this prohibition was intended to cover any programmes provided by commercial organisations[25], thereby removing even the limited opportunity of a small degree of commercial funding for British broadcasting.

While BBC sound broadcasting went from strength to strength during the war, the television service was suspended in 1939. By 1943, however, television was back on the agenda and another committee was set up to consider how the service should be structured when it was eventually resumed. Chaired by Lord Hankey, it was required to prepare plans for the expansion of services, for research and development, and encouragement of the export trade.

3. 4 Advertising in the Hankey Committee Report.

In recommending that research begin as soon as possible into improving the television service, the Committee rejected two possible extremes: a unified research effort by all interested firms combined to form a joint Research Association, and free competition between large firms[26]. Instead it proposed "the adoption of a middle course under which television research would be co-ordinated, whilst individual effort would receive all possible encouragement"[27].

So a compromise was once again the favoured option: collaboration was deemed to be important, even in the market place, but competition ought not to be hampered either. The Committee decided

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[24] Ullswater Report op cit. para 53, p. 19
[25] Burton Paulu, *Television and Radio in the United Kingdom,* Macmillan 1981, p. 49
[26] *Report of the Television Committee 1943* (Chairman: Lord Hankey) London: HMSO, 1945, para 41, p. 12 (Hankey Report)
[27] ibid. para 42, p. 12

that co-ordination of research should be carried out "under government auspices by a body which would command the full confidence of the industry..... We suggest that the task should be entrusted to the Television Advisory Committee"[28]. This duplicates the original approach to the formation of the British Broadcasting Company, which was also set up as a collaborative venture by commercial concerns, overseen, albeit not very effectively, by a government-appointed Board. Similar advice was given to those connected with developing the television export trade: "responsibility must lie with the industry which should , however, keep in close touch with the Advisory Committee....as the normal channel for communication with His Majesty's Government"[29].

The question of advertising arose briefly in the Hankey Report's section on finance, where it was recognised that the problem of whether sponsored programmes should be allowed "raises issues wider than purely financial ones"[30]. It avoided going into these wider issues in more depth, merely remarking that since in its early stages television would only have a limited audience it would in any case be unlikely to attract much revenue in this way from commercial interests. No conclusion was reached about the advisability of permitting sponsorship in television.

The Report also mentioned the difficulties associated with the international standardisation of television technology. It anticipated the technical possibility of transfrontier television, predicting with some prescience that the main problems were likely to be political, rather than technical[31]. The continuing unresolved debate over global harmonisation of technical standards and European transnational regulation and have confirmed this prediction.

The Television Advisory Committee was reformed in 1945 and the BBC's television service was resumed in June 1947.

3. 5 Conclusion.

During the period from 1927 till 1947, a pattern of broadcasting regulation peculiar to the UK began to emerge. Regulation policy was still resolutely anti-commercial, but technological factors such as improved reception from stations abroad (e.g. Radios Luxembourg and Normandy), the expansion of

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[28] ibid. para 43, p. 12
[29] ibid. para 55, p. 13
[30] ibid. para 70, p. 17
[31] ibid. para 59, p. 14

relay services which were able to evade advertising restrictions and, most importantly, the development of television were beginning to challenge this approach. Broadcasting is an area where technological advances have tended to provide as significant an external force for change in regulation as movement on the political front. In the 1930s and 40s, however, the pace of technical development was comparatively slow and regulation policy equally slow to respond. The Second World War, the ultimate political upheaval, also contributed to the delay.

That the public interest lay in maintaining the status quo as far as possible was assumed rather than debated. Since process regulation of the broadcasting structures, i.e. regulation in the shape of a non-commercial public corporation supported by advisory committees, was believed to have provided the optimum conditions for a quality product, no need was seen to modify these structures, except as a temporary solution to the problem of financing the research and development of television. The activities of private enterprise in this field were tolerated, as they were thought to be unavoidable, but commercial firms were not trusted to perform unsupervised. Reliance on the "expert boards" method of safeguarding the public interest in broadcasting was well established by this time and it has never lost its appeal. Committees of the so-called 'great and good'[32], appointed mostly on an honorary basis, are a popular feature of the British democratic process and have played an active part in the formation and implementation of regulation policy[33].

Because the system was still not commercially funded, economic theories of regulatory failure which claim that regulation is used by private business for its own ends are not yet relevant. Capture, as a general tendency of any regulatory operation, nevertheless did occur, as Caroline Heller has noted. Speaking of the Crawford Report's recommendation on advisory committees she writes: "this had proposed advisory bodies capable of initiating research and experiment on their own account and with direct access to the board of Governors, an idea viewed with understandable foreboding by the broadcasters. In the final result the advisory bodies which came slowly into being after 1926 were firmly the creatures of the Secretariat rather than the board of governors." The BBC management

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[32] *Note:* This method of policy-making has not always been universally approved. With respect to the broadcasting advisory committees, W. A. Robson criticises "the debilitating tendency to overload them with *ex officio* notables". (W. A. Robson (ed.), *Public Enterprise,* Allen and Uniwin 1963)

[33] *Note:* The Beveridge Committee reported that "watching the BBC's conduct generally or specifically are some thirty advisory council's or committees" (Beveridge I op. cit. p. 3). The current commercial television regulator has to make do with a mere ten.

swiftly "killed off the idea of external criticism from advisory bodies while co-opting the form for its own ambassadorial purposes"[34].

Instrumental, structural, and organisational perspectives are also useful in explaining the direction that broadcasting regulation took. Instrumentally, it would be hard to underestimate the impact of John Reith's personality on the philosophy and style of operation of the BBC, and consequently on broadcasting regulation as a whole. His role in the life of British broadcasting has been summed up by Stephen Hearst, former special advisor to the Director General: "no other individual throughout this century was ever again to play so dominant and creative a part in shaping broadcasting policy. There might have been a host of other regulatory provisions on the statute book but for him. He set the tone, he initiated virtually every ethical or moral debate, and his name is still being evoked sixty years later when the purposes and aims of broadcasting are being detailed"[35]. His austere view of the public service ideal, dedication to the highest cultural standards of programming, antipathy to commercial funding of broadcasting (apart from limited sponsorship), support for monopoly and authoritarian style of management permeated the institution and left a permanent mark on broadcasting in the UK.

Although he had resigned as Director General of the BBC in 1938, he served as Minister of Information during the War and remained close to communications policy-makers at the political level, many of whom shared his views. These views were also widely held in the upper echelons of the BBC, both in management and on the creative side. Most members of the policy network came from similar public school/Oxbridge backgrounds - the Committees of Inquiry were usually chaired by peers of the realm - and had in common the values and outlook on life of their social class[36].

The personal characteristics of key players in the development of broadcasting policy in Britain for its first quarter century therefore had a much stronger determining influence on both the genesis and

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[34] Caroline Heller, *Broadcasting and Accountability,* London : British Film Institute, 1978 (BFI Television Monograph), p. 17

[35] Stephen Hearst, *Broadcasting Regulation in Britain* in Jay. G. Blumler (ed.) *Television and the Public Interest,* London : Sage, 1992, p. 65

[36] *Note:* See note 53, Chapter 2. There is clear evidence of this in the Ullswater Report, although the Committee were attempting to prove the opposite. In paragraph 33 the Committee stated: "one point that was put before us in evidence was a suspicion that in appointments undue preference was given to candidates with Oxford or Cambridge degrees. That, however, is disproved by the following analysis of monthly paid non-engineering staff: With no degree, 204; graduates of Oxford, 76; graduates of Cambridge, 40; other universities, 75; total, 395". The fact that nearly a third of BBC personnel were from Oxbridge would appear to confirm rather than dispel the suspicion!

operation of regulation than in the cases of regulation of private business examined by Horwitz. Private sector industries bring their own pre-determined structural features with them to the regulatory set-up, along with an already established pattern of independent relations with the state. The constraints on individuals being able to mould a regulatory institution in their own image are much greater. The relationship between the Board of Governors and the BBC management was, of course, not intended to be adversarial, but this relationship, to a significant extent, set the pattern for subsequent relations between the ITA and the television and advertising industries.

While, as Horwitz has emphasised, instrumental critique alone is not enough to account for deficiencies in regulation, the circumstances of the creation of the BBC, and with it the creation of the regulatory structure of broadcasting in the UK, were very different from those analysed by American regulation theorists. The decision to exclude a commercial component and structure broadcasting as a government appointed public authority, formally independent of the state but dependent on it for general policy, made it a unitary enterprise. Instrumental critique of the classical model, i.e. the regulatory agency completely detached from industry, has regulators and industry chiefs sharing background and outlook, which would tend to inhibit tough regulation, but nevertheless limited in what they can do by the structural constraints imposed by their formal relations with one another and the state. But in British broadcasting the early regulatory structure was largely self-referential. The Board of Governors regulated merely by ensuring that the terms and conditions of the Charter and License were complied with. Even if the structure was decided initially by the state, the state, which also had a regulating function, soon came to identify itself extremely closely with the broadcasting system, and with those responsible for its (self) regulation[37].

Bernstein considers "the single most important characteristic of regulation by commission (is) the failure to grasp the need for political support and leadership for the success of regulation in the public interest"[38]. In the pre-commercial phase of British Broadcasting, however, the public authority as regulator, and the political leadership were extremely close in terms of their thinking. They shared a common perception of the aims and objectives of public service broadcasting and how it should be structured, even though the BBC was formally independent of the political system.

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[37] *Note:* A description of the three different paradigms of broadcasting regulation, together with an explanatory diagram, can be found in Chapter 10.

[38] Marver Bernstein, *Regulating Business by Independent Commission,* Princeton: Princeton University Press, 1985, p. 101

After the creation of a more classical semi-detached regulatory body, the Independent Television Authority, to oversee the commercial sector, this body also remained close to the political establishment and received on-going support and guidance. It only became "isolated".[39] when a new Thatcherite agenda took over in the 1980s which was much less sympathetic to the traditional view of the regulatory body as guarantor of the public interest in broadcasting. The government withdrew support from the IBA and eventually replaced it with a body more in tune with its own ideology. Failure to grasp the need for political support has never been a cause for regulatory failure in British broadcasting, and, for the most part, such support has always been forthcoming.

In the 1940s, after twenty years of operation, organisational factors had begun to affect the efficiency of the broadcasting system, which contributed to the movement for regulatory change. The increase in the BBC's size and bureaucracy and the over-centralisation of its management inhibited innovation and creativity. Writing in the Beveridge Report at the end of the decade, Selwyn Lloyd MP commented that in 1935 the BBC had 2,500 employees; by 1949 it had 12,000. In Lloyd's view, as the activities of an organisation grow, there is an inevitable tendency towards overstaffing, centralisation and bureaucracy. Those in authority become far removed from the rank and file. He claimed that he did not intend this as a criticism of the BBC in particular, it was the unavoidable result of the centralised control of a large and varied organisation. The fault lay with monopoly itself which was bound to lead to complacency and rigidity[40].

In Bernstein's life cycle terminology, by the 1940s the BBC was approaching the period of middle age. Because there was no external industry for the governing body to attempt to maintain an adversarial relationship with, and the independent advisory bodies did not offer as much constructive independent critique of Corporation policy and performance as perhaps they should have done[41], the BBC was open to criticism for being too elitist and out of touch with viewers[42]. This perception resulted, towards the end of the decade, in calls for a change in process regulation to allow for a more diverse and responsive broadcasting service.

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[39] *Note:* Brinton (1962) has claimed that is "isolation from presidential leadership and control....lack of continuous or effective legislative guidance...as well as the evident apprehension of courts" that has led to the failures of the Federal Communication Commission (FCC) in America. (A. V. X. Brinton. *The Regulation of Broadcasting by the FCC: A case study in Regulation by Independent Commission",* Unpublished doctoral dissertation, Harvard University. 1962)

[40] Beveridge I, op. cit. p. 202

[41] See: Chapter 3, page 10

[42] *Note:* Readers of *The Listener,* which had a circulation of 151, 350 in 1949, complained the they found "its arts programmes too avante garde and its talks too specialised". (Asa Briggs, *History of the BBC, The First Fifty Years,*. op. cit. p. 252)

The advent of television also expanded the international dimension of broadcasting regulation. The government was not able to ignore the economic need to encourage development of the new technology so that Britain could maintain and increase its share of international markets. It nonetheless still wished to exercise some control in this area by retaining the non-commercial public corporation as the most appropriate form of regulation for television as well as for sound broadcasting.

Chapter 4

The Beveridge Committee: Movement for Change.

4. 1 Introduction

Expansion of the television service following its resumption in 1946 was slow and by 1949 dissatisfaction was growing with the performance of the BBC in Parliament, among radio and television equipment manufacturers, and even among some Corporation employees. It was becoming increasingly obvious that it lacked the resources to provide nation-wide television coverage within a reasonable timescale, a problem exacerbated partly by its cumbersome management structures, and partly by the lack of enthusiasm for television at the top of the Corporation[1] .

The Labour government under Clement Attlee, which in 1946 had extended the Corporation's Charter and Licence for only five years instead of the usual ten, resorted to the traditional method of sorting out the nation's broadcasting difficulties and appointed a sixth Committee of Inquiry, under the chairmanship of Lord Beveridge. Its brief was to undertake a far-reaching review of the existing arrangements for broadcasting, sound and vision, and to recommend changes if necessary[2]. The Report has been examined here in depth because it contains such an excellent and comprehensive survey of all the arguments surrounding the introduction of advertising on television, and records in detail the views on the potential impact of advertising on the airwaves of almost every interest group with a stake in the UK broadcasting service, and of many individuals as well.

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[1] *Note:* According to Burton Paulu, "during the first decade of the post-war service, there were frequent charges that the BBC was essentially a radio-oriented organisation, whose leadership lacked interest in television". Although shortages of funds, materials and power delayed the development of television, the BBC "must shoulder some of the blame". (Burton Paulu, *Television and Radio in the United Kingdom*, London: Macmillan, 1981, p.p. 55, 56.). Sir Gerald Beadle, Director of Television from 1956 - 61, wrote in 1963: " Both before, and several years after the war there was a very strong feeling amongst the successive heads of the television service....that television was not being taken seriously enough by the BBC". (Gerald Beadle, *Television : A Critical Review* London: Allen and Unwin, 1963, p. 40).

[2] Report of the Broadcasting Committee 1949, (Chairman: Lord Beveridge) (Cmnd 8116), London : HMSO, 1951, p. 1 (Beveridge I)

4. 2 Advertising in Beveridge Committee Report.

The Committee deliberated for eighteen months, receiving a much wider range of evidence, both written and oral, than ever before. It finally delivered a report greatly exceeding any previous one in length and detail. It represents a watershed in the history of British broadcasting and paved the way, despite its cautious support for the status quo, for the destruction of the entrenched concept of "unified control". It stands at the end of an era, and while its official conclusions are conservative and in line with the traditions of the past, it nevertheless gave public expression to many of the forces which would soon succeed in radically transforming the face of broadcasting in Britain.

The issue which dominated the debate was whether the BBC should retain its absolute monopoly when its licence was renewed or, if not, what form any competition should take. The Committee disagreed with the Corporation's view that it was self-evident that an effective public service must be run as a monopoly, and considered seriously all the serious challenges to that view. A variety of alternatives were put forward quite a few of which advocated some degree of commercial funding. The proposals put forward by those in favour of breaking the monopoly through the medium of advertising-financed competition, and their reasons for wanting this, reveal where demand was building up for the introduction of market forces into the protected world of broadcasting. The arguments used to support the principle of commercial competition re-surfaced in various forms during later attacks on the duopoly of BBC and ITV which replaced the BBC's monopoly in 1955, and were used again in the most recent debates on the deregulation of broadcasting in the 1980s.

Practically all the most interesting and persuasive points are to be found in Volume Two of Beveridge, the Memoranda of Evidence. It is not surprising that some of the most eloquent opponents of the BBC's monopoly power came from the commercial sphere, and from those BBC employees who wanted to extend the market for their services. These voices, though forceful, did not, however, constitute a mass movement. The campaign for commercial television did not really get under way until after a new Conservative government was elected in October 1951. The main points of view expressed in the Beveridge Report are summarised below.

The actors union, Equity, although anxious not to follow too closely the American model, proposed a "station earmarked for sponsored programmes .....subject to necessary safeguards"[3]. Such a station

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[3] Report of the Broadcasting Committee 1949: Appendix H : Memoranda Submitted to the Committee (Cmnd 8117)

would offer a genuine alternative to listeners and protect artists from the BBC's abuse of its monopoly powers.

The safeguards suggested were:

1) payment of a percentage of the advertising revenue to the Postmaster General for improvement of broadcasting services;

2) restriction of credits to a mere mention of the sponsor's name;

3) entertainment programmes only to be broadcast.

Number (1) is interesting because it is in effect a version of the levy system imposed on the ITV contractors to pay for regulation in the form of the Independent Television Authority, the first regulatory body for commercial television. Number (3) rests on the frequently made assumption that commercial broadcasting is necessarily linked to the provision of light entertainment to the exclusion of other possibilities.

Equity claimed that in the field of popular entertainment the listener's opinion would be decisive, and that unlike the BBC the "commercial station must satisfy its audience to survive"[4]. It dismissed the aesthetic argument, saying that we are surrounded by advertisements in our daily life, some of them offensive, the impact of which we cannot escape; but anyone who objects to advertising on the air can simply switch off the radio or switch over to another station. This point was first made by the original Wireless Society in addressing the Sykes Committee, and again by its successor the Listeners Association to Beveridge, but those responsible for television advertising regulation policy have always been aware that the situation is, in reality, not so simple. The fact that television commercials appear without warning in the home, or "just happen", as one experienced professional advertising regulator puts it[5], means that not all viewers are able to switch off or over in time to avoid seeing what they do not wish to see, or do not wish their children, for example, to see. This characteristic of television advertising has always been cited as a reason for regulating it differently from print advertising.

London : HMSO, 1951, p. 500 (Beveridge II)

[4] ibid. p. 500

[5] Interview with Yvonne Millwood

The Radio Industry Council felt that the extension of television was the most important problem facing broadcasting at that time, and that the excessive centralisation of the BBC meant that it did not give a high enough priority to this task. Referring to the Hankey Report of 1943, it agreed that in the early days of television sponsorship would not have been an attractive proposition owing to the limited audience, but now the time had come when commercial organisations would be willing to sponsor. It therefore recommended the introduction of competitive commercial stations which would "induce higher standards both technically and in programme quality"[6] since the sponsor would demand the highest standards possible and the BBC would be forced to give equal satisfaction.

The Radio Industry Council, however, believed that reports of bad taste in American broadcast advertising were exaggerated, and that fears that it would be displayed in Britain were groundless. It added the rider that "to avoid the broadcast of any undesirable matter, suitable safeguards can be introduced, such as the setting up of a British Board of Television Censors"[7].

The Radio and Television Retailers Association agreed with this position. It advocated an independent sponsored broadcasting system, with a "suitable form of control of advertising....Such competition would make for higher quality programmes and would provide listeners with a wider choice"[8]. The advertisement content of programmes, however, should be limited.

Radio Luxembourg Advertising Ltd., as might be expected, came out strongly in favour of commercial radio for reasons that included the fact that "radio advertising is more economical in terms of manpower and materials than almost any other national advertising medium"[9]; and that "the operation of an effective cheap advertising medium is one of the prerequisites of low distribution costs"[10]. These purely economic arguments contradict the assessment of the Sykes Committee which stressed the potentially prohibitive costs of broadcast advertising. Radio Luxembourg's Memorandum ends with the broader philosophical point that if the monopolistic powers of the BBC were to be used against the company it would not only damage the interests of British manufacturers, but would constitute "an unwarranted interference with the personal freedom of millions of people

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[6] Beveridge II op. cit. p. 523
[7] Beveridge II op. cit. p. 523. *Note:* Some might feel that this threat has finally been carried out with the creation of the Broadcasting Standards Council under the 1990 Broadcasting Act.
[8] ibid. p. 573
[9] ibid. p. 568
[10] ibid. p. 568

...who are regular listeners to the programmes"[11] of Radio Luxembourg. The argument is presented here in terms of infringement of individual liberty, rather than infringement of "commercial speech". The latter became a popular rallying cry of the advertising industry in its attempts to counteract the influence of the consumer lobby on EC legislation during the late 1970's and early 1980s.

Memoranda submitted by several large advertisers take the same line as Radio Luxembourg Advertising Ltd.. Horlicks, Unilever and Rowntree jointly asked that "the economic claim for commercial broadcasting should be considered equally with the "social" and "cultural" claim for maintaining a non-advertising service"[12]. They recommended a dual system of the BBC, financed in much the same way, and another broadcasting agency supported by the sale of airtime. They hoped that television would also be opened up to advertising, and questioned whether the nation, "depending for its existence on efficiency"[13], could afford to ignore commercial broadcasting.

Thomas Hedley and Co., soap and detergent manufacturers, criticised the Incorporated Society of British Advertisers, of which they were members, for not putting the case for commercial broadcasting strongly enough. The ISBA had claimed in its Memorandum that the opinions of those firms who had bothered to answer its questionnaire on the desirability of introducing commercial broadcasting (only 382 out of 1330) were divided almost equally for and against. The absence of a decisive majority of its members in favour of broadcast advertising made the ISBA reluctant at that stage to support it[14].

Thomas Hedley rebutted the four main arguments relied on by the Sykes Committee in rejecting direct advertising, on which the ISBA had based its questionnaire. The Hedley Memorandum:

1) included data from the United States to show that in the long run there would be no adverse effect on the advertising revenue of newspapers, and forecast that "sponsored broadcasting would result in an improvement in advertising facilities in the form of rate reductions or better services, or both"[15];

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[11] ibid. p. 569. *Note:* On Radio Luxembourg, a "sponsored programme" meant sponsorship. in the fullest sense of advertiser - funded or produced, not merely payment for front and end credits on a programme produced in house or by an independent producer. (ibid. p.568)
[12] ibid. p. 559
[13] ibid. p. 559
[14] See: Chapter 4, p. 65
[15] Beveridge II op. cit. p. 556

2) pointed out that sponsored broadcasting would have to compete with the BBC for listeners and so the standard of their programmes would not be allowed to fall below those of their competitor[16];

3) advocated that "spot announcements and regional programmes should be available (which) would give small advertisers facilities comparable with those afforded by the buying of small spaces in the national and local press"[17];

4) denied that advertising would tend to make the service unpopular: standards would not fall and the popularity of Radio Luxembourg among British audiences was proof that "the British public willingly listen to commercial radio to get the standard of radio entertainment they desire"[18].

On the question of control the company envisaged that "sponsored broadcasting would be controlled by a publicly owned corporation"[19] which would prevent its misuse. Its submission concluded that commercial broadcasting would be of real benefit to advertisers and, more than that, by increasing trade and lowering prices it would raise living standards and contribute to social and economic progress, benefiting the country as a whole[20]. Any potential disadvantages would be avoided by running it as a public corporation. This solution was, of course, the one eventually adopted by the government in setting up Independent Television in the 1954 Television Act.

The Beveridge Committee was the first of the Committees of Inquiry to invite the Advertising Industry to submit evidence through its representative organisations, the Incorporated Society of British Advertisers and the Institute of Practitioners in Advertising. Individual companies in manufacturing had been consulted in the past but the views of advertising agencies and advertisers on a wider scale had not been sought. This is probably because the majority, (apart from those who were involved in advertising on Radio Luxembourg), had not shown much interest in pressing for change in the broadcasting arrangements until after the War. In 1946, the IPA had sent a deputation

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[16] ibid. p. 556
[17] ibid. p. 556
[18] ibid. p. 556
[19] ibid. p. 556
[20] ibid. p. 557

to the Post Office to discuss the question of broadcast advertising[21], which marked the hesitant beginnings of a lobby from the advertising industry for its introduction. This lobby had gathered only a small momentum by the time Beveridge started sitting.

The evidence submitted by the ISBA consists largely of an analysis of 382 answers to a questionnaire sent out to 1,330 manufacturers of consumer goods, i.e. potential users of the broadcasting medium, to find out whether or not they would welcome the opportunity to advertise on the air.

In answer to the first question: "does your company consider that steps should be taken to...introduce commercial broadcasting in one form or another in this country ?"[22], 201 replied in the affirmative and 181 in the negative, giving only a small majority in favour. Of these, 8 preferred advertising on the BBC, 57 wanted the provision of separate wavelengths for commercial broadcasting, controlled by the BBC, and a clear majority favoured one or more privately owned advertising supported stations.

The ISBA also asked its members how they regarded the four main objections to commercial broadcasting made by the Sykes Committee. A large majority - 246 to 56 - disagreed that newspapers would be adversely affected; a smaller one - 192 to 133 - that advertisements would lower standards; and 215 against 109 disagreed that advertisements would make the service unpopular. On the claim that only big advertisers would be able to afford the high cost opinion was evenly divided - 140 agreed and 139 did not.

Fear on the part of a number of advertisers of unfair competition and distortion of the market in all probability contributed to the unexpectedly conservative attitude to the idea of commercial broadcasting among ISBA members. But it is surprising that so many believed that commercials would actually have a negative effect, lowering standards and making the service unpopular. The ISBA evidence suggests that there was no significant demand at that stage from providers of consumer goods and services for the introduction of the proposed new medium of advertising, as the Post Office itself noted in its Memorandum to Beveridge. It reported that, with sole exception of the

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[21] ibid. p. 257
[22] ibid. p. 550

IPA's deputation to the Postmaster-General in 1946, "there has been no demand from any responsible quarter in this country for commercial broadcasts"[23].

The evidence of the IPA presented a different picture. This is perhaps only to be expected since, unlike an advertiser, an agency working on a commission basis can only benefit from the expansion of opportunities for advertising. The IPA's Memorandum, consequently, was extremely positive and constructive on the subject of advertising. It put forward a very strong case for commercial broadcasting in the form of "an additional programme under the control of the BBC on which time may be purchased for commercial programmes"[24]. The IPA made the following points (given in summary) in favour of a BBC controlled (and therefore non-competitive) advertising funded channel:

1) Advertising is essential to the nation's industry which operates in a competitive environment, and so an increase in facilities would be beneficial to industry as a whole.

2) The new television industry urgently needs funds for technological development and an expanded market for sets: the BBC's finances are inadequate for this task and it is moving too slowly in organising coverage nation-wide.

3) The experience of other Commonwealth countries did not suggest that an alternative commercial programme resulted in the lowering of standards, or " a vulgarisation of the national way of life"[25]. Sweeping condemnation of the American system was based on prejudice and ignorance.

4) Advertisers depend on the goodwill of the public. "An advertising programme must not offend the taste of those to whom it is addressed, and must reach a high level of entertainment in order to achieve its objective"[26].

5) As in the case of Radio Luxembourg, strict rules could be laid down regarding the types of programme to be broadcast; individual vetting of each programme; provision of a balanced

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[23] ibid. p. 257
[24] ibid. p. 546
[25] ibid. p. 542
[26] ibid. p. 545

schedule; control of the types of products and services advertised, and of the nature and content of items; and the amount of advertising to be included. In this connection, it noted that recently "the advertising profession.....has voluntarily taken successful steps to raise the ethical standards in this country"[27].

The IPA's submission was well reasoned and all the proposals put forward in (5) were, in fact, incorporated into the regulatory arrangements for ITV under the 1954 Television Act.

As well as consulting commercial concerns, which had a vested interest in sponsored broadcasting, the Beveridge Committee sought the opinions of a wide range of other groups and individuals from the world of politics and elsewhere under the heading of "disinterested outsiders". These were also divided into supporters and opponents of commercial broadcasting.

The Liberal Research Group, like most other Parliamentary groups outside the Labour movement, was opposed to the monopoly as a restriction on freedom of expression in general and recommended its break-up. It was against a full scale commercial system on the American model, but proposed a separate competing Television Corporation to be run as a public service and financed in part by sponsorship. On the question of control, there should be "strict safeguards protecting the public against the possible excesses of broadcast advertising"[28]. The Television Authority would have control of all output, but "would be permitted to finance a stated proportion of programme time - perhaps entertainment programmes only - by negotiating appropriate advertising sponsorship"[29]. Sponsorship would be limited to opening and closing credits only, "not 'puffs' in the commercial sense"[30], which ruled out spot advertising.

In contrast to the Liberals, the Fabian Society, a broad left grouping which oppo·cd monopoly on the grounds that it represented too great a concentration of power in the sphere of communications, also opposed commercial broadcasting because "the domination of broadcasting by advertisers would tend to result in the favouring of mass appeal programmes, chiefly of entertainment, to the detriment of all others"[31].

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[27] ibid. p. 545
[28] ibid. p. 382
[29] ibid. p. 384
[30] ibid. p. 384
[31] ibid. p. 317

The Labour Party was in favour of maintaining the constitution of the BBC intact, and opposed sponsored radio as "undesirable in the public interest", mainly for the well trodden reason that broadcasting standards would be driven down by the need for mass audiences[32].

The voice of the general public was represented by the Listeners Association who, like its predecessor the Wireless Society, claimed to be in favour of commercial broadcasting. It preferred that commercial stations should operate independently of the BBC's services, particularly in the case of television. This would be good for the British broadcasting industry which was currently at a disadvantage compared with that of other nations, and would offer an alternative market for the talents of writers, artists and technicians. The Association added that "regulations could be framed to safeguard against the more undesirable effects of broadcasting in other countries"[33], and if people did not like the sponsored programmes they could tune in to the "independent" BBC. There is an implicit, but significant, recognition in this last remark that sponsorship would remove some element of independence from the commercial stations as regards programming which a non-commercially funded BBC would retain.

The BBC's establishment vigorously fought the idea of commercial competition, or any challenge to its status. Its main defence of monopoly was that competition of any kind would leave serious quality programming "at the mercy of Gresham's Law" - the good driving out the bad - and would result in an inevitable lowering of standards[34]. Unlike any other contributors, they actually provided a definition of standards: "the purpose, taste, cultural aims, range, and the general sense of responsibility of the broadcasting service as a whole"[35], which sums up very neatly the public service ideal that had been the driving force behind the Corporation's programming policy since the beginning.

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[32] ibid. p. .345
[33] ibid. p. .305
[34] ibid. p. 197
[35] ibid. p. 197

4. 3 "Sponsored Broadcasting": Beveridge's Assessment.

Eventually, despite the excellent cases made out in favour of some form of commercial competition to the BBC, the BBC won the day. The Beveridge Report rejected "any suggestion that Broadcasting in Britain should become financially dependent on sponsoring by which it meant any kind of advertising"[36]. It also, somewhat reluctantly, endorsed the Corporation's right to remain Britain's sole broadcasting agency[37]. The reasons for Beveridge's majority rejection of sponsored broadcasting can be summarised as follows:

1) It destroys the social purpose of broadcasting, introduces an ulterior motive into broadcast programmes and is "an abdication of broadcasting for its own sake"[38];
2) it lowers the level of public taste by competition for audience numbers only and fails to cater for minority and special needs;
3) it cannot be effectively regulated in the public interest;
4) it is not wanted by the majority of advertisers[39], or by the majority of the public, and is opposed by most informed opinion;
5) it is not needed as a means of financing British Radio[40].

The Committee considered television as a "special issue", but came to the conclusion that all the arguments used against sponsoring applied equally well to sound broadcasting and television. It was of the opinion that although proponents of sponsoring were impressed by the "multiplicity" of programmes available in America as a result of this practice, this was an illusion: "with sponsoring multiplicity would produce not variety but mediocre monotony"[41]. This is precisely the argument that was used by opponents of deregulation of broadcasting in the 1980s, and even those who regard the huge increase in channels arising from the new media as desirable are aware that more channels does not necessarily mean more choice, just more of the same. As Beveridge put it forty years earlier, multiplying programmes will "simply spread out (the) supply of channels the more thinly"[42].

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[36] Beveridge I op. cit. p. 49
[37] ibid. p. 207
[38] ibid. p. 215
[39] *Note:* Beveridge remarks: "advertising agents are naturally enough enthusiastic proponents of sponsored radio. But with the advertisers themselves it is a different story". (ibid. p. 217)
[40] ibid. p. 214
[41] ibid. p. 218
[42] ibid. p. 219

The United States was once again taken as a general example for what should not be done in Britain. But although the Report's conclusions did not favour broadcast advertising, direct or indirect, the Chairman, together with two other Committee members, included in it a Note which appears to leave the door open for a very limited form of commercial input to some potential broadcasting stations of the future. The Note stated that, while its authors were not proposing anything along the lines of the United States broadcasting system for the UK, they saw no reason, since "advertising to bring buyers and sellers together was universally accepted as a necessary business activity", why a public service broadcasting agency should not "set aside named specific hours containing advertising, provided it retained complete control over its manner and content"[43].

The Beveridge Report also contained an ultimately influential Minority Report by Selwyn Lloyd M.P., dissenting from its conclusions. Lloyd was firmly convinced that there were "evils inherent in monopoly" which could not be avoided, and proposed a that new regulatory Commission for broadcasting should be set up with power to allot frequencies and award licences[44]. In radio, several Companies should be formed to run national programmes on commercial lines which would accept sponsored programmes. A commercial Television Corporation should also be set up, with others to follow when frequencies became available.

Lloyd rejected the BBC's arguments against commercial broadcasting. He did not accept that broadcasting would lose its social purpose because businesses who provide goods and services to the public are also fulfilling a social purpose, and goods would not be sold on air, or ideas propagated, unless an audience could be attracted. He did not believe that the American system was wholly bad and felt that strict control would ensure that advertisements did not "sully" the air as the BBC had claimed they would.

The controlling body suggested by Selwyn Lloyd had many of the features eventually incorporated into the Independent Television Authority in 1954, such as "limitation or prohibition of advertisement of certain goods, rules against interrupting an item otherwise than at a recognised

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[43] *Note:* The authors give their reason for this as "the governing fact about United States broadcasting agencies is not that they have some advertising revenue but that they have no other revenue; the listeners and viewers pay no fee for the privilege of reception. We....reject for Britain such a service which puts the financial control of broadcasting in the hands of people who sell goods and services." (ibid. p. 226)

[44] ibid. p. 202

interval, rules governing the time to be allowed for the advertisement and the periods for a number of 'spot' advertisements, and rules for the protection of the small advertiser". He also believed that it would be possible for British advertisers "to co-operate in the formulation of rules and standards which would mitigate the force of most of the objections to advertisements on the air"[45]. Selwyn Lloyd was to become one of the main Parliamentary forces behind the introduction of commercial television in 1954, and his vision, outlined in the Minority Report, helped to shape the regulatory structures for the new channel.

Some of the reasons given by Beveridge for rejecting commercial broadcasting are open to debate. Evidence from the Listeners Association proved that at least one section of the listening and viewing public were in favour of it. Perhaps too much weight was given to the "informed opinion" that did not want a commercial alternative. There were people from inside broadcasting, such as Norman Collins, Controller of BBC Television from 1947-1950, who were fervent supporters and played a key role in its introduction[46]. And if broadcasting is to serve a social purpose then freedom of choice and responsiveness to popular needs must also be important considerations. There was room for the idea of public service to be expanded to include at an increase in "popular" programming if that was demonstrably what a significant minority of the public wanted[47].

Nevertheless, Beveridge did not have an easy job. The arguments given in evidence about the effects of advertising on standards of service are contradictory. Most opponents of broadcast advertising asserted that commercialism attacks standards by appealing to the lowest common denominator, or at least make a necessary connection between advertising and a predominance of light entertainment; yet the Fabians objected that commercial stations "monopolise the best broadcasters, writers and producers"[48], and some advertising supporters maintained that competition would not only increase choice but actually raise standards. Those who claim that commercial competition is not in the public interest because the airwaves would be dominated by "popular entertainment" have to admit that this

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[45] ibid. p. 207

[46] Bernard Sendall, *Independent Television in Britain,* Vol. 1, London : Macmillan ITV, 1982, p. 14

[47] *Note:* Twenty years after the introduction of commercial television its role in comparison with that of the BBC was summed up by the ITCA in its evidence to the Annan Committee: "The concept of ITV as the people's television and the BBC as establishment television is still current. If there is truth in it today, the reason ...is that ITV has a more popular touch" (Independent Television Companies Association, *ITV Evidence to the Annan Committee*, A submission by the Independent Television Companies to the Annan Committee on the Future of Broadcasting, March 1975, p.a. 36, p. 17). Two years later the ITCA wrote: "ITV represents the broader appeal of populism" (ITCA, The Annan Report: An ITV View p. 9)

[48] Beveridge I op. cit. p. 318

would only be the case if there was a large public demand for it. The majoritarian approach to programming is at least logically consistent.

4. 4 Conclusion.

The Beveridge Report, with its extremely detailed analysis of the potential impact of advertising on the broadcasting service, and the possible regulatory responses that might lessen the negative aspects of this impact, shows that the system in the UK had by this time developed to an extent where the public interest can usefully be viewed as a collection of competing claims, each with a normative component. The claim that a commercial alternative to the BBC was in the public interest was prima facie justifiable on a number of grounds which are valid in terms of the UK's political system. Arguments presented to the Committee in support of this claim were based on the extension of the democratic right to free choice, and on considerations fundamental to a capitalist state which depends on the success of industry and the market to raise living standards and contribute to social and economic progress. As Horlicks, Unilever and Rowntree had asserted, the economic claim for broadcasting had as much validity as the social and cultural claims.

The counter-claim that it was in the public interest to preserve a system of unified control of broadcasting, i.e. a monopoly, was also justifiable within the political framework of the UK. The defence of monopoly in Beveridge rested on the principle that competition of any kind, but especially commercial competition, would fragment the service and make it impossible for broadcasters to fulfil the public service aims of range, quality and diversity. This would not be in the interests of the public as viewers and listeners. The belief that the cultural institutions that are part of a nation's heritage (of which broadcasting is one) deserve to be protected from the harmful effects of market forces underpins this argument. Although the UK operates a market economy, the political system still allows for legislation to regulate aspects of the market potentially damaging to the nation's heritage. "Anti-market" planning, conservation and pollution laws are enacted to preserve the environment, and state subsidy of the arts is also an admission that the market cannot adequately cater for the preservation and promotion of so-called "vulnerable values"[49] in society.

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[49] With reference to vulnerable values in broadcasting see the discussion in Jay. G. Blumler (ed.) *Television and the Public Interest,* London : Sage, 1992

The claim that the public interest lay in breaking the monopoly without having to subject broadcasting to commercial influences was also, on the face of it, justifiable. Monopoly ownership of the most powerful communications medium is a potential threat to the democratic principle of freedom of expression; but some crucial aspects of broadcasting - news and current affairs coverage, for example - are especially vulnerable to interference in their editorial content by advertisers, which also poses a threat to freedom of expression. A second or even third non-commercial public corporation would have avoided both these dangers. Ironically, the freedom of expression argument was hijacked (not very successfully) by the advertising industry itself in the late 1970s, when it began to campaign against EC consumer protection regulation directed at advertising[50].

As the Beveridge Committee only had an advisory role, its adjudication between these competing claims was provisional. It was up to the government of the day to make the final decision and enact the appropriate legislation. The Report, however, does contain a wide spectrum of opinion about the state of British broadcasting and its regulation. These ranged from complete satisfaction with the arrangements, to the strongly held view that the existing system was failing a significant proportion of consumers, and was against the interests of other important sectors of society. Whatever the merits of the various arguments, there was certainly a reasonable case to answer that the "unified control" model for broadcasting regulation, while justified for the initial period of development, had outlived its usefulness and should be replaced with something more in line with changing economic and technological circumstances, and with consumer preferences.

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[50] *Note:* This episode is discussed in detail in Chapter 13

Chapter 5

Commercial Television: The Early Years.

5. 1 Introduction.

The monumental report produced by the Beveridge Committee was published in January 1951, but the Labour Government which had commissioned it, although in broad agreement with its recommendations, was slow to respond. The BBC's Charter and Licence were not due to expire until December of that year, and despite the dissatisfaction in many quarters with its monopoly, and the undeniable demand for some kind of broadcast advertising from a minority of Beveridge's contributors, no major changes were envisaged. A White Paper was issued in July which, while accepting most of Beveridge's proposals, provided a forum for the increasing number of frustrated anti - monopolists to make their voices heard.

Events overtook the White Paper, however, when a General Election was called in October and a Conservative Government returned to power. The composition of this new government was a crucial factor in the rapid volte face in broadcasting policy which then took place. The new intake of Tory MP's included a large number of enthusiastic free marketeers, many from the world of business, who were committed to subjecting what they regarded as a bureaucratic and arrogant BBC to the beneficial effects of competition. Some of these had links with the Radio Industry and one active campaigner, John Rodgers, was a director of J. Walter Thompson, the international advertising agency. But, as Bernard Sendall has stressed, most of the proponents of commercial broadcasting had no vested interest in its introduction and were simply ideologically sympathetic[1] .

Change in the political system, therefore, was instrumental in breaking the regulatory cycle and generating a new paradigm for broadcasting regulation. The new paradigm, however, as history shows, turned out to be not so very different from the old. Not only was the new structure based on the existing model[2], but the background of attitudes and expectations which influenced how

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[1] Bernard Sendall, *Independent Television in Britain,* Vol. 1, London : Macmillan ITV, 1982, p 10

[2] *Note:* "In many respects the rules laid down for independent television were simply specifications of norms extrapolated from BBC practice, plus additional rules laid down for advertising". (Dennis McQuail, *Media Performance,* London: Sage, 1992, p 57)

regulation was done remained much the same. It is significant that most supporters of commercial broadcasting in Beveridge accepted the need for some form of regulation of advertising, usually advocating quite strict regimes in order to prevent abuses and avoid causing offence to viewers. And even those who claimed that the dangers of the American system had been exaggerated acknowledged that things would have to be done differently over here.

5. 2 The First White Paper and the Beginning of the Great Debate.

The innovators faced considerable opposition within their own party from traditional patrician Tories, such as Lord Halifax, Lord Salisbury, Lord Hailsham and Winston Churchill, which meant that the campaign to end the monopoly had to be conducted first and foremost within the party of government. The primary task was to convince a hesitant leadership to adopt a radical transforming broadcasting policy[3].

After extending the BBC's Charter for a further six months, a White Paper issued in May 1952, *Broadcasting: Memorandum on the Report of Broadcasting Committee, 1949*, gave the first sign that a break with traditional policy was being considered. Paragraph 7 stated that: "in the expanding field of television provision should be made to permit some element of competition" as soon as the capital resources became available. Paragraph 9 spoke of the need for safeguards, and for a "controlling body" to regulate the conduct of the stations. No explicit mention was made of advertising, direct or indirect, but it was evident that the government had in mind some form of commercial competition.

The Parliamentary debates on the future of broadcasting grew increasingly intense, with interested parties outside Parliament lining up for or against the proposed revolution. The fact that the BBC was to be left intact, with a continuing monopoly of radio services, and funded as before solely from licence fees did not pacify its supporters. They were unable to conceive of commercial competition as anything but an attack on the Corporation and a threat to, if not the complete destruction of, public service broadcasting[4].

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[3] Bernard Sendall, *Independent Television in Britain*, Vol. 1, op cit. p. 10

[4] See: Full discussions of these debates can be found in Burton Paulu *Television and Radio in the United Kingdom*, London: Macmillan, 1981, p. 43; and Burton Paulu, *British Broadcasting in Transition*, University of Minnesota, 1961, p. 30; Asa Briggs. *History of the BBC: The first Fifty years*, Oxford University Press 1985, p. 279; and Bernard Sendall *Independent Television*, Vol. I ibid. p. 25

There seems to have been, even at this stage - and despite the careful distinction made by Sykes - some confusion over the difference between sponsored programmes, funded by wholly or in part advertisers, and "spot" advertisements transmitted during breaks in programmes. Although Beveridge had striven to provide clear definitions and explanations, most contributors to the Report had used the term "sponsored broadcasting" in the most vague and general way. And while in earlier reports from Sykes onwards, limited sponsorship rather than direct or "spot" advertising had been the more acceptable option, sponsorship had by this time come to be closely identified with all that was bad about American commercial broadcasting. Lord De La Warr, for example, Postmaster General and one of the architects of the government's pro-competition policy, was still speaking in May 1952 of "our distaste for commercial sponsorship"[5].

In April 1953, however, the IPA and the ISBA jointly produced a memorandum entitled *Television: the Viewer and the Advertiser*, which set out clearly and in a positive light the various ways in which advertising could be introduced on television without imitating American methods too closely. In August the following year, after being presented with this persuasive document, De La Warre was able to refute the notion that the financing of programmes made by broadcasters other than the BBC could only be achieved by the American system of sponsorship.

In their pamphlet, the advertising industry trade associations made the following comments. "It appears to have been widely assumed that advertisers and advertising agencies would seek in due course to obtain control of the organisation and presentation of programmes. Although this assumption has received publicity, this Society and this Institute, representative of advertisers and advertising agencies throughout the country, wish to make it known that it is not correct....We therefore advocate that a competitive network, if it is to challenge the BBC effectively, have the power in its own hands to direct programmes.....It would accept advertisements for insertion in a variety of ways, the ways being negotiated with the advertiser. Thus, the competitive service we visualise would not be 'sponsored' .....The programme content would be free in the same way as a newspaper editorial is free from (advertisers') direct influence"[6].

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[5] Bernard Sendall, *Independent Television in Britain,* Vol. 1, op cit. p. 15

[6] *Television : The Viewer and the Advertiser,* A Memorandum on Competitive Television and Draft Suggestion for the Regulation of Programmes, Submitted jointly by the ISBA and the IPA to H. M Postmaster General, April 1953, p. 1

This short pamphlet made a vital contribution towards resolving the government's dilemma over how the new station should be financed. It reassured policy-makers that the advertising industry in Britain had no wish to emulate American commercial television, and would be satisfied with uncontroversial and easy to regulate forms of direct advertising. Consequently, the cherished editorial freedom of broadcasters raised in the public service tradition would not be at risk, and Earl De La Warre could declare with confidence in the summer of 1953: "there is a world of difference between accepting advertisements and sponsoring. The press accepts advertisements but they remain responsible for their own news and editorial columns. The cinema shows advertisements but their programmes are not sponsored by advertisers. The Government has made it clear that they envisage a system whereby the station and not the advertiser is responsible for the programmes"[7]. Parts of this speech found their way almost verbatim into the November White Paper, which set out in detail the government's proposals for the new system. This White Paper marks a complete reversal of previous official attitudes to the methods of funding broadcasting by advertising.

The IPA and the ISBA were quick to take advantage of the new mood. They produced another pamphlet, *Open Letter to the Postmaster General*, in which they praised De La Warr for making it "quite clear that sponsorship is not synonymous with advertising, and any future attack on competitive television which is based on the idea of sponsorship would be knowingly misdirected". They also rather optimistically put in a plea for television to be treated in the same way as the press - with no special, (i.e. statutory), controlling authority, and no further "administrative or legislative restrictions"[8]. So, from a position of neutrality at the time of Beveridge, the advertisers' trade association had moved rapidly to join with agencies in support of the campaign for commercial television, at a stage when the political will was manifestly already there to make it happen.

In *Television: the Viewer and the Advertiser*, advertisers and agencies set out a number of their own proposals for regulation of the new station. They suggested that the station should be responsible for enforcing the rules, avoiding any mention of the controlling body referred to in the first White Paper. The implied preference of the IPA and ISBA for a fully self-regulatory system was made explicit in their *Open Letter to the Postmaster-General*, in which they claimed that "there is no necessity to impose more administrative restrictions on competitive television than on newspapers or any other

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[7] Bernard Sendall, *Independent Television in Britain*, Vol. 1, op cit. p 22
[8] Bernard Sendall Vol. 1, op cit. p. 22

medium". According to Sendall, this was a "misjudgement", as a price had to be paid for securing enough support in parliament for commercial television[9].

Television: The Viewer and the Advertiser began its list of proposed requirements for advertising control with the declaration that "all those concerned with the preparation, presentation and transmission of competitive programmes within the United Kingdom shall recognise that the basic responsibility of the Station/Company shall be to serve and advance the public interest"[10]. Advertisers were evidently anxious to be seen to be committed to supporting the public interest justification for regulation of competitive television services. This commitment is backed up by the requirement that, in order to provide the highest quality of programme to the public, advertisers and agencies should recognise the broadcasters' right to refuse to accept any script or scenario that they believed was "detrimental to the public interest"[11].

The pamphlet's General Regulations stated that the broadcaster should not accept advertising or programme material which introduces, among other things, "anything which is obscene, indecent, profane or of doubtful propriety, or that is disrespectful to the Royal Family or Heads of State; nudity, or costumes permitting indecent exposure; dances which employ lewd or indecent movements; drunkenness or narcotic addiction as desirable or prevalent factors in the British way of life"[12].

The advertising industry made it quite clear in this document that it was prepared to co-operate in an extremely strict regime of control in order to avoid accusations that advertising funded television would lead to a decline in standards. In fact, advertisers of the mid-1950s have a great deal in common with Mrs Mary Whitehouse, founder and first President of the National Viewers and Listeners Association, and active campaigner against rudeness on the air since the 1960s. No respectable purchaser of airtime in the early days of commercial television could have imagined his successors paying premium prices to place their ads in or around, say, Spitting Image, The Singing Detective, or almost any contemporary slice-of-life documentary on the British condition. Nor would he have been very happy for his agency to submit for copy clearance a Cadbury's Flake or a Wonderbra commercial. The fact that every one of the standards of decency advocated in the

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[9] ibid. p. 22
[10] *Television : The Viewer and the Advertiser* op cit. p. 5
[11] ibid. p. 5
[12] ibid. p. 6

pamphlet has now been either abandoned or relaxed beyond recognition, shows how far the notion of what is acceptable on television has advanced (or regressed, depending on your perspective) since the more innocent days of the birth of ITV.

Television: The Viewer and the Advertiser also contained a section on Special Advertising Regulations to deal with controversial areas. The proposals cover medical products and treatments; advertisements likely to misrepresent, mislead or deceive; and certain categories of advertisement which should be banned - forms of speculative finance, matrimonial agencies, fortune tellers, undertakers and betting tips. There are also suggestions for special rules for children's advertising, which has since become a heavily regulated area. Most of these proposals were incorporated either into the 1954 Television Act itself, or into the statutory Code - *Principles for Television Advertising* - drawn up by the Independent Television Authority's first Advertising Advisory Committee. The provisions of the Act and the Code are nevertheless considerably more wide-reaching and detailed than the advertising industry's proposals.

The debate between opponents and supporters of commercial television, meanwhile, raged on. The former, under the aegis of the National Television Council, led by the Labour MP Christopher Mayhew, continued to argue that standards would inevitably degenerate, that advertisers would exert too much influence, that minority interests and sparsely populated areas would not be adequately served. The latter fought back with the Popular Television Association, which concentrated on the evils of monopoly and gave reassurances that advertising in Britain would not sink to the depths that it often did across the Atlantic. The supporters received help from Conservative Central Office since the bulk of the Conservative Party was becoming increasingly convinced of the rightness of the commercial cause.

The Labour party leader, Clement Attlee, also helped to harden Conservative resolve by promising to repeal any legislation introduced for the purpose of setting up commercial television if Labour were returned to power. This had the effect of making what had been largely a matter of individual preference, uniting people with very different politics, into a party political issue[13]. When the Television Bill came to be voted on, instead of a free vote on which the Government might have been

[13] Bernard Sendall Vol. 1, op cit. p. 25

defeated by a coalition of anti's, a three - line whip was imposed to ensure the passage of this controversial legislation.

The basic economic point - noted as long ago as the Selsdon Committee and a source of concern ever since - that to provide an adequate television service nation-wide would be very expensive and would put an intolerable strain on the licence fee method, was an important consideration. The costs of developing television were much higher than radio and, unlike the Labour Party, a Conservative government committed to robust free market economic policies was not willing to use public money to finance it when the private sector was able to do the job. So by the time the second White Paper, *Broadcasting: Memorandum on Television Policy*, was presented to Parliament by the Postmaster General in November 1953, the Government had come round to a firm decision that commercial television was desirable, and should be introduced without delay. The White Paper provided a detailed framework for the implementation of that decision.

On the question of monopoly, it expressed a diametrically opposite view from all previous government policy statements on broadcasting regulation. Paragraph 3 declared that "As television has great and increasing power in influencing men's minds, the Government believes that its control should not remain in the hands of a single authority....Moreover, competition should be in the best interests of viewers, writers, artists and technicians"[14]. The monopolists had been defeated and the central assumption on which broadcasting policy had been based almost since the beginning had been overturned.

The practical structure envisaged to translate the new philosophy into action, however, remained the same: the public corporation. This body would act as regulator, with strong controlling powers, by actually owning and operating the transmitting stations and other fixed assets. It would hire its facilities to privately financed companies who would provide programmes and draw revenue from advertisements. The government believed that such an arrangement would have the advantage of offering adequate scope for the participation of private enterprise and at the same time would ensure effective control.[15]. Combining the regulatory agency with ownership of the transmitting facilities was a convenient method of safeguarding standards, (clearly still at the heart of things), as a

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[14] *Broadcasting: Memorandum on Television Policy*, (Cmd. 9005), 1953, para 3, p. 4 (November 1953, White Paper)
[15] ibid. para 7, p. 5

programme provider's contract could be terminated for lack of compliance with any regulatory rules without great loss of capital investment in fixed assets.

The Corporation would have the right to vet scripts and schedules in advance, forbid certain classes of broadcast matter, and regulate advertisements. On the specifics of advertising control the regulator would agree with the Postmaster General on the conditions to be imposed, such as "types of advertising and classes of advertisement to be excluded and the distinction to be made between what is presented as advertisement and what is normal programme"[16] .

The White Paper stressed that representative advertising bodies had been consulted on this point and had confirmed that it was not the case that if advertisers could not sponsor, i.e. provide or control the programmes which carried their messages, they would not be willing to use the medium of television. They had assured the Government that the separation of advertisements from programmes inherent in spot advertising would not endanger the financial prospects of the new television service. This principle served as the cornerstone of advertising regulation policy in the UK and the separation of promotional message from programme content is still stringently enforced, even after the relaxation of the rules on sponsorship under the Broadcasting Act of 1990. It is also one of the key rules contained in the 1989 EC *Broadcasting Directive on Transfrontier Television* and the Council of Europe's *Convention on Transfrontier Television* of the same year.

On advertising, the government took the view that the fewer the rules and the less day-to-day interference the better. Doubtless some in the advertising industry felt that the degree of control planned was still too great, and would hinder their efforts and those of the programme companies to make television popular and profitable. On the other side, the opponents of commercial broadcasting were outraged at the total dependence of programme providers on advertising revenue. In spite of the strength of opposition, the proposals in the Memorandum were approved by Parliament and in March 1954 a Bill based on these proposals was published which, with some amendments, passed into law as the Television Act on 30th July.

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[16] ibid. para 9, p. 5

5. 3 The Television Act 1954.

In the words of the *Memorandum on Television*, the Act represented the "typically British approach" of compromise: it provided for private enterprise under public control. The new corporation, dedicated to public service ideals of broadcasting and with strong interventionist powers, yet operating within a limited free market framework, was to be called the Independent Television Authority. Its constitution was closely modelled on the BBC's: its members would be appointed by the Crown and the super-regulatory role of the Post Office was confirmed.

The ITA's initial duty was to award contracts to a number of regional and London-based applicants, and, having awarded them, to ensure that they fulfilled their contractual obligations. The companies would be responsible for providing the programmes but the Authority retained the right to provide its own if it thought the schedules submitted were not sufficiently balanced. It also had to ensure that a proper level of competition was maintained between the companies in the supply of programmes.

Section 3 of the Act contained some quite detailed programme requirements. Nothing could be broadcast which might offend against "good taste or decency" or lead to crime or disorder; programmes had to "maintain a proper balance in their subject matter and a high general standard of quality"; news had to be accurate and impartial; a suitable proportion of programming had to be of British origin and performance[17]. As Burton Paulu has pointed out, this put a much greater explicit burden on the ITA than the BBC, who in its Licence is required merely "efficiently to send" its broadcast matter[18]. The injection of advertisers' money into the system was obviously still seen as a threat in principle to the public service ideal, which had to be contained by tough regulation[19].

With regard to advertising in particular, the Act first of all disqualified anyone with any financial or other interest in any advertising agency from being a member of the regulating Authority. Such individuals or corporate bodies were also disqualified from applying for franchises[20]. It prohibited any prize or gift, in an advertisement or not, from being offered in any programme which was

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[17] The Television Act 1954, 2 and 3 Eliz. 2 Ch. 55, 1954, Sections 3

[18] Burton Paulu. *British Broadcasting* op cit. p 53

[19] *Note:* Stephen Hearst states that "the old mistrust of commercialism ensured that the Independent Television Act of 1954 was drafted with great rigour. The powers of regulation given to a newly created Independent Television Authority were extensive. Nothing of the sort was ever vouchsafed to America's Federal Communications Commission". (Stephen Hearst, *Broadcasting Regulation in Britain* in Jay. G. Blumler (ed.) *Television and the Public Interest*, London : Sage, 1992, p 67)

[20] The Television Act 1954 op. cit. Sections 1 and 5

available only to persons receiving that programme. No "valuable inducements" could be used by any of the contractors to attract audiences, which might be construed as unfair competition[21].

Section 4 of the Act stated that orders for advertisements could be received from advertising agents or direct from advertisers, but neither the Authority nor the programme contractors were permitted to act as an advertising agent. The Authority had to secure compliance with the Second Schedule, which sets out more detailed rules for advertisements. The Postmaster General could make regulations by amending or adding to the Schedule, and had to be consulted from time to time as to "the classes and descriptions of goods or services which must not be advertised and the methods of advertising which must not be employed"[22].

Section 3 (6) contained a very clear and unambiguous prohibition of anything which might be construed as indirect advertising. It did not mention the word "sponsorship", probably to avoid any possibility of misinterpretation, but excluded from any broadcast matter that which, "whether in an advertisement or not.... states, suggests or implies, or could reasonably be taken to state, suggest or imply, that any part of any programme broadcast by the Authority which is not an advertisement has been supplied or suggested by any advertiser; and, except as an advertisement nothing shall be included in any programme broadcast by the Authority which could reasonably have been supposed to have been included therein in return for payment or other valuable consideration to the programme contractor or the Authority".

There were, however, some permissible exceptions to this comprehensive list of unacceptable promotional activities: publicity for charitable purposes (which required the Authority's prior approval)[23]; reviews of current publications or productions; acknowledgements of copyright matters or announcements about live performances. These activities were assumed to be innocuous enough and were counted as legitimate matters of public information.

Also not prohibited, *Section 4 (6) (c)* were "factual portrayals of doings, happenings, places or things, being items which in the opinion of the Authority are proper for inclusion for reason of their intrinsic interest or instructiveness and do not comprise an undue element of advertisement". So,

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[21] ibid. Section 3 (3)
[22] ibid. Section 4 (5)
[23] *Note:* This is not the same as advertising by individual charities - a prohibited category

although "product placement" - buying the right to place products strategically in programmes for advertising purposes - was strictly forbidden, the natural occurrence of certain well known brands in the course of portraying daily life or recording events of interest to the public was recognised as inevitable.

In addition, *Section 4 (6) (e)* made it clear that the ITA should not ban "the inclusion of any advertisement in any programme broadcast by the Authority by reason only of the fact that it is related in subject-matter to any part of that programme which is not an advertisement". This clause gave some latitude to the broadcaster, when allocating airtime, to ignore co-incidental similarities between advertising and programme content. To be effective, television advertising has to take into account not only audience size, but audience type. Programmes representing a particular lifestyle may attract a class of consumer an advertiser wants to target. Sports programmes, for example, provide a natural environment for certain kinds of health products. Provided there can be no confusion of message with actual programme, the Act did not rule out the appropriate matching of commercials to programmes even when there are similarities in subject-matter.

The authors of the 1954 Act were determined to overcome fears that, despite its protestations to the contrary, the advertising industry would still be able to exercise too much control over programming. One of the most persistent claims of the opponents of change was that, even with the best of intentions, commercial imperatives would eventually override public service ideals to the detriment of British broadcasting as a whole. Sponsorship and product placement open up the possibility of direct interference by advertisers in programme content, infringing the principle of separation and threatening editorial independence and the integrity of the programmes.

Rule 1, of the Television Act's *Rules as to Advertisements*, in the Second Schedule, was designed to make the objective of editorial independence absolutely transparent. It stated that "the advertisements must be clearly distinguishable as such and recognisably separate from the rest of the programme". This tenet lies at the heart of British policy on broadcast advertising and has persisted undiluted throughout all subsequent Broadcasting Acts.

The other rules set out in the Second Schedule dealt with the timing of advertisements, the methods of pricing, the prohibited classes - anything of a political or religious nature, for example, or relating to an industrial dispute [24] and provision for local advertisements.

Rule 2 - "The amount of time given to advertisements in the programmes shall not be so great as to detract from the value of the programmes as a medium of entertainment, instruction and information," - is not without interest. This definition of the value of programmes demonstrates a reversal of priorities from John Reith's, who saw the aim of the broadcast medium as to inform first, to educate second, and to entertain last. Intentional or not, it marked a return to the emphasis of David Sarnoff, one of the founding fathers of American commercial radio, who, in the 1920s, first expressed the idea that "broadcasting represents a job of entertaining, informing and educating the nation, and should therefore be distinctly regarded as a public service"[25] . So, appropriately enough, the inaugurators of the new commercial television system in Britain officially reinstated entertainment as its first priority.

Rule 2, while ostensibly dealing with a question of principle - protection of viewers from the devaluing of programmes as a means of communication - also contained an implicit reminder to advertisers on a practical level that the devaluation of programmes by excessive advertising would also bring down the value of airtime as a means of selling their products.

Rule 3 of the Second Schedule dealt with the placement of advertisements, stating that they must not be "inserted otherwise than at the beginning or the end of the programme or in natural breaks therein". These were not legally defined, nor have they ever been, but remained discretionary. The Authority had to agree with the Postmaster General (whose word was final in case of disagreement) as to: "a) the interval which must elapse between any two periods given over to advertisements; b) the classes of broadcasts (particularly the broadcast of religious services) in which advertisements may not be inserted, and the interval which must elapse between any such broadcast and any previous or subsequent period given over to advertisements".

This represents quite a tough attitude towards the timing and distribution of advertisements, with the Postmaster General wielding considerable powers, and a fence erected around certain classes of

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[24] *Note:*. For the full list see Appendix 1
[25] Asa Briggs, *The History of the BBC: The First Fifty Years*, op cit. p.18

programmes to protect them from the contaminating influence of commercials. But space was left for the Authority to negotiate with the Post Office, and the decision to allow advertising in natural breaks within programmes was liberal by comparison with other European systems, whether fully public service or mixed. Even after deregulation in Europe in the 1980's the British government had to lobby hard to persuade the drafters of the EC *Broadcasting Directive* and the Council of European *Convention on Transfrontier Television* to permit this measure of freedom to advertisers under the proposed new community-wide broadcasting regulations.

Rule 4 prohibited "unreasonable discrimination either against or in favour of any particular advertiser." This provision paralleled existing competition legislation and has remained unchanged in all later Acts. The competition aspect of television regulation has also been subject since 1973 to the authority of the Office of Fair Trading.

The Third Schedule contained provisions enabling the Authority to obtain from the programme contractors scripts and details of advertisements in advance in order to ensure that they complied with the rules. This system of supervision, known as pre-vetting, has only just been abolished following the 1990 Broadcasting Act.

The Act also required the ITA to appoint an Advisory Committee "representative of organisations, authorities and persons concerned with standards of conduct in the advertising of goods and services", to give advice on the exclusion of misleading advertisements and the general principles to be followed, and to draw up a code of conduct[26]. The Advertising Advisory Committee has been, and still is, the most important consultative body in the drawing up of product regulation of television advertising.

The mould-breaking 1954 Television Act took British broadcasting from monopoly to duopoly, if not exactly overnight, then more rapidly than had been expected. In the period between the first meeting of the newly constituted Independent Television Authority on 4th August 1954 and the "opening night" of the new service on 22 September 1955, the detailed working-out of the provisions of the Act took place. A structure for ITV was determined which was to continue virtually unaltered for the next thirty five years.

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[26] Television Act 1954, op. cit. Section 8 (2) (b)

5. 4 Trial and Error: The ITA Begins Operations.

One of the first things the Authority did, in accordance with its statutory duties, was to appoint an Advertising Advisory Committee. This held its first meeting on 14th of January 1955. Its chairman, Robert Bevan, was an experienced advertising man who was considered to be well qualified to liaise between the industry and the Regulator. The Committee included representatives of the Advertising Association, the IPA and the ISBA to speak for the advertising industry; the Ministry of Health, the British Medical Association, the British Dental Association, the Pharmaceutical Society, the British Code of Standards Committee, and the Retail Trading Standards Association were also represented. This gave the AAC, according to one commentator, a "well balanced mixture of professional and consumer interests"[27]. Within a few years, however, the next Committee of Inquiry into broadcasting would take a very different view.

By June 1955, the ITA, following the recommendations of the Advertising Advisory Committee and in consultation with the Postmaster General, had produced a booklet entitled: *Principles for Television Advertising*, which represented "a general code of television advertising conduct". Many of the requirements of this code can be traced to the IPA/ISBA pamphlet *Television: The Viewer and the Advertiser*. The Authority was statutorily obliged to secure the compliance of its licensees with the rules contained in the Code.

The *Principles* is a clear and succinct statement of the minimum standards of conduct expected from advertisers when promoting their products on the air. The foreword stressed, however, that paragraph 2 "expressly reserves the right of the programme contractors and the Authority to impose stricter standards of advertising conduct than those laid down in the *Principles*"[28].

Since it was mostly concerned with controlling the content of advertisements, the Code falls mainly into the category of product regulation. Prohibition of "disparaging references"[29] which unfairly compare one particular advertiser's product or service to those of his competitors, to the extent that the notion of unfair competition is invoked, can be considered as process regulation.

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[27] Bernard Sendall Vol. 1, op cit. p. 101
[28] Independent Television Authority : *Principles for Television Advertising*, June 1955, p. 3 (ITA: *Principles, 1955)*
[29] ibid. (rule 6), p. 5

It began with a preamble which declared that "the general principle which will govern all television advertising is that it should be legal, clean, honest and truthful"[30]. This governing principle is taken from the International Chamber of Commerce's Code of Advertising Practice, first issued in 1937, exchanging only the ICC Code's "decent" for "clean". The ITA also adapted some other provisions of the ICC Code for use in regulating British commercial television.. The ITA Code went on to claim that while this advice was applicable to all types of advertising media in Britain, "television, because of its greater intimacy within the home, gives rise to problems which do not necessarily occur in other media and it is essential to maintain a consistently high quality of television advertising"[31].

Section 2 of the preamble required the detailed principles set out in the Code to be applied "in the spirit as well as the letter".

Section 3 provided a definition: "The word "advertisement" has the meaning implicit in the Television Act, i.e., 'any item of publicity inserted in the programmes broadcast by the Authority in consideration of payment to a programme contractor or to the Authority". This clearly defines advertising as direct or "spot" advertising only.

Sections 4 and 5 dealt with legal requirements: "advertisements must comply in every respect with the law, common or statute"; with regard to false or misleading advertisements: "no advertisement....shall contain any spoken or visual presentation of the product or service advertised, or statement of its price, which directly or by implication misleads". In particular, the Code warned against making special claims that cannot be proved; excessive use of scientific and technical terms and misleading use of statistics; and imitations that are likely to mislead.

Sections 7 and 8 dealt with testimonials and guarantees, which had to be used responsibly. Documentary evidence with respect to testimonials was required, and the detailed terms of guarantees must be available to the programme contractors for inspection.

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[30] ibid. p. 4
[31] ibid. p. 4

Section 9 required that the conditions of entry for competitions - those permitted under the 1954 Act and the 1934 Betting and Lotteries Act - be clearly stated.

Finally, *Section 10*, the most detailed, regulated advertising in children's programmes. In general, no product or service could be advertised, or method used, which might result in physical, mental or moral harm to children; and no method of advertising could be used which "takes advantage of the natural credulity and sense of loyalty of children".

Sub - clauses (a) - (f) of this section contained more specific warnings against: encouraging children to enter strange places, converse with strangers or do anything dangerous; making them feel that they are failing in some way, or are inferior, if they do not own the product advertised; advertising for children to join a club that has not been thoroughly vetted by the programme contractor; and encouraging them to make a nuisance of themselves in the interests of any advertised product or service.

Appendix 1 of the *Principles for Television Advertising* is entitled Specific Classes of Advertisements and Methods of Advertising. Unacceptable products and services included: money - lending, matrimonial agencies, fortune telling, undertaking, slimming aids, contraceptives and cures for smoking and alcoholism. Advertisements for mail order goods, financial services, homework schemes, and schemes involving hire purchase and instructional courses were dealt with under this heading, and betting (including pools) advertisements were banned, subject to review after six months.

Medical advertising, the only area to be specifically mentioned in the Act which required the Advertising Advisory Committee to include suitably qualified experts on medical matters, was taken care of in Appendix 2. This consisted of *The British Code of Standards in Relation to the Advertising of Medicines and Treatments*, a guide previously drawn up to assist those involved in this area of advertising in non-broadcast media, and recommended as a model in the ISBA/IPA pamphlet. It is extremely detailed and comprehensive since "the harm to the individual that may result from exaggerated, misleading or unwarranted claims justifies the adoption of a very high standard"[32].

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[32] ITA: *Principles*, 1955, op. cit. p. 10

It is somewhat surprising that, apart from the ban on claims to cure or "extirpate" tobacco or alcohol related ailments, no restrictions were placed on alcohol and tobacco advertising, even in relation to children's programmes. Perhaps it is this significant omission that inspired Bernard Sendall to refer to this first code as "a boldly liberal one"[33], although in other respects the regulation is very stringent. *Principles for Television Advertising* has been updated numerous times since its first publication, changing its title in 1964 to *The Code of Advertising Standards and Practices*. It has not altered in essence, but has accumulated successively larger amounts of detailed regulation, particularly in respect of children's and financial advertising. The original 1955 code, for example, has only 8 pages, excluding Appendix 2 on medical advertising, while the ITC's most recent offering has been expanded to two separate documents (an additional one dealing with sponsorship) containing a total of 43 pages.

Shortly after the first meeting of the Advertising Advisory Committee, the ITV companies formed an Advertisement Committee to deal with the practical side of running a television service dependent on advertising revenue for its income. Their initial attention was given to the system of charges to advertisers for airtime. The Act had left the fixing of rates entirely up to the companies; the regulator need be interested only in the "detail, form and manner of their publication." Following the American practice, a variety of discounts including "series" discounts and volume discounts were offered in order to attract a regular and long-term income[34]. In July, the Advertisement Committee formed a small Copy Working Party, forerunner of the Independent Television Companies Association's Copy Clearance Secretariat, to scrutinise the content of all advertisements prior to transmission. During this early period, the ITA did not involve itself routinely in pre-vetting but allowed the Companies to make their own decisions on the acceptability of commercials. The two parties nevertheless liased closely with one another.

Also under consideration at this time were the rules governing the process of advertising on television. The Postmaster General, Charles Hill, approved the ITA's proposals for controlling the amount and distribution of advertising time. The Authority had decided on restricting the overall amount of time devoted to commercials to a daily average of no more than ten percent - six minutes - per hour. The ITA explained its reasons for choosing this figure in its Annual Report for 1955: "American experience indicates that "spot" advertising time beyond 10 per cent is apt to defeat its

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[33] Bernard Sendall Vol. 1, op cit. p.. 32
[34] Brian Henry, op. cit. p. 34

own object because of adverse public reaction. On the other hand the Authority, without actual experience of how the new system would work in this country, had to be careful not to fix the amount of advertising so low as to endanger the commercial prospects of the system"[35]. At this stage, however, there was no inner quota restricting the amount of advertising in each individual clock hour. As a result, the peak evening period often contained considerably more than the six minute hourly average.

Not included in this six minute quota were the forms of promotion known as "advertising magazines" - shoppers' guides and advertising documentaries - which might last for approximately a quarter of an hour. They had, of course, to be clearly signalled as such to avoid any possibility of confusion in the minds of viewers, and they could not be shown between 7 p.m. and 10.30 p.m. The Authority acknowledged that "if they ceased to appeal to the viewer of their own merits they would cease to be profitable to the contractor and the advertiser[36]". In retrospect, it is rather surprising that this form of advertising was permitted at all as it appears to blur the distinction between promotion and programme in a quite unacceptable way. The Authority was evidently attempting to treat shoppers guides as extended advertisements rather than as programmes.

The number of periods devoted to commercials were not permitted to exceed six per hour; commercials could only be broadcast between programmes or in "natural breaks" in programmes (as specified in the Act, although what constitutes a natural break has always been a matter of common sense not law); and there had to be a minimum interval between commercial breaks, i.e. no break was allowed in programmes of less than twenty minutes, but those of less than half an hour could have advertising inserted if it appeared natural[37]. Certain classes of programme - religious broadcasts, anything connected with the Royal Family, important state occasions - had to be insulated from advertising by an interval of at least two minutes[38]. Schools broadcasts, when they were started by ITV in 1957, were also subject to this rule in order to prevent advertisers exploiting captive audiences of children.

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[35] Independent Television Authority (ITA) Annual Report and Accounts, for the period 4 August 1954 - 31 March 1955, London: Her Majesty's Stationary Office, 1st November 1955, p. 8

[36] ibid. p. 9

[37] *Note:* By the 1980s this rule had been tightened to exclude documentaries, plays and children's programmes of less than half an hour.

[38] ITA: Annual Reports and Accounts 1955-56, London: Her Majesty's Stationery Office, 1st August 1956, p. 19

Although the shoppers' guides did not survive the Pilkington Report of 1962, the decisions on the amount and distribution of advertising time have stood the test of time. These rules, apart from some minor modifications, remained unaltered until the deregulating 1990 Broadcasting Act. Even now, in 1995, the current regulatory body, the Independent Television Commission, has extended the average daily quota permissible on ITV - as opposed to Satellite and Cable networks which have a more relaxed regulatory regime - by a mere one minute.

Towards the end of 1955, after a few months of operation, the question arose of whether "the occasional practice of employing the comperes of entertainment programmes to present "live" advertisements during natural breaks in these programmes" ran the risk of implying that a programme had been suggested by an advertiser, which was prohibited under the 1954 Act[39]. Although the Authority was satisfied that no influence had actually been exerted on the programmes concerned, it felt that in the early days of Independent Television there must be no possible cause for misunderstanding and ruled that the practice be abandoned for the time being. In 1957, the ITA agreed to its reintroduction, provided at least thirty minutes separated a "celebrity" advertisement and the programme in which he or she appeared[40].

The regulator was more worried by this time about advertisers wishing to use popular television characters or programme themes in their commercials. Again, in order to avoid any possible confusion over programme and advertising content, or any impression of sponsorship, the Authority ruled that, subject to certain conditions which made it quite clear that advertisers were not responsible for the characters or themes, such commercials could be shown, but only on different days from the programmes to which they referred[41]. These judgements reveal how seriously the statutory prohibitions on sponsorship were taken; it had to be borne in mind that even the mere impression of advertiser involvement in programming was forbidden under the Act. Apart from the anomaly of shoppers' guides, the rigorous separation of any promotional message from programme content was strictly enforced right from the beginning.

Betting advertising was another issue on which the ITA showed its muscle. Associated Rediffusion lobbied hard for the ban on betting advertising to be lifted to complement its planned outdoor

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[39] ibid. p. 21
[40] ibid. p. 11
[41] ibid. p. 11

broadcast racing coverage. The Advertising Advisory Committee nevertheless stood by its original ruling which has only recently been relaxed[42].

By 1957, with demand for advertising, after a shaky start, at last reaching a level that guaranteed the financial security of the companies, the work of the Copy Clearance Committee had become more complex. A full-time staff was appointed to liaise with agencies, advertisers and production companies on regulation matters. In trying to resolve the confusion over process regulation, the Television Programme Contractors Association also drew up a list of programmes, classified by type, suggesting the distribution, number and length of the commercial breaks in each. From the companies point of view, not only strict "clock hour"- based timing according to the ITA's ruling had to be taken into account, but the nature of the programmes surrounding the breaks[43]. The tensions generated by the conflicting demands of compiling a competitive schedule attractive to advertisers, and at the same time complying with a fairly restrictive process regulation, have not diminished over time. Eventually, the criteria produced by the TPCA formed the basis of the ITA's new guide dealing with process issues, *Advertising Rules and Practices*, issued in 1958.

By this time, both the companies and the Authority had become anxious that too much advertising was being concentrated into the evening hours. The ITA Annual Report for 1958-9 states that at the beginning of 1958 an agreement was reached with the programme companies that any one clock hour should have a maximum of eight minutes. A review at the end of the year revealed that "particular programme patterns could lead to an over concentration of advertising in particular hours." Further modifications were made to prevent this happening and a table of showing a representative sample of figures was included to demonstrate how the rules limiting "spot" advertising operated in practice[44].

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[42] Brian Henry (ed.) op cit. p. 59
[43] Brian Henry op cit. p. 60
[44] ITA Annual Reports and Accounts 1958-59, London: Her Majesty's Stationery Office, 9th November 1959, p. 11

Figure 5.1: Advertising Minutage 1958-59

	Average over Whole day	Average between 7 and 10 p.m
January, 1958	4mins. 8secs.	6mins 11secs.
February, 1958	4mins. 56secs.	7mins. 13secs.
July, 1958	3mins. 56secs.	5mins. 50secs.
November, 1958	4mins. 52secs.	7mins. 29secs.
January, 1959	3mins. 47secs.	6mins. 7secs.
February, 1959	4mins. 27secs.	7mins. 16secs.

Source: ITA: Annual Report and Accounts 1958-59

By 1960, the maximum hourly amount had been reduced to seven minutes. Two events influenced this decision. In 1959, Herbert Morrison MP led an attempt to introduce a Television (Limitation of Advertising) Bill in Parliament, which would have forced an inflexible statutory limit of six minutes per hour, with no averaging. The attempt failed, but during the following year a Research Services survey commissioned by the ITA recorded an increased level of public dissatisfaction with the exposure of TV advertising. More than two thirds of the respondents were unhappy with advertising in 1960, compared with only half in 1957[45].

Other early problems with the process side of regulation arose in connection with possible breaches of the "unreasonable discrimination" clause in the Television Act, and with the practice of something resembling airtime broking, which was not acceptable under the Act, creeping on to the scene. Complaints about the former -"discrimination either against or in favour of any particular advertiser" - could be justified as a result of both lack of demand for advertising, and over demand; the shortfall in orders in 1956 had turned into a heavy demand by 1958.

In the first instance, frantic competition for scarce revenue tempted sales executives to grant exceptionally favourable deals to major advertisers who were prepared to provide long term

[45] Anthony Pragnell. *An Authority View 2,* in Brian Henry (ed.) *British Television Advertising,* op cit. pp. 300 - 301

guarantees of income. Bearing this in mind, the chairman of the TPCA'S Advertisement Committee insisted on strict adherence to the official rate cards, and although some manoeuvring undoubtedly did take place it was not enough to provoke the attention of the ITA. In the second instance, by 1958, when the power and effectiveness of promoting goods on television had become all too apparent, some agencies were trying to establish "spot franchises" for a few major clients, extending over a long period of time and placed in or around high rated programmes. In addition, these big advertisers were willing to pay premiums beyond the going rate to secure these spots. So not only was there a danger of favouritism again, but of an appearance of sponsorship if the same advertiser became too closely associated with a certain programme over a long period of time.

With regard to the attempts at broking, because bookings for airtime could now be made two years in advance, agencies also reserved popular spots on a speculative basis. Some "attempted to retain these valuable spots even when the original advertiser relinquished them, and the contractors issued dire warnings about "airtime broking"[46]. The problem was partly eased by reducing the scope for bookings, and extending the cancellation periods.

In 1957, the ITA was presented with a number of proposed advertising campaigns which it decided could not be shown under the provisions of the Act relating to the prohibition of advertising "by or on behalf of any body the objects of which are wholly or mainly of a political nature", or "which is directed towards any political end". It interpreted this provision very strictly to include what it called "opinion" advertising, ruling that "a company or industry which feels that its activities are in some way threatened by pending legislation or by proposals contained in the programme of a political party, may not insert any advertising designed to affect public opinion about that legislation or those proposals"[47]. But if non-political bodies were not allowed to advertise for political ends, political bodies were not permitted to advertise at all, even for non-political ends such as for staff or accommodation.

The Authority interpreted the word "political" in the context of the Second Schedule as applying to anything related to the government or organisation of the community (national or local), and a "political end" as "the purpose of affecting in some respect, whether by altering or maintaining it, the

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[46] Brian Henry (ed.) op. cit. p. 62
[47] ITA: Annual Reports and Accounts 1957-58, London: Her Majesty's Stationery Office, 29th October 1958, p. 15

manner in which the community is governed or organised"[48]. In considering whether or not an advertisement was meant to affect public opinion in this way, the regulator had to consider the "actual intention" of the body wishing to advertise, as the intention might be apparent not just from the proposed advertisement, but from other evidence such as accompanying publicity statements etc. The question had first arisen in 1956, when the industrialist Sir Bernard Docker had bought airtime to win public support for his battle for the chairmanship of the Daimler Car Company. The Chairman of food manufacturers J. Lyons and Co. had also taken out a two minute commercial in which he explained and praised the company's management aims and practices. The Lyons advertisement could have been taken as an "invitation to invest", banned under the rules on financial advertising[49]. Brian Henry comments that " 'opinion advertising' ....was to present many problems of definition and interpretation over the next twenty years"[50].

Four years later, the ITA was involved in a controversial decision not to accept advertisements for the Daily Worker newspaper on the grounds that it was the official organ of the British Communist Party. The Authority ruled that to broadcast a commercial for the Daily Worker would not only break Paragraph 6 of the Second Schedule of the Television Act, but also Section 3 (1) (g) which stated that "no matter designed to serve the interests of any political party" could be transmitted except as part of a balanced discussion or in a party political broadcast. The ITA's interpretation of the Act in this case was confirmed by legal opinion[51]. More recently, the gay press has been refused permission to advertise on television because the regulator regarded gay magazines as having the aim of forming public opinion. A challenge to the British government's policy of prohibiting paid political advertising on television on the basis that such a prohibition infringed the right to freedom of information guaranteed under the European Convention on Human Rights was nevertheless rejected by the European Commission of Human Rights[52].

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[48] ibid. p. 16

[49] Brian Henry (ed.) op. cit. p. 65

[50] ibid. p. 66 . *Note:* The regulator has sometimes had to make difficult decisions regarding the definition of religious advertising as well. Peter Woodhouse, IBA Head of Advertising Control from 1974-1981, recounts that an advertisement for the New English Bible had to be refused as religious advertising, but a serialised encyclopaedia on witchcraft and magic was accepted, which many thought was anomalous. (P. Woodhouse in B. Henry (ed.) op. cit. p. 375)

[51] ITA : Annual Report, 1960-61, op cit. p 40. *Note:* The Daily Worker complained to the Pilkington Committee that the ban was an infringement of democratic rights. The paper's Editor pointed out that the Daily Herald had been allowed to advertise on television even though its Articles of Association bound it to carry out political policy laid down by Labour Party Conferences, and so had the Daily Express which openly expressed a whole series of (Conservative Party) political aims to which it was dedicated. (Daily Worker Reporter, *Pilkington Committee hears: Our Case for Ad on Television*, Daily Worker 16 / 08/ 1961.)

[52] *Note:* See Chapter 13, p. 299

The ITA Annual Report for 1958-9 contained an outline of how the Copy Clearance procedures handled control of advertising standards. The day-to-day acceptance of advertising was in the hands of the programme companies, as stipulated by the Television Act, and virtually all this work began in the centralised script and copy acceptance department of the Independent Television Companies Association (ITCA)[53]. Agencies sent scripts to this department where they were given a preliminary grading of "acceptable" or "doubtful". They were then sent to the individual companies for each to make its own judgement. In case of disagreement, the normal procedure was for the problem to be discussed by the Copy Sub-Committee of the ITCA and the decisions of this body were then "reported to the full Advertisement Committee of the Association, so that by this means a growing collection of precedents and case law (was) built up"[54]. Where there was any doubt about the application of the *Principles of Television Advertising*, the companies consulted the Authority which consulted the Advertising Advisory Committee if necessary.[55]. The Report went on to say that in view of the rapid expansion of the system and the increase in the volume of work, the ITA had decided to appoint an officer who would be able "to devote all his time to problems of advertising policy and control and to liase with the companies and the ITCA on advertising matters"[56].This post was filled in April 1959 by Archibald Graham.

The extent to which the licensees regulated themselves in the early days is apparent from this brief description. The Authority only became involved if problems arose, but did not routinely vet all scripts prior to transmission as it was obliged to do after the 1964 Television Act. This lack of "hands on" regulation was heavily criticised in the next Committee of Inquiry into broadcasting. The Advertising Advisory Committee, however, was regularly consulted. Among the issues the Committee considered in the first few years of operation were claims made in toothpaste commercials, where it ordered certain commercials to be withdrawn or modified, the advertising of "sedatives, relaxants, hypnotics or stimulants", which it banned[57], and slimming treatments. After

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[53] *Note:* The Television Programme Contractor's Association (TPCA) changed its name to the Independent Television Companies Association (ITCA) in 1958.

[54] ibid. p. 14

[55] ibid. p. 15

[56] ibid. p. 15

[57] *Note:* Forty years later, in December 1994, an advertisement for Britvic orange juice was "dramatically scrapped" by the broadcaster hours before it was due to go on air, merely because it used the voice of a celebrated hypnotist and contained "mystic" scenes. Watchdog groups had complained that it could put viewers in a trance. A series of commercials for another hypnotist's quit-smoking and relaxation videos had been banned the previous week by the current regulator, the Independent Television Commission. (Paul Byrne *Drink Firm Scraps TV "Trance" Ad* Daily Mirror 2nd Dec. 1994, p. 5)

consultation with the Postmaster-General, the ban on advertising of slimming products was lifted provided they did not lead to harmful effects[58].

Changes in ITA policy continued to be made during the next few years before the publication of the latest of the government commissioned reports into broadcasting - the Pilkington - in 1962. The creation, in 1959, of the separate post of Controller of Advertising, and the appointment of three specialists in medicine, pharmacology and chemistry to advise the ITCA's Copy Clearance Committee marked the gradual expansion of the Authority's qualified full-time staff. The number of freelance consultants employed grew as the demands of advertising regulation became more complex.

5. 5 Conclusion.

The relatively short period up to the passing of the Television Act represents an origination phase in the regulatory cycle. Broadcasting regulation in the UK for the first time took on some of the defining characteristics of classical regulation of private business, though by no means all. Once again, public interest theory, especially the conflicting claim version, has the most explanatory value in analysing the form that regulation took.

The political system was responsible for weighing the various claims on behalf of the public interest through the democratic process. And having decided on a suitable compromise, which expanded the notion of public interest to include the claims of manufacturers, the advertising industry, audiences and those working in broadcasting[59]. Parliament settled on a particular legal framework for regulating the new service: a public authority with statutory control over the two participating industries - television and advertising - and the ability to delegate a certain amount of responsibility for control of advertising content to one of the regulated parties, who would operate the enforcement procedures itself.

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[58] ITA: Annual Reports and Accounts 1958-9 op. cit. pp. 15 - 16

[59] *Note:* In the words of the *Memorandum on Television*: " Competition should be in the best interests of viewers, writers, artistes and technicians. There will also be an increasing and urgent demand for filmed television programmes throughout the world, and competition at home should induce vitality and help Britain to produce programmes for overseas markets" (November 1953 White Paper, op. cit. para. 3, p. 1)

Although two industries were now involved in the regulation equation as the subjects of regulatory control, since one was not in existence at the time that policy was decided, and the other explicitly opposed the kind of detailed statutory regulation proposed by the government, economic capture/conspiracy theories are still irrelevant as an explanation of the genesis of commercial television regulation. As David Plowright, former Chairman of Granada Television, has emphasised, "the decision to limit broadcasting in this country was made by Parliament. The ITV companies only came into existence once the rules had been drawn up and the first round of franchises awarded. They found a system already in place which ensured that normal commercial practice could not apply and that the basic pattern of marketing was adapted to the particular circumstances of restricted competition"[60]. So, while it can be argued, and in due course was, that restricted competition, and particularly control of entry to the broadcasting market, was to the companies' advantage, it was not of their making.

The weight of thirty years of broadcasting tradition is also visible in the regulatory arrangements for the commercial service. The television companies were given stringent public service requirements in programming, and strict control of advertising, including the amount and distribution, was considered to be an essential part of the public service ideal. Even a new generation of political leaders with noticeably more pro-entrepreneurial cultural values was anxious to ensure that advertising money did not undermine the high standard of service previous policies had encouraged. Although the ITA was intended to be independent from the state in running its internal affairs with the co-operation of the regulated parties, the theoretical powers of the government over the content of programming and advertising were extensive. Legislation provided for regular consultations with the relevant government departments and ministers (chiefly the Postmaster-General), and mechanisms such as the Committees of Inquiry and the Home Affairs Broadcasting Committee in Parliament enabled the state to maintain a watching brief over the regulator's activities, and act as a source of guidance if necessary.

The composition of the new regulatory Authority in terms of its member's backgrounds was, as Paulu has noted, remarkably similar to that of the BBC, "despite the anticipation that they would tend to be younger, and less representative of the Establishment"[61]. Member's age averaged around

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[60] David Plowright, *Survival and Success I* in Proceeding of the 20th University of Manchester Symposium, *Life After Broadcasting Bill*, Manchester Monograph, 1989, p. 41.
[61] Burton Paulu. *Television and Radio in the United Kingdom*, London: Macmillan, 1981, p. 133

sixty, and they came predominantly from public school and Oxbridge backgrounds. The new regulator could therefore be expected to bring to policy-making on commercial television much the same socio-cultural attitudes as were dominant in non-commercial broadcasting. This did not suggest that a rapid descent down the American path of solely ratings-oriented programming was very likely. The commitment of the government, the advertising industry and the regulator to the public service ideal was very strong, but fears that somehow a dangerous genie had been let out of the bottle were reflected in the sheer quantity of the statutory regulatory arrangements for commercial television, which greatly exceeded in complexity anything the BBC had to comply with.

Chapter 6

Advertising Regulation: The First Critique.

6. 1 Introduction.

Despite the efforts of the ITA's Controller of Advertising and the Independent Television Companies Association's Copy Clearance staff, after five years of operation criticism of the way the Authority was handling advertising control was beginning to build. Members of Parliament across all parties, but particularly in the Labour Party, complained that the amount of advertising on television was still too much, to the extent that its intrusiveness detracted from viewers' enjoyment, and the ITA's own research suggested that viewers were indeed becoming alienated. Five Labour MPs attempted unsuccessfully to introduce a Television (Limitation of Advertising) Bill in June 1959, aimed at imposing a legal limit on advertising time of 10% per hour with no averages. There was also rising concern over the content of advertisements, many of which appeared to be infringing the spirit of the Code, if not the letter.

The government therefore felt it necessary to order a thorough review of how regulation of commercial television was working. It appointed a new Committee of Inquiry, chaired by Sir Harry Pilkington, which started to take evidence in 1960. By the time of its publication two years later, the Pilkington Committee had received so many submissions that the memoranda filled two volumes and more than 1200 pages. Space devoted directly to issues raised by advertising was relatively little, but the discussions in the Committee's Report had a strong impact on regulation policy.

6. 2 Advertising in the Pilkington Committee Report.

The ITA submitted several papers on control of advertising in which it reiterated its commitment to the principle of "complete and manifest distinction between the programmes and the advertisements". The Authority emphasised that it was this principle that distinguished British Independent Television

from all other self-supporting systems of the world[1], and described how it was put into practice, along with other methods of safeguarding standards of conduct in television advertising. It explained that ultimate responsibility for this safeguarding still lay with the Advertising Advisory Committee, who prepared the compulsory code of conduct, but the "main instrument of day-to-day control" was the Copy Committee of the Independent Television Companies Association. The Copy Committee had become a central "clearing house" for the pre-vetting of up to 6000 scripts per year in 1958, and since 196O the ITCA had also been operating a daily closed-circuit pre-viewing of all finished commercials[2].

The ITA understandably presented its achievements in the controversial area of advertising regulation in a very positive light. It angrily refuted charges made by the Advertising Inquiry Council, a non-party-political voluntary organisation founded in 1958 to protect consumer interests, that the AAC contained too many representatives of the advertising industry, while neither the Inquiry Council nor either of the present consumer associations were represented on it[3]. The ITA's defence, that only three of the Committee's members represented advertising interests, and the remaining eight had the consumer's interests primarily at heart, did not in the end convince Pilkington and changes were recommended in the AAC's composition to make it more balanced. A further suggestion by the Inquiry Council that "a Broadcast Advertising Council with a statutory obligation to watch over the advertising material ....from the consumer's point of view" should be established[4] was not taken up.

The ITA also mounted a vigorous counter-attack against the British Medical Association which had fiercely criticised the standard of medical advertising, calling for a total ban on the advertising on television of all over-the-counter medicines. The Authority pronounced it "deplorable that, having seen no grounds over the years for adverse criticism of television medical advertisements through the channel afforded by its representation on the Advertising Advisory Committee, the BMA should have been so sweepingly disparaging in its published Memorandum to the Committee"[5]. It accused the BMA of adopting "special standards of judgement" which it had not seen fit to apply in its dealings with the AAC, in order to pressure Pilkington into supporting the removal of proprietary

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[1] *Report of the Committee on Broadcasting 1960: Volume I. Appendix E: Memoranda Submitted to the Committee, Papers 1-102* (Cmnd. 1819-I), p. 432. (Pilkington II)
[2] *Report of the Committee on Broadcasting 1960: Volume II. Appendix E: Memoranda submitted to the Committee, Papers 103-275* (Cmnd. 1819-I), p. 739. (Pilkington III)
[3] Pilkington I op. cit. p. 446
[4] ibid. p. 446
[5] ibid. p. 447

medicines from the list of acceptable classes of advertisements. While admitting that the system of control had suffered from the "imperfection" that not all of the scripts for over-the- counter drugs commercials had been submitted for checking by the Copy Panel's independent consultant, the ITA concluded that the powerful nature of the existing controls, based on the "exacting and mandatory ...code of standards - *Principles for Television Advertising* - precluded any need for "a discriminatory ban on proprietary medicines in television alone"[6].

The ITA's position was supported by the Proprietary Association of Great Britain who also found the BMA's attitude inconsistent. In its memorandum, the Proprietary Association complained that, without warning, the BMA had suddenly found reason to assert that the extent to which television advertising encouraged "self-medication" was "contrary to the public interest and wholly undesirable"; that the requirements of the Code had been "subtly evaded"; and to propose that yet another committee, "with doctors in the majority", should be set up to view all medical advertisements if a complete prohibition of this class could not be achieved. The Proprietary Association, like the ITA, pointed out that the BMA had "misunderstood" the role of its representative on the Advertising Advisory Committee, who had the right to raise there any objections the BMA might have. It claimed that "adequate machinery for the proper control of television advertisements exists and is exercised", and accused the doctors' trade association of prejudice and ignorance of advertising[7]. Apparently, it was the BMA's failure to go through the proper channels or to use the consultative procedures carefully put together by the regulator and its advisors which caused almost as much annoyance as the criticisms themselves. Unilateral action by one party was seen as undermining the attempt to solve regulatory problems by negotiation and compromise.

These disagreements, together with much of the other evidence submitted, show that opinions on the nature of television advertising were as divided as ever. Some concentrated on its harmful effects and the likelihood of worse things to come if much stronger regulation were not enforced. Others either argued in favour of the status quo, or pressed for a relaxation of the restrictions and more competition. But, generally speaking, the same sets of interests still occupied much the same positions as they had at the time of the Beveridge Report, adjusting only to the fact that commercial

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[6] ibid. pp. 450 - 451
[7] Pilkington III op. cit. pp. 988 - 989

television, for good or ill, was there to stay. The first half dozen years of operation did not bring about any significant changes in attitudes.

For example, Christopher Mayhew, MP, who had led the campaign against the introduction of commercial TV, opened his paper with an attack on "excessive advertising" and the "abuse of natural breaks". He also complained of the "excessive power of the programme companies in general and of the networking committee in particular"[8]. To remedy these defects he recommended limiting the maximum of advertising in any one hour to five or six minutes; amending Schedule Two of the 1954 Act so as to restrict all commercials to the beginnings and ends of programmes; and giving the Authority a powerful say in the network committee. To reduce the power of the companies, break their monopoly of advertising, and decentralise control of British television he proposed a third public service corporation.

The Co-operative Movement, which had also opposed the 1954 Act, questioned whether the principles and rules governing broadcast advertising were being complied with in the spirit as well as in the letter. They, too, were concerned about the harmful effects of the monopoly of advertising revenue enjoyed by the programme companies and proposed a third non-advertising funded channel since they felt that more commercial competition would have a "deleterious" effect on standards. In addition, they wanted a supervisory council similar in function to the Press Council[9].

The Trades Union Congress, representing the broad left, did not see any reason in the light of experience to change its view that commercial television would seek "the lowest common denominator in demand and hinder the raising of broadcasting standards". It considered that the ITA was failing in its duties to subordinate the demands of advertisers to the main function of television, to "entertain, inform and educate the viewers". They complained of the excessive amount of advertising time in a single hour, and of the intrusiveness of showing commercials in breaks rather than in the intervals between programmes[10].

The Viewers' and Listeners' Association, which as the Listeners' Association had spoken out before previous committees in favour of some commercial alternative to the BBC in order to provide more

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[8] ibid. pp. 1135
[9] ibid. p. 1194
[10] ibid. pp. 1256 - 1257

choice, had changed its stance. After some years of actual exposure to advertising on television, the broadcasting consumers' representative body found itself in agreement with Christopher Mayhew that the situation had gone too far, and that the "misuse of advertising" needed rectifying. Like the Advertising Inquiry Council, the Viewers and Listeners Association recommended the appointment of a permanent "Broadcasting Consumers Council" to protect the interests of consumers; a single independent consumer body for all broadcasting is still being demanded by consumer organisations today[11].

On the other side, the National Broadcasting Development Committee, successors to the Popular Television Association, were dissatisfied with ITV's monopoly, arguing that "the way to end a commercial monopoly is to introduce a further measure of commercial competition". A number of Conservative MP's, in line with the free market ideology that had been so powerful a force behind the introduction of commercial television in the first place, also pressed for a third channel to be supported by advertising revenue[12].

Those with a vested interest in the extension of commercial television - large manufacturers and the advertising industry's trade associations - also aired their views in the section of the Report devoted to advertising. The Beecham Group and Thomas Hedley and Co., who had pressed their case before the Beveridge Committee to be allowed to promote their products through the broadcast medium, argued this time for an expansion of commercial opportunities to prevent the contractors from exploiting their monopoly and charging exorbitant rates for airtime[13]. The ISBA, only lukewarm at the time of Beveridge, expressed the view that "television advertising performs a useful service that is often welcomed". It suggested extending the present commercial service to further channels but did not favour sponsorship as a means of financing these channels[14]. The IPA complained of the monopolistic situation which had led to unacceptably high costs, and recommended both increased broadcasting hours and a third station. It agreed with the ISBA in rejecting sponsorship, however[15].

Among those who actually worked in broadcasting, the Musicians' Union repeated their opposition to any form of commercial broadcasting, and called, somewhat optimistically, for the discontinuation

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[11] ibid. p. 1264
[12] ibid. p. 1222
[13] ibid. p. 974
[14] ibid. p. 979
[15] ibid. p. 985

of the ITA and its service[16]. The Actors' union, Equity, did not favour such a drastic solution, but still did not wish to extend the power either of the BBC or the of ITA. They accepted the need for some competition and proposed, as had many other contributors, a pay-as-you-view, or subscription, channel[17].

The views expressed in the Pilkington Committee amounted, on the whole, to more of the same. Attitudes towards advertising's present reality were still rooted in the past, and most arguments concerning the advantages or disadvantages of commercial funding for British broadcasting, sound or television, had been rehearsed before previous committees. Nevertheless, Independent Television, to all but the Musicians' Union, was an established fact, if not a universally approved one, and the debate had to be adjusted accordingly. For one side, the problem was now how to keep its paymasters under tighter control, and for the other, it was how to increase their scope and opportunities.

The one noticeable exception was the press, one of the most powerful voices of the anti-commercial broadcasting lobby since the 1920's, whose interests had been protected and deferred to by all the special broadcasting committees. Having been unable to beat the system, some press organisations had joined it as shareholders in the network companies, and others had turned down the opportunity, giving them less reason to complain[18]. Their routine protests are therefore conspicuously absent from the Pilkington Report.

It was the task of the Pilkington Committee to draw conclusions from the huge pile of evidence submitted to it and to take broadcasting policy-making in the UK a step further with its recommendations. Commercial television in Britain had only been in operation for seven years by the time the Report was presented and was still in the experimental phase. It was based on a two-tier system under which the ITA transmitted the programmes produced by the contractors, together with the advertisements which had financed them. Pilkington considered that this two-tier constitution unduly favoured the programme companies, and left the Authority with a control over network

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[16] ibid. p. 796
[17] ibid. p. 786
[18] *Note:* After the establishment of the ITA, "most of the principal programme companies were partly owned by newspapers, and with the advent of commercial radio in 1972, their involvement was increased. In 1959, even the Guardian became a stockholder in Anglia TV". (Burton Paulu. *Television and Radio in the United Kingdom*, London: Macmillan, 1981, p. 60)

arrangements, programming and advertising that was "illusory and negligible"[19]. It recommended a radical re-structuring which would give the ITA considerably more powers.

Specifically with regard to advertising, the Committee was deeply critical. It held that the two purposes of Independent Television - to provide both public service broadcasting and a service to advertisers - were fundamentally incompatible. It considered the first to be the main objective, and the second as "incidental", i.e. necessary only in so far as it served the first. But under the existing system the commercial product, the saleable product of the programme contractors, was not the programmes but advertising time, and the financial rewards derived from making the product as attractive as possible. As commercial concerns the companies were likely to treat the sale of airtime as their main objective to the detriment of programming standards. As long as the constitution of Independent Television dictated that the network companies should be in charge both of programme production and airtime sales, just to increase the regulatory powers of the ITA would not be enough to redress the balance[20].

Pilkington rejected the assurances given by the ITA in its paper that the situation was on the whole satisfactory and that it neither needed nor desired any extension of its powers. In order to "remove from programming production the commercial incentive always to aim at maximum audiences and maximum advertising revenue" the Committee recommended the following systematic changes:

i) The Authority to plan the programming.

ii) The Authority to sell advertising time.

iii) Programme companies to produce and sell to the Authority programme items for inclusion in the programme planned by the Authority.

iv) The Authority, after making provision for reserves, to pay any surplus revenue to the Exchequer[21].

While the Committee was still sitting, the Chancellor of the Exchequer announced, in 1961, that it would impose a 10% tax on television advertising revenue - the Television Advertisement Duty. This was the first of a series of unwelcome attempts by the Treasury to cream off some of the increasingly

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[19] *Report of the Committee on Broadcasting 1960* (Chairman: Sir Harry Pilkington) (Cmnd 1753) London : HMSO, 1962 para 567, p. 167, (Pilkington I)

[20] ibid. para 569, p. 167

[21] ibid. paras 578-579, pp. 169 - 170

large profits made by the programme contractors. Needless to say it provoked an outcry, particularly from the agencies whose commission would be chargeable only on actual airtime rate not including TAD, reducing overnight their gross margins. Since a similar tax was not extended to advertising in the press a considerable proportion of advertising revenue switched away from television to the press[22].

The Pilkington Report is evidence that even after a relatively short period into its operation, regulation of advertising, both process and product, was fairly widely perceived to have failed in a number of ways. The Committee itself did not accept the regulator's submission that everything was satisfactory; the judgement that oversight was "illusory and negligible" was a severe one. From Pilkington's point of view, the regulatory Authority had allowed the contractors too much freedom to regulate themselves through the copy clearance system which had led to laxness in enforcing the rules. But this was not just the fault of the ITA, the system itself was deficient. Although the ITA had argued that a firm commitment, within the existing structure, to the principle of maintaining separation of programme content from advertising was enough to guarantee standards, Pilkington believed that only by radically altering the structure of the regulatory system would the "fundamental incompatibility" of the two purposes of independent television be reduced. Removing the television companies' right to sell airtime and vesting it with the regulating Authority - a public body - would remove the temptation for the companies to put profits from airtime sales above the production of quality programmes.

6. 3 Some Repercussions of the Pilkington Report.

The ITA had, with some reason, been shocked by the BMA's sudden attack on its competence, not to mention the proposed total ban on the advertising on television of proprietary medicines freely available over the counter and freely advertised in other media. It took steps to deflect further criticism in 1961, even before the Report had been published, by ordering a thorough review of scripts and visuals for 184 medical products. Claims which overstressed the effectiveness of self-medication were not allowed, and the practice of using celebrities to promote products was discontinued.

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[22] Brian Henry (ed.) *British Television Advertising*, London : Century Benhas, 1986, p. 85

By 1962, however, it was becoming clear that more radical decisions would have to be made to limit the advertising of tobacco products. The ITA Annual Report for the year 1961-1962 noted that, following the Royal College of Physicians announcement in March 1961 of the links between cigarette smoking and lung cancer and diseases of the respiratory tract, the Authority would review the advertising of cigarettes in consultation with the Advertising Advisory Committee. Tobacco manufacturers, at the same time, decided to cease advertising tobacco products before 9 p.m., when many children were watching[23]. In June 1962, the Authority announced that certain types of appeal would be unacceptable in future: excessive emphasis on the pleasures of smoking: exploiting the heroes of the young in commercials, or appealing to "pride or general manliness", and the use of fashionable social settings, or "romantic situations and young people in love" to promote smoking[24]. These rules, along with several others designed to reduce the attractiveness of cigarette smoking, were included in the Code of Practice.

The 1962-63 Report stated that "the tobacco manufacturers and their agencies co-operated willingly in the application of the new code"[25], and around 80 commercials had been either modified or withdrawn and replaced. It concluded with some satisfaction that the manufacturers had subsequently decided to carry into other media the rules drawn up by the Authority for television advertising.

With regard to children's advertising, the same Report declared that although the rules contained in the *Principles for Advertising* had always been applied stringently, it would nevertheless, with the approval of the AAC, expand the *Principles* to include a new appendix containing further "interpretative rules". Advertising magazines had also been under threat, since it could be argued that they breached the spirit of the rule that advertising matter and programming should be kept clearly separate. They represented a curious hybrid, simultaneously both a commercial and a programme. The ITA restricted their numbers in 1962 and tried to find a formula which made their advertising purpose clearer. This was not enough for the Pilkington Committee, however, which recommended their discontinuation and an order to this effect was made by the Postmaster General in March 1963.

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[23] ITA : Annual Report and Accounts 1962-63, London: Her Majesty Stationary Office, 30th of July 1963, p. 35
[24] ibid. p. 35
[25] ibid. p. 35

On amount and distribution, the 1962-63 Report included a small table to illustrate how had policy had developed since 1955.

"Subject to the overriding limit of spot advertising an hour over the day, the maximum amount of advertising in any one clock hour has been reduced over the years as follows:

Figure 6.1: Advertising Minutage 1955 - 63

1955-57	No limits
1958	8 minutes
September 1960	7 1/2 minutes
September 1960, and to date	7 minutes

***Source:** ITA: Annual Report and Accounts 1962-63*

In practice, over the year 1962-63 as a whole, an average of 4.5 minutes of spot advertising per hour was transmitted on each station. The average between 7 and 10 p.m. was 6.2 minutes"[26].

Advertising had been distributed in an average of three intervals an hour between programmes or in natural breaks within programmes, with very little divergence from the average, since the considerable reduction of 20% in the number of natural breaks made in the winter of 1960. The following paragraph taken from the Report gives a revealing insight into the kinds of considerations the regulator had to take into account, and the manoeuvres necessary to obtain a reasonable compromise.

"Of the intervals used for advertising 55 per cent were between programmes, and very few of those that occupied "natural breaks" were of a kind that might be expected to cause irritation. Nevertheless, by continued attention to the techniques of transition from programmes to advertising intervals; by experimentation with methods of extending the length of advertising intervals and so making possible a slight reduction in their number; by changing the order of advertisements where justified to avoid the more obvious clashes between advertising and programme moods; and, on the

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[26] ibid. p. 34

Authority's part, by allowing occasionally a little flexibility in the application of the spot advertising "clock hour maximum" so that an interval could be used on one side of the striking hour rather than another - the Authority and the programme companies sought to achieve on balance the smoothest possible presentation of programmes and advertisements"[27].

Intervals of advertising were normally 2.5-3 minutes long which was regarded as "as much as it is reasonable to broadcast"[28]. Again flexibility was the key. Programme companies were allowed to experiment with selling a period of more than three minutes to a single advertiser "whose product might justify prolonged demonstration", or a series of advertisements could be grouped together around a theme and this might excuse a longer than average interval.

These extracts show the extent to which the Authority was involved in the details of timing regulation even before the consolidated Television Act 1964 gave it an increased mandate to do so. They also give an idea of the way in which non-legally defined limits on timing allowed for greater flexibility of interpretation. There was still some room for the regulator and the companies to experiment. Shortly after publication of the Pilkington Report in July 1962 the government produced a White Paper. This exploratory document initiated a period of debate before any final decisions about the future of British broadcasting were made. It rejected the Committee's recommendation to change the constitution of the ITA and proposed the introduction of a third channel in colour which should go to the BBC.

On advertising, it accepted the success of the hourly average of six minutes and did not recommend that the amount should be regulated by law. It agreed with Pilkington that admags should be abolished and that subliminal advertising should be specifically prohibited; called for discussion with the Authority on the problems of natural breaks and advertising in children's' programmes; and considered granting statutory powers to the Copy Clearance Committee's medical consultants[29].

A second White Paper in December developed these ideas further and announced that the ITA was to be given "more formal and direct control over advertising"[30]. The AAC must also include some

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[27] ibid. p. 34
[28] ibid. p. 34
[29] *Broadcasting: Memorandum on the Report of the Committee on Broadcasting.* 1960, (Cmnd. 1770), 1962, p. 9 (July 1962 White Paper)
[30] *Broadcasting: Further Memorandum on the Report of the Committee on Broadcasting.* 1960. (Cmnd. 1893), 1962, p. 8

consumer representation from the general public. The government had not been convinced by the advertising industry lobby that there was either sufficient public demand or potential revenue to support a second commercial station and ruled it out for the time being.

6. 4 The Television Act 1964: Further Controls on Advertising.

When the Television Act was finally consolidated in March 1964, it carried over most of the previous provisions on advertising, supplemented by some of the proposals contained in the Pilkington Report and its own consultative documents[31].

The wording of the 1964 Act with regard to advertisements contains some significant changes from the its predecessor.

Section 8 (1) provided that: It shall be the duty of the Authority -

(a) to draw up, and from time to time review, a code governing standards and practice in advertising and prescribing the advertising and methods of advertising to be prohibited, or prohibited in particular circumstances; and

(b) to secure that the provisions of the code are complied with as regards the advertisements included in the programmes broadcast by the Authority.

This removed the obligation from the Advertising Advisory Committee actually to produce the Code itself, as it had done with the *Principles for Television Advertising*. Direct control was shifted to the Authority. The Committee, which from then on had to include representation of the public as consumers, was only charged with a duty to keep the Code under review and submit recommendations for alterations when necessary. It would no longer actually draw up the rules as it had done previously. Its advice ceased to be binding, removing its formal powers to make major decisions about the standards of conduct affecting television advertising. The 1954 Act had left the terms of reference of the AAC's task deliberately vague "so as to avoid hamstringing the Authority in advance with a number of detailed rules"[32]. But now that the ITA had worked out its own modus

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(December 1962 White Paper)

[31] *Note:* The revised Rules as to Advertisments *(Schedule 2)* are given as Appendix 3 and as the new Code of Advertising Standards and Practice as Appendix 4.

[32] Anthony Pragnell. op. cit. p. 308

operandi with the television companies it made more sense that both initiative and ultimate authority with respect to drawing up detailed statutory rules should reside with it and not the AAC.

The Act required the Authority to satisfy itself that the chairman of the Committee has "no financial or other interest in any advertising agency"[33] nor any other "financial or other interest in advertising as is in the opinion of the Authority likely to prejudice his opinion as chairman"[34]. This ruled out anyone like Robert Bevan, the AAC's first chairman, who was also chairman of S.H. Benson, the advertising agency.

The Act also required the appointment of a Medical Advisory Panel which the Authority had to consult before drawing up the Code referred to in *Section 8*. The Medical Panel's advice, unlike the AAC's, would be mandatory, a measure of the influence of the medical establishment and the seriousness with which medical advertising viewed by policy-makers. Advertising for proprietary medicines would still be permitted, however.

The powers of the ITA over amount and distribution were clarified and extended in *Section 8 (Subsections (3) and (4))*. The Authority could give directions to a programme contractor regarding the amount of time to be given to advertisements in any one hour or period, the minimum intervals between commercial breaks, the number of breaks, and the exclusion of advertisements from specified broadcasts.

By these measures the government sought to address the concerns expressed in the Pilkington Report, which had a much more immediate and direct influence on broadcasting policy than Beveridge had had. It could be argued that it was not an entirely positive influence. The Committee seems to have paid more attention to the critics of television advertising, and taken an unjustifiably gloomy view of the amount of misleading or harmful commercials shown. However, the decisions to include consumer representation on the AAC and to cancel the legally binding nature of the Committee's advice were undoubtedly sound. Abolishing admags, which were popular, seems a bit harsh, but it was not easy to reconcile them with the principle of distinguishing clearly between programme and advertising. The generally disapproving tone of the Report's references to advertising

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[33] Television Act 1964, Eliz. 2, Ch. 21, 1964, Section 9(4) (a)
[34] ibid. Section 9(4) (a)

led to a more interventionist approach by the ITA, and reduced the chances of further commercial competition in the foreseeable future. It was to take another twenty years before the idea became an acceptable policy option.

The ITA's Report for 1963-1964 welcomed the "clarification" of its powers over the amount and distribution of advertising[35], although it had originally claimed that it did not need any extension of its powers. The Authority announced that it would keep to a six minutes per hour daily average and a seven minute maximum, but was prepared to be flexible in exceptional circumstances when the fourteen minutes permitted in two adjoining clock hours might be split unevenly.

Coverage of Royal ceremonies, religious and schools broadcasts still had to be insulated from commercials by a two-minute interval. The Religious Advisory Committee, however, proposed the de-insulation of late night religious broadcasts on the grounds that "the impact of religious programmes might be diminished by their seeming to be set apart from other programmes or epilogues was to be implemented on the programmes"[36]. This implies at least some acknowledgement of the attractive, as opposed to the intrusive, aspect of advertisements which can help to retain viewers' interest until the next programme. Natural break rulings were complex, but aimed at limiting commercial breaks to an average of three an hour during a week's broadcasting. The rule prohibiting breaks in news bulletins, including combined national and local news bulletins, remained[37].

The new composition of the AAC was announced: four members concerned with the consumer's general interest in advertising, four members with professional interests in the standard of medical and allied advertising, and four members of the advertising industry. The newly formed Medical Advisory Panel comprised members from the twelve professional medical organisations listed by the Postmaster General including the main medical, surgical, dental, pharmaceutical and veterinary associations of England and Scotland. Their advice would be sought on the claims made and the methods of presentation used in television advertisements, giving the sanction of the law to the

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[35] ITA: Annual Report and Accounts 1963 -64, London: Her Majesty's Stationary Office, 30th July 1964, p. 46
[36] ibid. p. 48
[37] ibid. p. 47

existing practice under which they had acted independently for the programme companies on a non-statutory basis[38].

Fulfilling its duty under the recent legislation, the ITA itself drew up a new code drawing on the old *Principles of Television Advertising* which had served it well as a basis for control. Almost all its provisions were included in the new Code, with some additions implementing the requirements of the most recent legislation. The ITA also had consultations "about advertising standards in general with those concerned with the self-disciplining activities of the Advertising Standards Authority and the Code of Advertising Practice Committee"[39], the two bodies responsible for standards in non-broadcast advertising.

The ASA had recently been set up by the advertising industry to police itself in the hope of avoiding an increase in statutory regulation. It worked in conjunction with another voluntary body, the British Code of Advertising Practice Committee, and together they had produced a Code of Practice which owed a great deal to the *Principles of Television Advertising*. Based on these joint consultations, the ITA produced a new Code in June 1964 entitled *The Independent Television Code of Advertising Standards and Practice. The British Code of Standards Relating to the Advertising of Medicines and Treatments*, which television shared with the print media, was once more included.

The very fact that there had been such an upsurge of self-regulatory activity in advertising, driven by the need to control television advertising, tends to disprove the theory that commercial television would automatically lead to a decline in general standards, and the corruption of public life. In the event, advertising on television had brought the industry into focus as never before, and raised its awareness of the need for better self-policing as an alternative to more legislation.

In order to apply the stringent new controls over the executive decisions relating to the acceptance of advertisements, the ITA's Advertising Control Office, as well as the Copy Clearance Committee, started to receive copies of proposed scripts of all but the most minor local ads, and to review all finished films. The Authority was easily able to adapt the existing machinery to cope with the increased day-to-day involvement with copy clearance required by the 1964 Act. To formalise this

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[38] ibid. p. 50
[39] ibid. p. 51

arrangement a Joint Advertisement Control Committee was set up composed of specialist staff of the Authority and the contractors, under the chairmanship of the ITA's Head of Advertising Control.

6. 5 1964-1972: Regulation as Usual.

Throughout the rest of the 1960's, Independent Television continued to develop but the framework for advertising control provided for in the 1964 Act did not undergo any further significant changes. The one major upheaval was the final banning by the Labour government, elected in 1964, of all cigarette advertising on television. This measure was announced by the Postmaster General in Parliament in March 1965 and took effect on August 1st. It represents one of the few occasions when the state took advantage of its legal powers to intervene directly in the regulation of a specific class of advertisements.

The ITA's 1965-1966 Report reveals that in that year its Advertising Control Office received a total of 7,700 pre-production scripts for inspection, an annual figure which remained relatively stable over many years[40]. About 8% of non-medical scripts had to be amended to bring them into line with the Code compared with about 16% of semi-medical and 30% of medical scripts. This shows the high priority the Authority gave to ensuring the compliance of this class of advertisements with the rules.

That only 1% of finished films needed editing before approval was granted demonstrates the effectiveness of the revised pre-transmission vetting procedures carried out jointly by the ITA and the Copy Clearance Secretariat. With regard to the Advertising Advisory Committee, the Report pointed out that as a result of the increased powers of direct action accorded the ITA in 1964 the AAC had "fewer problems to resolve and does not need to meet as regularly as in former years." Its value as a forum for the discussion of matters of general principle was nevertheless still recognised[41].

In 1968, the year of the renewal of the ITV companies' contracts, the ITA had to take on board two new pieces of general legislation concerned with advertising standards in all media: the Trade Descriptions (No. 2) Bill, and the Medicines Bill. The Annual Report for that year states that "there

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[40] ITA: Annual Report and Accounts 1965-1966, London: Her Majesty Stationary Office, 16th November 1966, p. 50.
Note: It has recently increased to approximately 12,000.
[41] ibid. p. 53

were consultations with the Ministries concerned to ensure that the provisions of the Television Act 1964 were taken into account in the drafting of these Bills and that the Authority's position as regards television advertising, which is that of an official instrument of consumer protection, would not be weakened"[42]. It was clearly important that the regulation of television advertising should not be considered in isolation from independent consumer protection legislation and that there should be maximum harmony between special rules for television and the law of the land. .

In addition to its interaction upwards with state as the level of authority above, the ITA also recorded the results of its interaction outwards with the viewing public. Although it received very few letters about advertising - only sixty in 1968 out of fifteen million homes receiving ITV - the regulator claimed that there was "a very lively interest in television advertising matters at the many public meetings addressed by the Authority's senior Headquarters staff and Regional officers"[43]. The Television Act, the Code of Practice and the machinery for its implementation were explained during these meetings, and public comment invited. In this way the Authority was able to keep in touch with people's feelings about the effectiveness of regulation. It was satisfied that viewers were, on the whole, now more content with the amount and distribution of advertising, and were happy to have it as an alternative to paying an increased licence fee for television services. This impression was confirmed by a national survey commissioned in 1970, where eight out of ten people said that they preferred advertising to a higher licence fee. 44% claimed to enjoy all advertising, while only 17% disliked it. This is a considerable improvement on the 1960 figures, but it is quite possible that growing familiarity with commercials on television had lessened their negative impact.

The Code of Advertising Standards and Practice was updated at that time in order to take account of the two new Bills, and to harmonise with the self-regulatory Code, *The British Code of Advertising Practice*. The revised version was appended to the Annual Report.

By 1971, the ITCA was busy making plans for the increase in broadcasting hours recommended by the Prices and Incomes Board. The Association, together with the ITA, was also preparing for the second commercial channel which all parties with a stake in commercial television had been pressing for some time. Various possibilities were investigated: a service provided by a new set of contractors

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[42] ibid. p. 53
[43] ibid. p. 57

to compete with the existing channel, an option favoured by the ISBA; a general service independent of both BBC and ITV; and a fourth specialised channel.

The ISBA also lobbied for an extension of broadcasting hours and the removal of the exchequer levy. The levy had replaced the Television Advertisement Duty in 1963, when a two-part system of rentals for the contractors been set up. The second stage of the rental consisted of a direct charge on net advertising receipts in excess of £1,500,000. The exchequer would take up to 45% of a net turnover of £7,500,000 or more. This system proved fairly onerous over the years, and remained the source of much irritation to the companies. In effect, it penalised profitability and acted as a disincentive to keeping costs down[44]. This aspect of process regulation has caused difficulties throughout the life of Independent Television in the UK, and company accountants have been kept busy devising ways of keeping money out of the hands of the Treasury. In the event, all planning turned out to have been in vain; the government postponed the additional service and removed all restrictions on broadcasting hours instead.

6.6 Conclusion.

There are a number of ways in which the events of the first two decades of operation of the Independent Television Authority, as an agency dedicated to the regulation of private business in the UK, conform to some of the theoretical perspectives discussed previously. There are, nevertheless, ways in which the empirical circumstances does not fit, and a particular theory either does not explain what happened or needs some modification.

For example, although progressive public interest theory and regulatory failure theories are helpful, they presuppose that a regulatory agency "concentrates its attentions on a single industry or group of closely related industries", as specialisation helps it to discover what the public interest is in a given area[45]. In the case of commercial television in the UK, however, the agency is responsible for regulating two different industries who are related only as seller is related to buyer within a pre-determined regulatory structure. They are not naturally related in terms of goods or services on offer to the public, or in terms of aims and objectives. These objectives are, as Pilkington pointed out,

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[44] Brian Henry (ed.) op cit. p. 99

[45] Marver Bernstein, *Regulating Business by Independent Commission*, Princeton: Princeton University Press, 1985 , p. 157.

incompatible according to the terms under which the regulatory agency was set up. To regulate in favour of one industry is likely to disadvantage the other. The regulator, therefore, not only has to find a way of reconciling industry and consumer demands, but opposing industry demands as well. Regulation of Independent Television in this country, however, is mainly directed at promoting the ability of television companies to provide a quality service, and thereby "serving and advancing the public interest"[46] before the interests of advertisers. The advertising industry, which had adopted a firm public interest stance with respect to programming at the genetic stage of regulation, found that, in practice, regulation left them with second class status[47]. Although at the beginning the claim of advertisers that their participation in television represented the public interest was judged to be justifiable, the regulatory system still gave far more weight to the claims of programme producers and consumers.

So the television regulator suffers not just from the difficulty noted by Bernstein that its general objectives of promoting and restricting are sometimes in conflict, but also from having to regulate two separate industries whose agendas are obliged to be entirely different as a specific requirement of regulation policy. The television Authority has to decide where the public interest lies in two distinct areas, programming and advertising, which are only related within the given regulatory structure; and it can fail to do justice not only to viewers and listeners, but to one or another industry as well.

Although McQuail's definition of the public interest can be applied in the context of advertising regulation, it is more relevant to the process side. The various solutions to the perceived failure of the regulatory structure which were considered by the Pilkington Committee can be taken as competing claims to represent the public interest. Alternatives to the status quo of duopoly, which envisaged either non-advertising funded additional services, or more commercial competition, were prima facie justifiable within the political and legal system.

In the case of product regulation of advertising, since it is more concerned with protecting the viewing public as consumers of the goods and services promoted on television than as consumers of

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[46] *Television : The Viewer and the Advertiser*, A Memorandum on Competitive Television and Draft Suggestion for the Regulation of Programmes, Submitted Jointly by the ISBA and the IPA to H.M Postmaster General, April 1953, p. 5

[47] As the ISBA complained: " as there is a strictly limited amount of airtime available for advertising, the ITV companies have been able to impose terms and conditions of business which are very much in their favour.....This has resulted in high profits which the Government of the day has found necessary to control by means of a levy on advertising revenue." (ISBA/IPA: *Television 76: The ISBA/IPA View*, Incorporated Society of British Advertisers, Institute of Practitioners in Advertising, November 1972, p. 13)

programmes there are fewer competing claims. It makes more sense, therefore, to view the public interest in the traditional way as the protection of potentially vulnerable consumers from the activities of powerful producers, who may be tempted to abuse their right of access to the broadcast medium. There is only one possible competing claim: that consumers have a right to information and too much regulation interferes with advertisers' ability to give this information. This claim was not actually made on any scale by advertisers until the late 1970s and early 1980s, and will be dealt with in more detail in Chapters 12 and 13.

Capture theory also has something to say about advertising regulation. Pilkington and other critics believed that capture had occurred as an effect of the practical operation of regulation. In their opinion, the regulator was excessively sympathetic to the difficulties of the programme contractors, and the copy clearance mechanism had permitted contractors to influence the way in which enforcement of the rules was carried out. The Advertising Advisory Committee, as a consumer protection mechanism was too heavily weighted in favour of the advertising industry, to the extent of having an advertising executive as its chairman, and its advice was mandatory. This structural bias in favour of both the regulated industries helped to account for the feeling that the public interest in the area of advertising control had been perverted.

Stigler's version of capture theory, which sees regulation as facilitating cartel management by the regulated industry, can be applied to the empirical facts of the operation of the regulatory system, even if it had been initiated by the state and not by industry. The system had been designed intentionally to allow the television companies to operate as a cartel protected by strict controls on market entry, but clearly the repercussions of this system had not been fully anticipated. After their initial problems in getting enough advertising revenue, the network companies became so profitable that Lord Thomson was prompted to make his much quoted comment that they had been given "a license to print money". Pilkington was unhappy that the regulatory system set up under the original Television Act gave so much power to the programme contractors, but felt that the solution was not to ease controls on market entry and provide more competition, but to provide a more powerful regulatory structure.

Perceptions of regulatory failure are nevertheless bound to be to some extent subjective. Even if many people had expressed reservations about the principle of a broadcasting duopoly with one

partner having a monopoly of airtime for commercial purposes, it is quite possible to argue that, in the particular case of broadcasting, this type of regulatory structure constituted not a failure, but a necessity. For precisely the same reasons that the broadcasting system as a cultural institution, embodied in the BBC, had been insulated from the market, its extension, in the form of Independent Television, also had to be protected to some degree. The overriding purpose of regulation was to provide the right conditions for public service broadcasting to continue to flourish, and if the price turned out to be a powerful cartel with monopoly rights to a valuable commodity it was a price worth paying. This is the view the government took in rejecting calls for more commercial competition at that stage, merely increasing instead the powers of the ITA with respect to advertising.

During its first two decades, the ITA gradually developed its own mode of doing regulation based on certain familiar aspects of British culture. The search for pragmatic rather ideological solutions and the impulse to reach them by consensus decision-making and compromise rather than an adversarial approach are part of the British tradition [48]. A dislike of extremes, the emphasis on fairness and the "nannying" role of public institutions are all reflected in the behaviour of the commercial television regulator. It is interesting that what organisational critiques of regulation tend to see as a sign of regulatory failure, i.e. the impulse to compromise and form "consensus networks" in order to minimise conflict, has always been viewed as one of the strengths of the UK system, particularly in the area of advertising control. Although there is a line beyond which compromise turn may into unnecessary concession, the regulating Authority for commercial television has always believed that obtaining a consensus is essential to the decision-making process.

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[48] *Note:* It has been pointed out to me by Howard Tumber that the legal and political systems in the UK are adversarial. While this is entirely true from a formal point of view, I have been trying in this study to explore some of the ways in which *informal* attitudes and values influence the actions of those involved in regulation, both in creating formal structures, and in operating within them in real life.

Chapter 7

The ITA Becomes the IBA.

7.1 Introduction.

In 1972, following the government's decision to permit commercial sound broadcasting at local level, the ITA was given the additional responsibility of regulating the new Independent Local Radio system, an alteration in broadcasting regulation that eventually became law on 23 May, 1974. This necessitated a change of name and the ITA was re-titled the Independent Broadcasting Authority (IBA). The new regulatory function did not have any direct bearing on television advertising control, but as the IBA intended to use the existing copy clearance framework for vetting scripts for radio advertisements this meant expanding it appropriately.

The Authority took the view that because radio is a more low-key and less threatening medium than television - advertisements would only be broadcast to relatively small local audiences, and radio's role as the centre of family entertainment in the home had long since been taken over by television - vetting procedures need not be as strict as those for television. There was also "a special need for speed and flexibility in dealing with the requirements of radio advertisers"[1]. The IBA therefore left the sound broadcasters with a greater degree of freedom to clear scripts at local level rather referring everything to the central Clearance Secretariat. These arrangements for ILR would be used as a model by the 1984 Hunt Committee in proposing more flexible regulation of Cable television, when political and technological changes once again provided the driving force for a paradigm shift in broadcasting regulation. The period up to and including the 1980 Broadcasting Act, however, was still dominated by the second paradigm - duopoly - even though a further commercial channel and a commercial breakfast service were inaugurated during that time, and, by the end of it, the phenomenon of Thatcherism had arrived on the nation's political scene.

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[1] Independent Broadcasting Authority (IBA) : *Annual Report and Accounts 1973-74*, London : Home Office, 31st March 1974, p. 38

7. 2 The Run-up to the Annan Committee.

1972 also saw a major confrontation between ITV and the government following the publication of the Parliamentary Select Committee on Nationalised Industries' Report into the workings of the commercial television Authority. The Select Committee believed that although the Authority was technically competent and conscientious, in general "it was too much influenced by the needs of the companies which (were) its agents, too cautious in testing new forms of programmes and in affording greater public access to the medium and to industry"[2]. The extent to which advertisers influenced events was also criticised, and the Report recommended that the provisions of the 1964 Act on natural breaks should be more strictly observed; that discussion programmes should be broadcast during which consumers would have the chance to test products on air and answer the claims of advertisers; and that advertising should be "bunched" into blocks of up to thirty minutes, as practised in Germany, Switzerland, Holland and Italy, and other ways of spacing advertisements considered so as to reduce the pressure for maximal audiences.[3]. These suggestions reflected the rise in power and influence of the consumer movement in the 1970s, both in the UK and Europe, as a result of which the advertising world found itself faced with a much more vocal and organised opposition than before[4].

An advertising working party was formed by the programme contractors, the IPA and the ISBA to fight these proposals which they felt would seriously damage the health of ITV. In a discussion document issued by the working party, they pointed out that the term "natural break" had never been legally defined so as to leave a degree of flexibility to directors of programming, and the regulating authority had, in any case, been reducing their number and length since 1955. In answer to the suggestion that the "block" system of advertising should be adopted, the group argued that in those countries where it was in operation the stations did not depend solely on advertising revenue but received a share of the licence fee as a supplement to their income. In addition, permitting only one thirty minute block per night would reduce the amount of advertising by one third, an intolerable situation[5].

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[2] *Second Report from the Select Committee on Nationalised Industries, together with minutes of proceedings of the Committee, minutes of evidence, appendices and index (Session 1971-72: HC 465)* London : HMSO, 1972, para 170, p. lxix

[3] ibid. paras, 79, 81, 82, p. xxxviii

[4] *Note:* An account of these developments is given in Chapter 13.

[5] Brian Henry (ed.), *British Television Advertising*, London : Century Benhas, 1986, pp. 146-147

With respect to allowing consumers to debate specific claims on air the representatives of the television companies and the advertising industry felt that "products were best tested (and reported on) in print, and drew attention to the fact that the Government had just decided to appoint a Minister for Consumer Affairs who was probably in a much better position than the broadcasters to make a decision on the most effective means of protecting the shopper"[6]. Fortunately for them, the Minister responsible agreed and the SCNI's recommendations were shelved for the time being.

Towards the end of the year, the IBA issued a new edition of the Code to include the rules on advertising on radio, and to update the television guidelines, taking into account cases on which decisions had been made since the last edition. Rules on preventing even an appearance of sponsorship were clarified. The Authority was particularly concerned about the use of "a small number of regular broadcasters", or well known television characters in commercials, which might suggest that Independent Television as such was seeming to support the case of one advertiser or another through the use of these personalities. The companies received a warning about this practice and ITN newscasters were forbidden to appear in commercials at all[7]. A considerable body of case law had meanwhile been accumulating which made the task of those responsible for enforcing regulation easier, but perhaps made the system less open to innovation from an advertising point of view.

In 1973, the IBA put forward further proposals for the additional commercial channel, which was once more under consideration by the government. The regulator conceived of it as a complementary rather than a competitive service which would cater for minority and specialist interests. Complementary scheduling could only be done, however, if ITV were to operate a joint programme planning system with the fourth channel. Scope was also envisaged for the statior to be supplied with programmes by the regional companies or independent producers[8]. The Authority disagreed on this issue with the IPA and ISBA who were concerned that if the new channel were operated by existing contractors, even with an increased role for the IBA, their stranglehold on airtime would become even greater. To avoid this, advertising interests argued for competitive advertising on ITV 2. The IPA also advocated that some advertising time should be sold by BBC1[9].

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[6] ibid. p. 147
[7] IBA: Annual Report and Accounts 1973-74, op cit. p. 39
[8] ibid. p. 9
[9] Second Report on SCNC, 1972, op. cit. para 78, p. xxxviii

The ITCA's plan was that a separate company would be formed, with the contractors as shareholders. Scheduling would be organised along the IBA's recommended lines, but with a large proportion of independently produced material. Since it was unlikely that the channel would be self-financing it would be subsidised by ITV l, both directly, from advertising revenue, and indirectly from "surplus studio production resources"[10].

Again the government delayed making a decision. In March 1974, after fifty years of regulation, the regulatory responsibilities for broadcasting were removed from the Postmaster-General and transferred to the Home Office. Within a short time the Home Secretary, Roy Jenkins, had appointed another broadcasting committee. Headed by Lord Annan, its brief was to consider the future of broadcasting and "to propose what constitutional, organisational and financial arrangements should apply to the conduct of all these services"[11].

In the same year, the IBA Act became law, consolidating the Television Act 1964 and the Sound Broadcasting Act 1972. The wording of the provisions on advertising in Sections 8 and 9 is unchanged from the 1964 Act, apart from the substitution of "the Minister" for "the Postmaster-General" in Section 8 Subsection 9, following the transfer of responsibility for broadcasting to the Home Office.

7. 3 Advertising in the Annan Committee Report.

The Report of the Annan Committee was finally published in March 1977, having taken written and oral evidence from approximately 750 organisations and individuals.

The IBA's and the ITCA's memoranda were published in 1975 as separate booklets. While the two were broadly in agreement on many issues, the ITCA had some quite active criticisms to make of its regulator. According to the programme companies' Association, the composition of the Authority was not sufficiently representative of the viewing public; those of "the great and the good" who could

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[10] Proposals submitted by the Independent Television companies to the Minister of Posts and Telecommunications: July 1973, p 2

[11] *Report of the Committee on the Future of Broadcasting*, (Chairman: Lord Annan) (Cmnd 6753), London: HMSO, 1977, p. 3 (Annan Report I)

spare the time to serve on it were mostly "elderly" and they interpreted their duties in too authoritarian a manner[12]. The ITCA complained, for example, that the ITA took "too detailed an interest in the minutiae of scheduling and programming", and that "the voluminous canon of restrictions" they imposed acted as a brake on programming[13]. It also reported that the pre-vetting procedures were unsatisfactory to some companies. These were the first open signs that the contractors were beginning to feel somewhat restricted under the weight of regulation. Their criticisms did not entirely accord with the version of events put forward publicly by the Authority. The IBA's own evidence to the Committee gives no hint of any differences of opinion, and its Annual Reports preferred to stress the harmonious relations between itself and the regulated parties.

The ITCA's memorandum reveals the extent to which the machinery for advertising control had developed in professionalism and complexity since the early days. The companies not only had to comply with the periodically updated IBA Code, but were obliged to "satisfy Acts of Parliament and ministerial orders covering many areas of advertising, including lotteries, medicines, hire purchase and the labelling of food" - a long and growing list[14]. By this time, the Copy Clearance Secretariat consisted not only of the Copy Committee of five company sales directors, but also of a permanent staff of nineteen who were responsible for negotiating with advertisers and their agencies over the interpretation of the Code. The expansion of operations was necessary because, in the words of the ITCA, "observance of the steadily growing complexity of the rules is obtained only by scrutiny of every advertisement individually"[15]. This work was had to be continually monitored by the IBA to ensure that the rules were not being misinterpreted..

The ITCA maintained that having the companies act as a "buffer" between the marketing men of the advertising industry and the civil servants of the regulatory authority helped prevent conflict. There was certainly plenty of work for the Copy Clearance staff to do. In 1973, over 10,000 scripts were vetted and 6,000 films checked, and the ITCA were able to tell the Annan Committee that the Office of Fair Trading had recently expressed its approval of the way in which the Copy Committee performed its task. The Companies Association also submitted to Annan its proposals for a

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[12] Independent Television Companies Association, *ITV Evidence to the Annan Committee*, A submission by the Independent Television Companies to the Annan Committee on the Future of Broadcasting, March 1975, p23
[13] ibid. p. 24
[14] ibid. p. 122
[15] ibid. p. 122

complementary rather than a fully competitive commercial channel unchanged from its 1973 submission to the Post Office.

The IBA's memorandum devotes only half a dozen pages out of 95 to advertising, plus a short appendix consisting of arguments against any form of general broadcasting complaints council, or consumer council. It is neither as lively nor as challenging as the companies' paper. It merely covered the usual ground, describing the procedures for controlling the content of individual commercials and the rules for regulating their amount and distribution.

On the product side, the Authority claimed to have discovered little evidence of anxiety on the part of the public about the content of advertising. It arrived at this conclusion through correspondence with the public and through its many formal and informal contacts with viewers. Further evidence came from the low level of complaints from the public - only 90 letters or telephone calls during the four month period from January to June 1974[16] The IBA denied that this was due to the low level of public awareness of its existence, and drew attention to its practice of making brief television and radio announcements about its regulatory role and about the Code of Practice[17]. On the process side, the Authority again rejected the suggestion that commercials should be bunched into long blocks of up to half an hour, on the lines of some European systems, rather than placed at regular intervals. It believed that "by extending the lengths of some blocks of advertising between programmes to 3.5 minutes and increasing the proportion of these longer breaks, it has carried the grouping of advertisements and reduction in the number of advertising intervals to the limits of good practice in the presentation of programmes and advertisements"[18].

Although the Annan Committee accepted the argument that block advertising was inappropriate for the UK system of commercial broadcasting, the IBA evidently felt that Parliament needed further persuasion. It repeated its case before the Select Committee on Nationalised Industries, which had

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[16] Independent Broadcasting Authority (IBA): *Evidence to the Committee on the Future of Broadcasting under the chairmanship of Lord Annan*, September 1974, p. 22

[17] *Note:* In spite of this claim, the regulating Authority (now the ITC) has to this day had problems with public awareness of its regulatory function. The non-broadcast advertising self-regulatory body, the Advertising Standards Authority, has a higher profile and still receives many complaints directed at television or radio commercials.

[18] IBA: *More Channels - More Choices?*, The Cable Broadcasting Debate. Implications of the proposals of the Hunt Inquiry, The View of the Independent Broadcasting Authority, November 1982, p. 25

favoured the idea earlier, claiming that the present system of distribution worked well and that the Authority received few complaints about it[19].

The Annan Report represents a shift in attitudes towards commercial broadcasting in general and broadcast advertising in particular. At last the pervasive air of disapproval seems to have evaporated, and the Committee was able to state that it had received "very little opposition to advertising as a means of financing broadcasting, though some organisations, including the TUC, were opposed to further extensions of commercial broadcasting"[20]. It maintained that advertising had for many years been under sustained attack as an undesirable type of propaganda which creates anti-social wants and degrades the use of the English language, pointing to the 1964 *Report of the Commission of Enquiry into Advertising*, under the Chairmanship of Lord Reith, as the most comprehensive indictment of advertising made so far[21]. As an antidote to this view, the Committee re-stated the arguments made to it by supporters of advertising, who claimed that it is "an essential link in the chain of distribution which makes it possible to achieve high volume sales leading to lower costs. It encourages innovation and improvement of products because it can create sales for new products quickly, thus making investment in research, development and new plant worthwhile"[22]. Annan viewed the arguments for and against advertising "as being about the kind of society we live in"[23]. If competition is to be purged from the social system, then in "totalitarian logic", so must advertising; otherwise, in a market economy it must simply be "curbed by law and by regulation". It saw this curbing of advertisers as the main function of the IBA, and believed that "for the most part it carries out this function effectively"[24].

This positive verdict on the effectiveness of the commercial television regulator represents a remarkable change in attitudes towards television advertising on the part of the establishment. For whatever reason - increased familiarity on the part of viewers, more effective regulation by the IBA, a rise in the sophistication of commercials themselves - both the policy-making elite and the viewing public at large had come to terms with the idea of advertising on television. Since it was more or less satisfied with the status quo, Annan did not take up the idea, first proposed by Pilkington, that the

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[19] *Tenth Report from the Select Committee on Nationalised Industries, together with the proceedings of the Committee, minutes of evidence .....and appendices (Session 1977-78: HC 637-I, 637-II)* London: HMSO, 1978, p. 77
[20] Annan Report I op. cit. p. 163
[21] ibid. p. 163
[22] ibid. p. 163
[23] ibid. p. 163
[24] ibid. p. 163

IBA should be responsible for selling airtime. In the Committee's view, the Authority would not be able "to match the marketing efforts and expertise of the eager beavers in commercial companies who knew their regions intimately"[25].

The Committee took a practical view of the vexed question of natural breaks. It thought that if programmes were produced so as to have plenty of natural breaks this would be too obvious; they would be like "shoddy garments in which the stitching is all too visible"[26]. But if natural breaks were eliminated, programmes would just be made shorter in order to fit in enough advertising. In other words, natural breaks must remain natural and not be artificially created, and it was up to the IBA to use its common sense and aesthetic judgement in this respect. Serious documentaries, for example, such as The World at War should, like the current affairs programme World in Action, be screened without commercial breaks.

The Annan Report was also liberal in its attitude to the amount of advertising permitted and took heed of the evidence given by the ISBA and the IPA, both of whom considered the system of spot advertising highly satisfactory. The ISBA did not want any overall increase in airtime "because it might prove to be unacceptable to viewers as well as counterproductive for advertisers as too much advertising would make each individual commercial less effective"[27]. As it had done in the past, the ISBA adopted a conservative approach towards the quantity of advertising to be screened. Nevertheless, the Committee felt that although a daily average of six minutes was still about right, the limit of seven minutes in any one clock hour need not be rigidly adhered to. Occasionally up to ten minutes would be acceptable if this was judged to be appropriate[28].

It did express concern, however, about a number of aspects of television advertising which it felt should be regulated more tightly. Evidence from America showed that children's memory and appreciation of programmes were damaged by interruptions for commercials. Moreover, advertising aimed at persuading children or their parents to part with their money could "encourage a degree of covetousness at a stage when children are unable to exercise sufficient discretion in assessing the merits of such an attitude to life"[29]. And while a minority of the Committee felt it was not worth

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[25] ibid. p. 164
[26] ibid. p. 165
[27] ibid. p. 167
[28] ibid. p. 167
[29] ibid. p. 166

sacrificing the £15 million revenue represented by such advertising, a majority recommended a complete ban on commercials during programmes specially made for children. This recommendation was not ultimately followed and the existing rules on advertising during children's programmes remained in force.

Creeping sponsorship was another problem area. The IBA had recently issued guidelines on "indirect advertising" - sponsored events, track side banners, advertising hoardings, and the use of TV personalities in commercials - but according to Annan, these new rules were still not effective enough in dealing with "clandestine advertising". An instance of this was when pop music programmes were packaged by producers in collaboration with record companies. Record companies could then seem to be buying time on the air to expose their products. The Committee disliked the possibility that the public might be "misled into watching programmes which in effect were elaborate advertisements for commercial interests"[30].

In general, control of the content of advertisements through the mechanism of the Copy Clearance Secretariat, working in conjunction with the IBA's own specialist staff, was given the seal of approval. Annan was not impressed with the IPA and the ISBA's complaint that the regulator was "very tough" and sometimes "too legalistic", and recorded that advertising industry representatives "had failed to bring tears to our eyes"[31].

Eventually, the Annan Committee recommended only two minor changes to the system of advertising control. Its major proposals concerned the establishment of a fourth television channel, which it suggested should be run by an open Broadcasting Authority acting more like a publisher than the IBA. Regulation of the channel should encourage innovative programming commissioned from a variety of independent sources, and it should be financed by block advertising, various forms of sponsored programmes and grants from educational bodies. In some ways this blueprint was more radical than the one finally decided on by the Thatcher government in 1980.

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[30] ibid. p. 169
[31] ibid. p. 169

The Report also recommended the setting up of a Broadcasting Complaints Commission "to consider complaints against all the Broadcasting Authorities of misrepresentation or unjust or unfair treatment in broadcast programmes"[32].

While the Annan Report was in preparation, the IBA went on making adjustments to its regulations. The revised 1975 Code ruled that advertisements for children's toys must include an indication of price. The manufacturers had objected that this might lead to higher prices in the shops, but the IBA insisted on an experimental period of two years. In 1977, this rule became established until a slight relaxation was permitted in the late 1980s.

In 1977, the fifth edition of the Code was issued and amended, after consultation with the Home Secretary, to permit advertising by Member Firms of the Stock Exchange. Following the hope expressed by the Annan Committee that the Authority would relax its restrictions on advertising by charities, a Working Party was set up in 1977 to look at ways of doing this. Its report, published in September 1978, advised that recognised charities should be allowed greater freedom to advertise subject to strictly defined conditions. After further consultations the IBA accepted this advice[33]. The proposed liberalisation was subsequently vetoed by the Home Secretary in 1979, on the grounds that it would be difficult "to amend the IBA Act 1973 to allow religious charities to advertise their welfare activities without entirely lifting the ban on advertising by religious bodies", for which there was not a sufficient case at that time[34]. In order to avoid discrimination all charities had to wait another ten years before enjoying the privilege of advertising on television.

After considering the Annan Report in depth, the ruling Labour government issued a White paper in 1978. It accepted Annan's recommendations for the setting up of a fourth channel to be run by an Open Broadcasting Authority, authorised by the appropriate legislation, and envisaged extending the IBA Act until the 1990s.

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[32] ibid. p. 474
[33] IBA: Annual Report and Accounts 1978-79, London: Home Office, 31st March 1979, p. 47
[34] IBA: Annual Report and Accounts 1979-80, London : Home Office, 31st March 1980, p. 49

7. 4 A Change of Government: A Shift in Policy.

In 1979, a General Election on May 3rd removed the Labour Government which had appointed the Annan Committee and produced the latest White Paper on broadcasting policy. A Conservative administration under Margaret Thatcher was returned to power which reversed Labour's plans, and broadcasting started to take a change of direction which, in a little over a decade, would result in the most thoroughgoing overhaul of the system since its inception.

This did not take place in isolation but as part of a radical programme of political action designed to effect long term and irreversible social and economic change. Heavy state intervention in the economy, hallmark of previous Labour administrations, was to be reduced. Wage controls and price control agencies, such as the Price Commission, which had forced the contractors to keep the rate card prices of airtime down were to be abolished. The new government intended to promote a vigorous free enterprise culture by privatising the nationalised industries and scaling down the extent of state regulation of private business.

At the beginning, however, the Prime Minister directed her reforms at other areas of industry and broadcasting was treated to a fairly mild dose of market medicine. Thatcherism, with its insistence on allowing market forces rather than the state or the regulators to determine the success or failure of commercial enterprises, was still in its experimental stage. As broadcasting was not an immediate priority it was not subjected to radical re-structuring until end of the 1980s. In a speech given to the Royal Television Society in September 1979, the Home Secretary, William Whitelaw, outlined the government's ideas for an additional channel. He made it clear that "the main source of funds for the Fourth Channel will be spot advertising, though block advertising and sponsorship may be permitted. This would not be competitive advertising, however, as such competition would inevitably result in a move towards single-minded concentration on maximising the audience for programmes with adverse consequences for both of the commercial channels". The IBA, and not an Open Broadcasting Authority, would be responsible for regulation.

The Home Office's cautious approach was echoed by the IBA when they produced their own proposals shortly afterwards. It recommended "a Fourth Channel company with its own Board of Directors which, exercising considerable independence though ultimately responsible to the authority, would undertake the operational control of the Fourth Channel.....the Fourth Channel should be run

as a service complementary to, but different from, ITV"[35]. Existing companies would have a place on the Board, but not a dominant one. The company would act as a publisher, commissioning and acquiring programmes (a substantial number from sources other than the ITV companies) but not producing them. "Innovation and experiment would be encouraged"[36]. Finance for the Channel would come from the ITV contractors who would sell and receive payment for the advertising time, paying a subscription to the IBA to meet the agreed budget if there should be a shortfall.

The IBA Annual Report for the years 1979 - 1980, where the proposals are summarised, acknowledges that "there were a number of interests which expressed themselves forcefully in favour of advertising on the existing service and on the Fourth Channel being sold in competition with one another. The Authority recognised the reasons for this argument, but was satisfied that viewers would be best served by an arrangement which offered no temptation constantly to pursue large audiences and so to narrow the range of programmes"[37].

The IPA and ISBA, the principal interests that had lobbied for competitive not complementary advertising on Channel Four, were disappointed by what they perceived as an effective continuation of the ITV companies monopoly. The logic that equated increased commercial competition for airtime with falling standards and the betrayal of public service broadcasting was, however, still a powerful influence on policy-makers in the broadcasting field[38].

The advertising industry was not without genuine grounds for complaint, however. In a paper submitted to the IBA in October 1979 the ISBA detailed a number of abuses of monopoly power on the part of the companies which they alleged had been going on since 1968: the operation of the ITCA Cancellation Committee; deliberate restriction of airtime; inadequate means of checking whether the correct commercials had actually been broadcast; price differentials in commercials of less than thirty seconds; and lack of consultation before changes in sales policy[39]. Despite the

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[35] ibid. p. 7
[36] ibid. p. 8
[37] ibid. p. 8
[38] *Note:* For example, in a published summary of its evidence to the Annan Committee, the Standing Conference on Broadcasting, whose members comprised leading academics, representatives from the spheres of broadcasting, the press, politics and religion, and independent social welfare groups, stated unambiguously: "commercialism tends to exclude experiment and novelty and to encourage a reliance on established formats with proven profit potential and no development costs." (*The SCOB Papers: Broadcasting in the United Kingdom,* Evidence to the Committee on the Future of Broadcasting, The Standing Conference on Broadcasting: London: January 1976 p. 4)
[39] Brian Henry (ed.), *British Television Advertising*, London : Century Benhas, 1986, pp. 196-197

contractors' argument that these were commercial matters which were best dealt with on an individual company basis without interference from the regulator, the ISBA urged that a committee be set up where a wide range of problems not necessarily within the statutory remit of the IBA, could be discussed before the Authority.

The IBA was unwilling to antagonise advertisers and agencies on whose co-operation it relied in carrying out its regulatory duties, and promised to consider prohibiting making the sale of airtime on ITV conditional on buying airtime on Channel Four, and banning the linking of discounts between the two channels. It also recommended that each company publish separate rate cards for ITV and Channel Four and agreed that an Advertising Liaison Committee should be formed to provide a forum where IBA officials and representatives of the ITCA, the IPA and the ISBA could discuss matters of common interest with a view to improving commercial relationships.

7.5 The Broadcasting Act 1980

After a period of discussion, a Broadcasting Bill was published in February 1980. It extended the life of the IBA until 1996, legalised the proposed structure of the Channel Four company as a wholly owned subsidiary of the Authority, and established the Broadcasting Complaints Commission, a survival of the Annan Report. The three member Committee would investigate complaints of "unjust or unfair treatment" and "unwarranted infringement of privacy" in both ITV and BBC programmes, but had no brief to deal with advertisements.

The Act, which passed into law in November 1980, is longer and more detailed than any previous Acts, but much of it is devoted to a restatement of the structure of the IBA, and the arrangements for Channel Four. No less than six pages are given over to the organisation of the Broadcasting Complaints Commission.

The general provisions on advertising remain unchanged, but sponsorship would be permitted on Channel Four in some exceptional circumstances. The majority of specific provisions for Channel Four refer to process regulation and follow the plan set out in the White Paper. Schedule 2 contains the nine Rules as to Advertisements carried over from previous Acts. An additional Section (14)

deals with teletext services[40] which had become increasingly popular with viewers seeking various kinds of specialised information. ITV's Oracle service provided it with a useful extra source of advertising revenue, but a number of complaints had been made to the IBA about individual advertisements. The Authority was therefore required to draw up and review a code " giving guidance in such matters concerning standards and practice for teletext transmissions (including advertisements)"[41].

The Advertising Liaison Committee held its first meeting in June 198O, chaired by Lord Thomson of Monifieth, who took over from Lady Plowden as chairman of the IBA in the following year. The Committee's brief was to consider "matters of principle relating to commercial relationships which were raised by the participating bodies"[42]. It proved an extremely useful means of facilitating negotiations between advertisers, agencies and contractors, with the regulator acting as an intermediary, and as adjudicator in any disputes. The Committee met four times a year and the resulting improvement in communications helped to reduce the level of conflict between buyers and sellers. A closer involvement in the business dealings of its regulatees made it easier for the IBA to ensure that the "no unreasonable discrimination" clause, contained in every broadcasting Act since 1954, was being implemented in practice.

New contracts were announced to run from January 1st 1982 and the new commercial breakfast TV franchise was awarded to TV AM to commence in 1983.

7. 6 Conclusion.

The decade between the ITA becoming the IBA in 1973, and the commencement of the new ITV contracts in January 1982 was relatively calm. In life cycle terms the regulator was entering middle age. Organisationally, this meant that the Authority had grown in size and complexity, particularly with respect to its system of advertising control, with the inevitable increase in bureaucracy that such an expansion brings. Nevertheless, writing in 1981, Burton Paulu makes the point that "IBA staff

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[40] *Note:* Ceefax was launched for the BBC in 1974, and Oracle for ITV in 1981.

[41] *Broadcasting Act 1980* (Ch. 64) London: HMSO, Section 15 (1). *Note:* The teletext code is brief, a mere two and a half pages; Part A covers all transmissions and part B advertisements. As a specialist service its provisions are less stringent than the ITV code (advertisements for undertakers and for betting were allowed, for example, under certain conditions) but sponsorship of transmissions, or even an impression of sponsorship, was not permitted.

[42] IBA: Annual Report and Accounts 1981-1982, London: Home Office, 31st March 1982, p. 57

procedures are less elaborate and less formalised than those of the BBC. The IBA is a newer and smaller organisation"[43]. It still did not compare with large US regulatory agencies, such as the Federal Communications Commission, which were the basis for the American critiques of regulatory decay and decline.

This perception of smallness was shared by the ITCA. Describing the monthly meetings of the Authority's Standing Consultative Committee attended by the chief executives of the fifteen ITV companies, an ITCA document stated that "as an industry, Independent Television is relatively small (but at these monthly meetings) the twenty or so people who control it....reach, by consensus and compromise, decisions which may not always be advantageous to individual companies or a group of companies - or to the Authority for that matter - but which all accept as correct for ITV, its viewers and society"[44]. This description, made for the benefit of the Annan Committee, represents an ideal picture of how regulation in Britain ought to be done. Both regulator and regulated show that they are aware that there exist wider considerations beyond their immediate goals - a classic common interest position - and claim to pursue their individual goals in a collaborative rather than an adversarial way.

This ideal was not always achieved in practice, however. The ITV companies' complaint, also to the Annan Committee, that the Authority involved itself too much in the details of interpreting the Code, and was imposing a "voluminous canon of restrictions" on advertising, revealed another side to their relations. The advertising industry was not entirely happy either with the "legalistic" approach of the IBA. From the point of view of advertisers and agencies, the IBA as an institution was becoming more inflexible and increasingly regulation-minded in the carrying out of its regulatory duties. An IPA/ISBA paper on the reallocation of broadcasting resources after 1976 refers to the inefficiency of the ITV structure as a whole. Its authors believed that there were too many programme contractors, with many smaller regional companies surviving only because they were heavily subsidised, and suggested that "the industry's over-capacity and wasteful use of resources" should be eliminated by "rationalising" the network[45].

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[43] Burton Paulu, *Television and Radio in the United Kingdom*, London: Macmillan, 1981, p. 145
[44] ibid. p. 146
[45] ISBA/IPA: *Television 76: The ISBA/IPA View*, Incorporated Society of British Advertisers, Institute of Practitioners in Advertising, November 1972, pp. 15-16

The fact that organisational critiques of the television regulator could be made with some justification after two decades of operation indicates that, despite the SCNI's criticism that the IBA was too much influenced by the needs of the companies, capture, in the sense of the regulated parties having control over the regulator to an extent that seriously undermined its consumer protection function had not taken place.[46]. On the contrary, the regulated industries were both beginning to feel that the system was now tending to work in favour of purely regulatory objectives, such as regionalism and "risk aversion" in advertising control. Besides, as has been mentioned earlier, the fact that the regulator was responsible for overseeing two different industries whose interests often conflicted, made capture a more complex phenomenon than merely a case of regulatory bias towards industry at the expense of the consumer.

Under the tripartite system of regulation of British commercial television, where one of the regulated parties is also responsible for the enforcement of regulation, it, too, is in danger of becoming "regulation-minded". The advertising industry had been complaining for a long time to the IBA about the television companies' "abuses" of their privileged position, which it believed the Authority did not take seriously enough.. Advertisers and agencies often found the way in which the ITCA enforced standards of advertising content through the Copy Clearance Secretariat as great a source of frustration as the activities of the IBA. They felt that the system put them at the mercy of not just one but two sets of enthusiastic regulators. According to Brian Henry, the Advertising Liaison Committee was intended as a way of overcoming "years of acrimony and misunderstanding" between buyers and sellers[47].

The decade of 1970s also witnessed the rise of more distinct coalitions of interests, whose greater degree of organisation helped them to carve out a role for themselves in the field of broadcast advertising regulation. The organised consumer movement, in particular, had gained in confidence and influence, and the European Commission was in the process of instituting a wide-reaching consumer protection programme aimed, among other things, at more stringent advertising controls, particularly with respect to television. The public specifically as consumers of broadcasting had the

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[46] *Note:* Proliferating rules and regulations and interpreting them strictly does not automatically mean that consumers' interests are being served better. Such activity may cover up the fact that more profound changes need to be made in order to remove bias towards industry at the structural level. At this stage, however, policy-makers did not see any need for the system as a whole to be radically re-structured either to tighten regulation, or to provide more competition apart from Channel 4.

[47] Brian Henry (ed.) op cit. p. 213

National Viewers and Listeners Association, with its charismatic, if not universally popular, President, Mary Whitehouse, and a number of other representative organisations who did not hesitate to make their displeasure known if the regulator appeared to be neglecting its duties in advertising or programming. Advertising and television themselves were becoming high profile and glamorous industries, whose cultural importance was enhanced by the proliferation of fashionable academic media studies courses. By the early 1980s, the UK broadcasting scene had become infinitely more sophisticated and complex. But the next ten years were to bring in even more diversity with the gradual development and spread of the new electronic media, which posed a fresh challenge for regulation.

Chapter 8

The New Media: All Change for British Broadcasting?

8. 1 Introduction.

The 1980s represented a turning point in British broadcasting because, for the first time, regulation started to take a back seat as a matter of principle. The prevailing Thatcherite ideology was uncompromisingly free-market and pro-entrepreneurial. The rise of the political right in the United States and Britain brought with it an entirely different set of attitudes towards state ownership of industry and regulation of private business. These attitudes, which were hostile to state intervention in the market, started the deregulation ball rolling in the advanced industrial economies of the West and Japan.

Consequently, perceptions of what constituted the success or failure of regulation underwent a complete reversal. It was the view of the Thatcher government, supported by a number of influential right-wing economists[1] , that regulation had failed to achieve anything worthwhile, not because there was not enough of it, or because it was not being pursued vigorously enough to safeguard the public interest, but because there was too much. Regulation was the problem not the solution. The plethora of restrictions and obligations imposed on it by regulators was preventing private business from functioning efficiently and was causing the economy as a whole to suffer as a result.

This viewpoint entails a quite different concept of the public interest. The interests of producers and the interests of consumers are no longer seen as hostile to one another. On the contrary, according to Thatcherite philosophy, the more successful producers are the more the public will benefit, as both groups share an interest in the overall performance of the economy. As economic growth and prosperity increases, wealth created by private enterprise will be spread throughout society in a

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[1] See: Alan Peacock, *The Regulation Game*, Oxford: Basil Blackwell, 1984. *Report of the Committee on Financing the BBC* (Chairman: Professor Alan Peacock) (Cmnd 9824) London : HMSO, 1986. Irwin Steltzer, *Regulatory Methods: A Case for 'Hands Across the Atlantic'*, in Cento Veljanovski (ed.), *Regulators and the Market* Institute of Economic Affairs (IEA), 1991, pp. 59-77. Cento Veljanovski, *Freedom in Broadcasting*. London : Institute of Economic Affairs (IEA), 1989. M.S. Fowler and D.L. Brenner *A Marketplace Approach to Broadcast Regulation*, in E. Wartella et al (eds.) *Communication Review Yearbook*, Vol. 4, pp. 645-695. Beverly Hills, CA: Sage

"trickle down" effect from top to bottom. The public interest is closely identified with the interests of commerce. This concept has something in common with the broader notion of "national interest" used by supporters of commercial television at the time of the Beveridge Report.

For the Conservative government of the 1980s, the needs of the buying public would be taken care of by promoting competition and choice, and competition could only be fostered by an active programme of privatisation and the freeing of commercial activity from the burden of regulation. By the time deregulation policy had become firmly established in the second half of the decade, the government, unlike all previous ones, no longer regarded broadcasting as a special case deserving of protection from market forces. Commercial broadcasting, in particular, became a target for market reforms. Duopoly of system and monopoly of advertising sales would no longer be tolerated.

In addition to the political changes, telecommunications technology was threatening to run ahead of regulation in a way that had never happened before. The new electronic media of Cable and Direct Broadcast Satellite, with their technical capability of carrying many more channels than had previously been possible, and of transmitting programmes across national frontiers, undermined the old "scarce resource" argument for regulation of the radio frequencies[2]. They also made a unified regulatory regime for commercial broadcasting potentially unworkable at a practical level, rather than the most convenient arrangement as it had always been until then. Regulation of the new media, if any, would have to be approached quite differently.

8. 2 Cable and Satellite in the UK: Implications for Advertising Control.

Cable and Satellite services in the UK began on an experimental basis in the early 1980s. Direct Broadcast Satellite systems were still very much in their infancy and Britain depended to a large extent on development of the relevant technology being carried out in Europe. As the government intended to award the first available DBS channels to the BBC, Cable offered more immediately attractive opportunities to advertisers[3].

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[2] Jeremy Tunstall, *Communication Deregulation,* Oxford: Basic Blackwell, 1986. and S. Papathanassopoulos, *The Deregulation of Television and Policies for New Media Development.* unpublished Ph.D dissertation, City University, 1989

[3] Jeremy Tunstall, *Communication Deregulation,* Oxford: Basic Blackwell, 1986.

The government's Information Technology Panel produced a report in 1982 on the organisation of Cable services, recommending that entertainment and interactive channels should be provided financed by private enterprise and regulated by an authority with minimum statutory powers. The Panel was of the opinion that "advertising interests clearly stand to gain from the introduction of cable systems, since these would provide a new advertising medium for smaller and more specialised firms"[4]. The Report went on to say the advertising industry believed that breaking the ITV contractors' monopoly by establishing competing cable systems could well result in a fall in advertising rates.

The Panel also considered the likely effects that such an opening up of competition would have. It would benefit the advertising industry by widening the choice of media for TV advertising, and far more firms would be able to afford the cheaper rates for smaller local and regional cable networks, but this would reduce audiences for ITV, reducing at the same time revenue from airtime. Any fall in revenue could, however, have the negative result of "a cut in programme expenditure and consequently a decline in the range and quality of output"[5]. In this new area, policy-makers once again had to consider the same basic question that has been so endlessly debated in connection with British broadcasting policy since the very beginning: does competition result in a better service or a worse one? The Information Technology Panel, focusing this time on commercial television, merely restated the problem without providing any answers.

It is nevertheless a significant document because it contains the first signs of a radical break with existing UK broadcasting policy, particularly with the long established feature of the "avoidance of competition between channels for the same source of finance.....This policy would be difficult to sustain as the number of channels increases"[6]. Without going into detail, the Panel recommended, subject to investigation of the implications for finance and regulation, a different set of regulatory arrangements for Cable systems, including a new statutory body as broadcasting authority[7]. It also recommended the government to urge Cable operators and programme providers to set up an effective means of self-regulation along the lines of those used by the advertising and newspaper industries[8].

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[4] Information Technology Advisory Panel (ITAP), *Report on Cable Systems*, London: HMSO, 1982, para 7.9, p. 44 (ITAP Report)
[5] ibid. para 6.8, p. 37
[6] ibid. para 6.8, p. 37
[7] ibid. para 8.11, p. 50
[8] ibid. para 6.iv, p. 9

8. 3 Advertising in the Hunt Committee Report.

To investigate in more depth the issues raised by the ITAP Report the government appointed the usual Committee of Inquiry, chaired by Lord Hunt of Tamworth. Considering how far-reaching the implications of Cable and Satellite television were, both for broadcasting in particular and for the British economy as a whole, the small (three-member) Hunt Committee had a very short time - less than seven months - in which to complete its report. The document, a mere 42 pages long, was published in September 1982. The terms of reference are nevertheless familiar: how to secure the benefits, in this instance, of Cable and Satellite technology, "but in a way consistent with the wider public interest, in particular with public service broadcasting"[9].

Although the Hunt Report is relatively brief, it represents a milestone in British broadcasting policy because it recognised unequivocally the need for a completely different paradigm of broadcasting regulation. At this stage, however, the new model was intended to operate alongside the existing one, not to replace it. In considering how this new paradigm should be implemented, the Committee examined and rejected the thesis implied in the ITAP Report that Cable television should be seen as just another branch of publishing which could be regulated, with respect to product regulation at least, in a similar way. In doing so, it employed traditional and well established arguments used by numerous policy-makers before it. Firstly, most people still regarded the viewing of programmes in the home, often as a family, as a different activity from going out to buy a book or a magazine which is a private activity; and secondly, "film with all its associated techniques of close-up and special effects is a uniquely powerful instrument"[10]. Accordingly, Hunt advised that Cable should have certain liberal ground rules; self-regulation alone would not be generally acceptable, and some degree of "oversight" (as distinct from regulation which implies imposing detailed rules) should be applied[11]. Hunt agreed with the ITAP panel that a new statutory body and not the IBA should have responsibility for oversight.

The Report devotes some four pages specifically to advertising, starting with the acknowledgement that advertising on Cable raised issues at the heart of the Committee's terms of reference which was to concern itself with safeguarding public service broadcasting. It reiterated the point made by ITAP

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[9] *Report on the Inquiry into Cable Expansion and Broadcasting Policy* (Chairman: Lord Hunt of Tamworth) (Cmnd 8679) London: HMSO, 1982, para 1, p 1 (Hunt Report)
[10] ibid. para 11 p. 4
[11] ibid. para 12 p. 4

that independent public service broadcasting was entirely dependent on advertising revenue and might suffer if resources were diverted to rival services in direct competition for the same resources. A deterioration in ITV programming might have a knock-on effect on the BBC[12]. In spite of this risk, Hunt nevertheless came down firmly in favour of advertising on Cable and Satellite, as the Committee did not believe that Cable expansion would be possible financed solely by rental and subscription[13].

On the economics of Cable, Hunt's investigation contained two somewhat dubious assumptions. The first was that a rise in Gross National Product automatically entails a rise in advertising expenditure[14]. In fact, the relationship is more complex and the ratio of ad-spend to GNP may fall as well as rise in times of recession[15]. The second, encouraged in part by the IPA's extremely optimistic figures, was that the new media would necessarily bring in enough "new" money to make them self-financing[16]. The huge initial capital investment costs were largely ignored. Presumably the Committee agreed with ITAP that the Cable market would be sufficiently attractive to private business not to necessitate the use of public funds to help it become established[17].

With respect to regulation of advertising, the Hunt Committee took the view that Cable television should have no restrictions on the amount of the advertising it took, bearing in mind that if it was too intrusive this would counter-productive. Cable could offer different types of concentrated specialist advertising which were not acceptable for public service broadcasters because protecting the viewer from excessive advertising was part of the concept of public service broadcasting. The Report envisaged longer and more informative kind of advertising such as home shopping programmes or even whole channels devoted to home shopping or to classified advertising[18] .

The Committee did, however, recommend the observance of a code of practice governing the nature of advertising on Cable, based on the existing IBA Code suitably modified; standards regarding prohibited products or methods should not be different from those applying to ITV. Significantly,

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[12] ibid. para 36 p.12
[13] ibid. para 35 p. 12
[14] ibid. para 38 p. 12
[15] *Note:* In fairness to Hunt, however, it should be mentioned that the 1986 Peacock Committee was also convinced that "the data suggests a fairly close relationship between advertising expenditure and the level of gross national product or consumer expenditure", affected occasionally by cyclical movements. (*Report of the Committee on Financing the BBC* (Chairman: Professor Alan Peacock) (Cmnd 9824) London : HMSO, 1986, para 284)
[16] ibid. paras 41 - 44, pp. 13 - 14
[17] ITAP Report, para 5.6, p. 33
[18] ibid. para 48, p. 15

though, for the first time since Hankey, the report of an official Committee of Inquiry, rather than a special interest lobby, favoured including scope for sponsorship in television. This would be subject to clearly defined rules; the principle of separating advertising message from programme content should be preserved[19]. Perhaps even more significantly, in a complete break with the past of television regulation, it was recognised that the range of advertising on Cable would "preclude the external pre-vetting of advertisements....and that a mechanism for dealing retrospectively with complaints of breaches of the code of practice (would) be sufficient"[20].

So, rather than the Peacock Report, it is Hunt's document - rarely cited in connection with advertising regulation, but only with regard to its shortcomings on Cable economics[21] - which is the source of an influential new set of ideas on the role of advertising in television, affecting both process and product regulation. The concept of "light" regulation for television, which later became a cliche, was given its first detailed formulation by Hunt. The departure from established practice recommended by Hunt for Cable and Satellite systems only would in less than a decade find its way into mainstream regulation of the whole commercial sector.

In response to the Hunt Report, the IBA rapidly produced a pamphlet of its own, *More Channels - More Choice?*, which challenged many of the Committee's conclusions. On finance, it stressed that while advertising might increase it was not inexhaustible. Competition between broadcasting companies and Cable operators for a limited amount of revenue would, in any case, result in powerful pressure for the public service system to maximise audiences at expense of range and quality. Having no limit on the amount of advertising on Cable would put public service providers, with their numerous public service obligations, at a considerable competitive disadvantage. Channels wholly or largely dedicated to advertising might be acceptable, but not unlimited advertising on general Cable services[22].

On regulatory arrangements, the IBA argued that "programming, advertising and other standards set for Cable systems should approximate to those required of the present broadcasting services"[23]. It

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[19] ibid. para 49, p. 16
[20] ibid. para 49, p. 16
[21] *Note:* While Pilkington, Annan and even Peacock, who was chiefly concerned with the BBC, are widely quoted on advertising regulation policy, this historically important aspect of the Hunt Report is seldom mentioned.
[22] IBA: *More Channels - More Choices?*, The Cable Broadcasting Debate. Implications of the proposals of the Hunt Inquiry, The View of the Independent Broadcasting Authority, November 1982, para 22-25, p. 5 (IBA: *More Channels - More Choices?*)
[23] ibid. para 32, p. 6

insisted that the Cable authority must have "real teeth.....and its supervision cannot merely be reactive." On the contrary it must actively monitor and review the situation to prevent "shutting of stable doors after the horses had bolted"[24]. The IBA concluded by proposing itself as the regulating Authority for Cable, citing its experience and expertise as reasons why it was best qualified for the job. If Cable franchising were to be added to its existing responsibilities the Authority might need to be expanded, but this would still be "the quickest, most practical and most economical means of creating the necessary supervisory structure"[25].

8. 4 The Government's Plans for the New Media.

The government took a further seven months after publication of the Hunt Report to issue, in April 1983, a White Paper entitled *The Development of Cable Systems and Services*. It represents a compromise between the more liberal measures advocated by Hunt and the plea of the IBA that programme services should not be weakened by unregulated competition for advertising between ITV, ILR and the Cable operators.

The White Paper agreed with Hunt that a new statutory body (the Cable Authority) should be responsible for Cable franchising, not the IBA. Once it had awarded the franchises, this body would use "a light regulatory touch and adopt a reactive rather than a proactive style"[26]. This would be the general approach to advertising control which would operate, in the main, analogously to Independent Local Radio. The Cable Authority would have its own statutory code of practice modelled on the IBA code and containing a "common core" of advertising provisions[27]. But since much of Cable advertising would be locally based, copy clearance would be handled by the stations at local level. The IBA/ITCA Joint Advertising Control Committee would be expanded to include Cable representatives for consultations and guidance on clearing more widely distributed advertisements or in sensitive cases[28].

Although the government was not in favour of full self-regulation using the ASA/BCAP codes and machinery (which the ISBA had lobbied the Hunt Committee to recommend), classified advertising

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[24] ibid. para 34, p. 6
[25] ibid. para 35, p. 7
[26] *The Development of Cable Systems,* (Cmnd. 8866), London: HMSO, 1983, para 143 p. 59 (1983 White Paper)
[27] ibid. para 100, p. 44
[28] ibid. para 102, p. 45

and other categories which closely resembled print advertising would be allowed a greater degree of self-regulation even than ILR. The ASA's experience and Code of Practice should be drawn on in dealing with this area[29]. Sponsorship, with appropriate safeguards, would be permitted.

The IBA's claim, supported by ITV and ILR, that unlimited advertising on Cable would be unfair was accepted. The government agreed that the high quality of independent television had been achieved because the amount of advertising had not detracted from enjoyment of the programmes. It made the point that by careful regulation it had been possible to include more advertising on television in Britain than on any other major European public service system. The White Paper concluded that "abandoning all restrictions on the permissible amount of advertising would inevitably alter the nature of independent broadcasting....for the worse"[30]. The Cable Authority should therefore ensure that "advertising on cable television and sound services comparable to those of the IBA and ILR does not exceed the maxima (overall and in any one hour) for the time set by the IBA[31].

As a start to the enterprise, the government envisaged a pilot scheme of ten to twelve licences, awarded on an experimental basis, to cover up to 100,000 homes until the Cable Authority was appointed to oversee the next stage of the expansion of Cable services.

The Authority was constituted under the Cable and Broadcasting Act 1984. It contains a only single Section on advertisements, Section 12, which required the Authority to draw up, periodically review, and enforce a Code of Standards and Practice in advertising, including, in particular, the sponsoring of programmes. Like the ITV regulator, the Cable Authority would be able to prohibit certain advertisements, classes of advertisements and methods of advertising; it would not be able to accept advertising directed towards a political end or relating to an industrial dispute without the permission of the Secretary of State. On the amount of time given to advertisements the Act stated that it should not exceed -

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[29] ibid. para 100, p. 44
[30] ibid. para 96, p. 43
[31] ibid. para 97, p. 43

(a) in the case of so much of a licensed diffusion service as appears to the Authority, after consultation with the IBA, calculated to appeal to the tastes and interests which are generally catered for by ITV, the maximum amount of time which could be so given if that service were ITV[32].

This is a compromise designed to appease the IBA and the ITV network companies who had opposed unlimited advertising on Cable. By allowing the Cable Authority to place restrictions on the amount of advertising in and around programming of a similar nature to what was being offered by ITV, i.e. programming which was likely provide competition for ITV audiences, but not elsewhere, the government hoped to satisfy the public service broadcasters and at the same time leave room for Cable operators to experiment with alternative services which might include a large advertising element.

On the 4 May 1984, the right-wing Adam Smith Institute published the Omega Report which mounted a vigorous challenge to traditional thinking on funding for broadcasting in the UK. It contained a strong critique of orthodox public service broadcasting as embodied in the BBC, which it perceived as arrogant, elitist and increasingly out of touch with the mass of viewers. It advocated a move away from the licence fee, which it regarded as an imposition and unresponsive to the demands of the viewing and listening public, towards a much freer and more diverse use of advertising (including sponsorship) as means of finance for both ITV and BBC.

The Institute went much further than the Hunt Report by recommending the relaxation of rules prohibiting certain classes of advertising and arguing for the IBA to be replaced with a more "commercially aware" body[33]. This was at a time when the IBA was busy expanding the rules governing financial advertising, strengthening the rules relating to alcohol, and refusing altogether to accept, amongst others, the category of female sanitary protection for advertising on ITV. And having recently issued, in 1982, the pamphlet *Guidelines on Programmes Funded by Non-Broadcasters*, which clarified and tightened up the rules governing the small number of cases where sponsored programmes were broadcast[34], by 1984 the regulator still only felt able to try a small experimental relaxation. This cautious step permitted something which had not been allowed before:

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[32] Cable and Broadcasting Act 1984, (Ch. 46) London: HMSO, 1984, Part 1 Section 12 (3) (a)

[33] Brian Henry (ed.), *British Television Advertising*, London : Century Benhas, 1986. p. 227

[34] *Note*: The restatement of the prohibition on sponsorship in the IBA Annual Report 1982 points out that "exceptional allowance is made for charitable appeals, various publications or entertainments, commercially-financed documentaries or other programmes of intrinsic interest to the public, provided that they do not comprise an undue element of advertisement". (IBA: Annual Reports and Accounts 1982, London: Home Office, p. 191)

advertising by funders of programmes and sponsors of events in and around the programmes and events in which they had an interest, "provided there is no link in content or style with the programme"[35]. So while the Adam Smith Institute was recommending wholesale deregulation of advertising, the IBA was either adding to the rules, or liberalising at a very measured pace.

The Adam Smith Institute's Report, which found support within the advertising industry, reflected a new mood in government. Thatcherism had gained strength and ideological cogency and was determined to take on broadcasting, which it regarded as one of the last bastions of combined establishment and Trade Union power. Its most immediate target, however, was not the commercial sector but the BBC and its mode of finance. A Committee, chaired by noted free market economist Professor Alan Peacock, was appointed in March 1985 to consider whether the Corporation might in future be funded, in part at least, by advertising or sponsorship.

8. 5 Advertising in the Peacock Committee Report

Since a major part of its brief was to review the funding arrangements of the BBC, and "to assess the effects of the introduction of advertising or sponsorship on the BBC's Home Services"[36], the Peacock Committee had to look carefully into the theory and practice of financing broadcasting services by advertising as exemplified by ITV and Channel Four. Apart from the new political emphasis on the benefits of the free market, technological developments were in the process of changing the broadcasting scene and its economics irrevocably. Spectrum scarcity, which had dictated so much of broadcasting policy in the UK since its inception, would soon become irrelevant as a constraint. The revolution in technology which gave rise to the new media and the expanding world of multiple channels and multiple choice, meant that some of the old reasons for tight regulation of broadcasting, particularly on the process side, no longer applied.

The Peacock Report was published in 1986, after a year of deliberations on a huge number of submissions: 843 memoranda of evidence from individuals and organisations, including a number of specially commissioned pieces of research. It broke with the tradition of previous Committees of Inquiry, stretching back to the Crawford Committee of 1926, by recommending that the BBC should

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[35] IBA: Annual Report and Accounts 1985, London: Home Office p. 149

[36] *Report of the Committee on Financing the BBC*, (Chairman: Professor Alan Peacock), (Cmnd 9824) London : HMSO, 1986, p. 1 (Peacock Report)

eventually be wholly financed by a method other than the licence fee. Peacock's blueprint for the complete restructuring of British broadcasting was, in fact, much more radical than that eventually adopted by the Conservative government in its 1989 White Paper, *Broadcasting in the 90's: Competition, Choice and Quality*. Peacock's central conception, echoing the Adam Smith Institute Report, was consumer sovereignty. Power should be shifted away from the broadcasting elite, represented by the "comfortable duopoly" of BBC and ITV, to the "robust" consumer. On this view, regulation was now protecting producers more than consumers, not because of any form of capture but because the regulatory system did not permit a proper market in broadcasting which would empower consumers to make real choices for themselves.

As with earlier inquiries, the nature of public service broadcasting once more came under scrutiny. Peacock recapitulated the main argument of the Annan Committee that "if the BBC and the independent sector were to compete for advertising revenue then both would feel obliged to cater for mass audiences and this would lead to a decrease in the range and quality of programmes on offer"[37]. Peacock's own emphasis on television and radio services bringing as much "enjoyment and pleasure to as many viewers and listeners as possible, while at the same time fulfilling some public service obligation" is none the less a move away from the traditional Reithian view of public service broadcasting.

In considering consumer preferences, the Committee declared its commitment to the actual users of the broadcasting services, stating that although the opinions of the various official consumer groups were valuable they did not represent all consumers. Accordingly, it had gone to great lengths to get the views of members of the public "directly and not just through umbrella organisations"[38]. This somewhat distrustful attitude towards official consumer organisations, two of whom are represented on the AAC, is characteristic of the business lobby, and reflects a not entirely fair view of the organised consumer movement as hostile to advertising[39].

In order to get as broad a picture as possible of what viewers themselves wanted, Peacock not only invited submissions from individuals, but commissioned a market survey by National Opinion Poll to discover people's attitudes to advertising on the BBC. An analysis of its results given in Chapter 9 of

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[37] ibid. p. 2
[38] ibid. p. 5
[39] *Note:* See Rein Rijkens and Gordon Miracle (1986) *European Regulation of Advertising.* Amsterdam, Elsevier Science, p. 92. The professional consumer representatives whom I interviewed, Diana Whitworth of the NCC and Sue Bloomfield of CA, stated very firmly that they were in principle in favour of advertising and welcomed it on television.

the Report reveal that about 60% of respondents were in favour of advertising on the BBC provided that this would not reduce programme quality. 69% thought that advertising would not in fact lower standards. A BBC survey also concluded that approximately two thirds of consumers preferred a "free" service funded by advertising, to the licence fee. But even such a champion of consumer rights as Peacock had to admit that "measuring the effects of a change in broadcasting finance on the welfare of the viewers and listeners is beset with many difficulties"[40] .

For example, consumers' interests would not be served if, as a result of extending advertising to the BBC, the smaller of the ITV regional companies came close to bankruptcy, and the BBC itself was obliged to "tailor" its programming to suit the advertisers. Public opinion may not be sufficiently well informed about the economics of broadcasting to judge whether increasing the overall amount of available airtime would disrupt the system to the detriment of programming range and quality. Clearly, even a convinced majoritarian like Peacock recognised the limitations of the preponderance approach when applied to broadcasting and the Report takes a more common interest-oriented stance on the validity of consumers' opinions on the financing of television. There was considerable evidence to suggest that a deterioration of the service would in fact take place; studies had shown that even limited advertising on the BBC would put the smaller ITV companies into loss and reduce profitability in the others, with an inevitable downgrading of services.

One study conducted by Leeds University into the effects on programme range and quality of both full and limited competitive advertising on the BBC had some influence on the Committee. Pointing to international experience as a lesson, the study concluded that "competition for advertising on any scale would be quite destructive of programme range and a threat to many facets of programme quality"[41] . This conclusion was based on reports on the economics of broadcasting systems in a number of other countries.

The Leeds team found that in America the total dependence of the three networks on competitive advertising has resulted in advertisers claiming "rights" to maximum audiences. But to make audience volume the highest priority works against diversity and risk-taking in programming. The option of limited advertising might be more attractive, but only if it did not diminish the licence fee and could be suitably regulated. Against this, both the American example and instances from Europe (Italy and

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[40] Peacock Report op cit. p. 101
[41] ibid. p. 199

Germany were cited) showed that it could be "difficult to make controls on advertising stick (whether on amount, content or placement)". In addition, mixed funding tends to be insecure causing producers to be over conscious of the ratings[42].

The Committee took this evidence on board in rejecting the ISBA's argument for the progressive introduction of advertising on the BBC. The ISBA envisaged a gradual increase spread over a ten year period, after which the Corporation would be funded entirely by this method. Peacock, however, decided that this scheme would quickly lead to a narrowing of range. Competitive pressures would force a revision of programme strategies in order to maximise audiences. In the opinion of the Committee, the ISBA had underestimated "the likely consequences of growing competition for advertisement revenue and the probability that regulation would become virtually impossible to enforce"[43].

The IPA, which usually favoured any extension of broadcast advertising opportunities, appear to have been less ambitious in this instance, producing a proposal for "limited" advertising to supplement the BBC's revenue from the licence fee. As with the Hunt Committee, its research came up with much more optimistic figures on the likely expansion of advertising demand and expenditure in the next decade than some other studies. Peacock interpreted "limited" advertising both as spot advertising of, say, one minute per hour, and as two or three four-minute blocks per day on the Franco-German model. This concept was also rejected as difficult to maintain at this low level; block advertising was still seen as unattractive to advertisers.

Interestingly enough, a BBC commissioned survey of the "Campaign" list of the top spenders of 1984 revealed only a small majority in favour of advertising on the BBC - 58% - with 35% opposed to it altogether. This survey also showed that "top advertisers did not expect to spend enough extra on advertising to meet more than a small part of the costs of running the BBC as well as ITV". This was in spite of their forecast that competition would decrease the cost of airtime by 15%[44]. So, in contrast to the enthusiasm of their trade association, nearly forty years on from the Beveridge Report those actually responsible for finding the cash for expensive television advertising campaigns are still adopting a conservative approach to any extension of their opportunities to spend money (or even to save money through cheaper airtime).

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[42] ibid. p. 201
[43] ibid. p. 83
[44] ibid. p.190

The effects of broadcasting policy on other media, particularly the press, were also taken into account. The Newspaper Society commissioned two pieces of research both of which produced pessimistic forecasts of the extent of the drop in advertising revenue for publishers if funds were to be re-directed to the BBC. One referred to the potential effects on profitability and viability as "catastrophic"[45]. Press fears about competition from broadcast advertising had proved exaggerated in the past and Peacock took the more relaxed view that there would be a limited adverse effect on print media revenues. As regards other media, Cable and DBS services funded by subscription charges and not by advertising might benefit, but advertising supported services would experience increased competition which would be reflected in lower programme standards.

The implications for regulation also influenced the Committee against the introduction of advertising on the BBC while the present system of broadcasting was retained. Peacock, as a convinced free marketeer, had quite a different perception of the role of regulation in the broadcasting system from any of the previous committees. He firmly believed that both process and product regulation could only be justified:

> *i) "as a means of stimulating the effects of a genuine consumer market, in all its range and variety, against the distortions inherent in a duopoly financed by advertising and the licence fee.*
>
> *ii) as a way of introducing minority, high quality or experimental work, which might not be commercially viable in a fully developed market"*[46].

The Committee, in its concluding section, recommended the establishment of a Public Service Broadcasting Council to take care of the second requirement, funded by a variety of sources. More importantly, "development of a full broadcasting market, incorporating direct consumer payment as an option" should be encouraged[47]. The direct consumer payment option, in the form of subscription, was to be the solution to the problem of funding the BBC. When all these measures were finally in place "the justification for the general restrictions imposed in the first century of broadcasting to reflect both the scarcity of the spectrum and the novelty of the medium will wither away"[48].

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[45] ibid. p. 191
[46] ibid. p. 149
[47] ibid. p. 149
[48] ibid. p. 149

On the way to this ideally self-regulating broadcasting market, Peacock envisaged that the current tight regulation would be progressively loosened. The first step would be to reduce the vetting functions carried out by the IBA to the level of the much less strict Cable Authority. Ultimately, all pre-vetting, or "pre-publication censorship", would be abolished, leaving the control of broadcasting, like the print media, to the law of the land covering obscenity, defamation, libel, sedition and other abuses of free speech[49].

This libertarian agenda runs in direct contrast to the entire history of regulation policy - making by committee. The successive committees before Peacock had always pursued protectionist policies; they saw the broadcasting process and its product together as forming a uniquely influential medium of communication requiring special conditions and restrictions to ensure that the "vulnerable" social and cultural benefits it was able to provide were not undermined. Quality broadcasting and the crude laws of the marketplace were regarded as antithetical to one another. And if television in particular were to be used for commercial purposes, the consumer would also be in need of protection from manipulative advertisers pushing their goods and services over the air.

Peacock intended to reverse this whole tradition. For him, both broadcasting and the consumer should be thought of not as vulnerable but as robust and mature enough to derive positive benefit from the dynamics of market exchange. Sufficient diversity of supply would stimulate demand, which would in turn generate a better product through competition. According to this view, market mechanisms are, on the whole, much more sensitive to consumer preferences than any amount of regulation.

The Report has almost nothing to say about product regulation of television advertising. The Committee's brief was to investigate the ways in which advertising and sponsorship are able to provide revenue for a broadcasting system and the effects they might have on programming. All the Committee's concluding remarks therefore deal with the implications of advertising for funding, programming and scheduling, and not with rules governing the content of commercials. The brief comments on the difficulty of controlling advertising in a fully competitive system such as that of the United States refer more to the negative impact it has on the surrounding programming than to its inherent potential to mislead, damage or offend. Presumably, the suggestion that broadcasting could be left to the law of the land applies to advertising control as well as programming, and existing

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[49] ibid. p. 150

legislation would be adequate to cover the content of television commercials, once the market had developed. This could be backed up by some sort of self-regulatory arrangements as in non-broadcast advertising.

8. 6 The White Paper: *Broadcasting in the 90s: Competition, Choice and Quality.*

The government's reaction to the Peacock Report, *Broadcasting in the '90s: Competition, Choice and Quality*, was presented as a White Paper to Parliament in November 1988. It acknowledged its debt both to Peacock and to the Home Affairs Committee's long Report on the 1987-88 session, *The Future of Broadcasting*. In line with Peacock's thinking, the document commenced by claiming to "place the viewer and listener at the centre of broadcasting policy"[50].

The White Paper also agreed with Peacock that rapid technological change required a corresponding change in the framework for broadcasting in Britain. With more frequencies available, and a proliferation of delivery systems giving greater scope, "viewer choice, rather than regulatory imposition, can and should be relied on to secure the programmes which viewers want"[51]. The caveat is added that "rules will still be needed to safeguard programme standards on such matters as taste and decency and to ensure that the unique power of the broadcast media is not abused"[52]. The concrete recommendations of the White Paper, however, show that the government had a much less relaxed attitude towards product regulation than the Peacock Committee. Although a radical deregulation of the existing process arrangements was planned, a whole new regulatory quango with statutory powers, the Broadcasting Standards Council, was to be set up with "overarching" supervisory powers over both programme and advertising content.

In summarising its approach, the government made it quite clear that broadcasting policy must, as far as possible, be made to fit in with its overall deregulation policy. Anti-competitive practices - barriers to entry and distortion of the market - had to be eliminated. There would be "less regulation (removing restrictions which are outmoded or unnecessary) and better regulation (lighter, more flexible, more efficiently administered)"[53]. The Paper nevertheless rejected Peacock's

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[50] *Broadcasting in the 90s: Competition, Choice and Quality.*(Cm. 517), London HMSO 1988, p 1 (1988 White Paper)
[51] ibid. p. 5
[52] ibid. p. 5
[53] ibid. p. 6

recommendation of a subscription system for the BBC which would be left in peace for the time being. The great shake-up was reserved for ITV in order to break up the "comfortable duopoly" and establish a much more open market within the independent sector.

In spite of what some of the leading advertisers had said in response to the BBC's survey, the ISBA had adopted a very strong position in its evidence both to the Peacock Committee and the Home Affairs Committee. It argued forcefully for a much looser structure in the commercial sector giving advertisers a much wider range of options. Its chairman, Kenneth Miles, explained to the Home Affairs Committee that "advertisers want a combination or a mix of volume coverage and targeted coverage. Increasingly targeting is becoming much more important"[54]. This meant a greater diversity of channels geographically, to serve local advertisers' needs, and the use of split airtime franchises to target specific audiences.

The White Paper also acknowledged the need for more competition in the sale of airtime. It proposed the creation of a fifth terrestrial channel; separate night hours licences; allowing Channel Four to sell its own airtime; and the expansion of Satellite and Cable services to provide more competition opportunities. As recommended by Peacock, Channel 3 (as the new ITV regime was to be called) franchises would be offered for competitive tender; and, as recommended by the Home Affairs Committee, a single agency would be set up to regulate all independent sector television services. This body would be known as the Independent Television Commission. It would regulate with a much "lighter touch" than the IBA and would not have the IBA's responsibilities for prior clearance of programmes and approval of scheduling. It would, however, have consumer protection obligations as before with regard to both advertising and programming. These included control of the content of advertisements, and some positive programme requirements designed to limit "the ability of broadcasters to sell audiences to advertisers in such a way that the range and diversity of programmes would be curtailed"[55].

The White Paper was greeted by a storm of protest from the broadcasting world. There were widespread fears that the days of producer-led, innovative, quality programming were numbered, and that independent television in Britain had in effect been surrendered to the advertisers and the money men. Many felt that the ideals of public service broadcasting which had served the country well for

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[54] *Home Affairs Committee. Third Report. The Future of Broadcasting.* Volume 2: *Minutes of evidence and appendices* (Session 1987 - 88: HC 262-II); p. 159

[55] 1988 White paper op. cit. p. 21

nearly seventy years would not long survive the new era of competition in the 1990s. Nevertheless, the government prevailed and after a great deal of impassioned debate, much of it focused on the controversial proposals for auctioning off the Channel 3 franchises to the highest bidder, a new Broadcasting Act was finally passed in 1990, to take statutory effect from January 1st 1993. It incorporated most of the principles set out in the White Paper.

8. 7 The Broadcasting Act 1990.

This Act is by far the most detailed piece of legislation ever framed to deal with the broadcasting system in the UK and only a brief summary of its main provisions can be given here. The structure and functions of the new regulatory body Independent Television Commission, especially its duties with regard to the regulation of advertising, will be discussed in more depth in the next two chapters.

The ITC was to put into practice the new system of awarding the franchises for Channel 3, which were to commence operations on January 1st 1993. At an appropriate time after that applications would be invited to run a fifth commercial channel. The principle of auctioning off the franchises to the highest bidder, on strict commercial lines, was diluted after intense lobbying from a variety of interests across the spectrum of broadcasting. The adoption of a "quality hurdle" - fairly stringent positive programming requirements - ensured that applicants retained a strong public service element in their programme plan[56]. This was backed up by an "exceptional circumstances" clause under which the Commission is entitled to reject the highest bid in favour of a lesser one if the latter proposes a service the quality of which was either "exceptionally high", or "substantially higher" than the highest bid[57]. Applications could also be refused if it was suspected that "the relevant source of funds is such that it would not be in the public interest for the licence to be awarded"[58]. Broadcasting was evidently still considered too sensitive a field to be left wholly open to commercial forces.

Several Sections of the Act are devoted to the organisation and complaints procedures of a new monitoring body, the Broadcasting Standards Council, designed to report on the portrayal of "violence and sexual conduct.....and standards of taste and decency" in all sound and television

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[56] *Broadcasting Act 1990* London: HMSO, 1990, Section 16, Subsection 2
[57] ibid. Section 17, Subsection 4
[58] ibid. Section 17, Subsection 5

programmes. Advertising is not specifically mentioned, but the government later made it clear that the monitoring of commercials would be part of its remit.

The Broadcasting Complaints Commission was retained with the same remit as before. Channel 4 was to be reconstituted as a Corporation licensed to provide a public service with a distinctive character of its own. It would be responsible for its own advertising revenue by selling its airtime, but the Channel 3 franchisees must make up any shortfall below 14% of total the television revenues for any one year.

Section 8 deals with general provisions as to advertisements, and *Section 9* with control of advertisements. The wording of both is very similar to that of previous Acts, with the exception of the specific obligation for the regulator to appoint an Advertising Advisory Committee and a Medical Advisory Panel. This was abolished and the much looser notion of "appropriate consultation" is used instead. After such consultation, the ITC must still draw up and periodically review a code dealing with the classes of advertising permitted and its amount and distribution. The AAC thus lost its statutory status after nearly forty years, as did the marginally more recent Medical Advisory Panel.

The Office of Fair Trading was given an active role in supervising the networking arrangements for Channel 3. It had to ensure that they are not anti-competitive and that access to the network is free and does not discriminate against independent producers.

8. 8 Conclusion.

The history of broadcasting in the UK reveals the degree to which the state has been responsible for the genesis of regulation, i.e. for the decision to have it at all, and for the initial determination of its form. It has also been the prime mover in bringing about changes to this form, either by extending or reducing the scope of the regulatory agency. Although Marxist critique has lost most of its fashionable appeal in recent years, for obvious reasons, it is still possible to argue, as Horwitz does, that capitalist state theory has the advantage of situating the process of regulation within much wider structures of power and constraint. It focuses on the state as the most powerful actor in a capitalist democracy. According to a structuralist Marxist critique, however, even though the actions of the state and state "managers" are crucial, they are constrained by the opposing needs to "accumulate" and to "legitimate". In other words, "the state must safeguard the conditions for continued economic

growth and performance, and at the same time meet democratic demands relating to equity and due process"[59].

Horwitz himself has some reservations about the application of this politico-economic model to the empirical history of regulation and deregulation in a given area, taking as his example telecommunications. He makes two particular criticisms. The first is that "it is difficult to impute motives and/or interests to abstractions like "the state", which is made up of different apparatuses sometimes with conflicting agendas.....Likewise "capital" implies a structured unity which in large part does not exist except on a very few issues"[60]. The second is that the emphasis on the constraints placed on state activity by the need both to promote accumulation of capital, and to legitimate such accumulation before the electorate, ignores the interest of the state, or of state agencies, in preserving themselves. This fact is better explained by organisation theories.[61]

While Horwitz's first criticism may be valid with regard to the American situation where the vastness, complexity and heterogeneity of the political system make it difficult to abstract from it a general set of motives or interests applicable to all state-originated concrete regulatory arrangements. In the UK, however, it does make sense, for the purpose of analysis, to speak of a single political entity whose actions at any one time result in some particular form of regulation, and whose reasons for taking such actions are not hard to identify. If "the state" is taken to mean simply Parliament, or more narrowly, the government of the day, it is not particularly difficult to trace its motives as an actor in the specific arena of broadcasting and advertising regulation where the scale of activity for most of the time has been comparatively small and intimate. And if "capital" is interpreted simply as what is necessary for "continued economic growth and performance" in a free market economy, then the empirical history of broadcasting and advertising regulation very clearly shows the state organising regulation within the parameters of "accumulation of capital", and of "legitimation" understood as satisfying a variety of democratic demands within the UK political and legal system[62].

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[59] Robert B. Horwitz, *The Irony of Regulation Reform: The Deregulation of American Telecommunication*, New York: Oxford University Press 1989 p. 44

[60] ibid. p. 44

[61] ibid. p. 44

[62] Hoffmann-Riem, discussing broadcasting supervisory bodies, raises the question of "whether the main task of supervision lies more in the area of political legitimation and less in influencing the conduct of broadcasters." He states that "it cannot be ruled out that the....state legislatures were primarily interested in the effect of supervisory instruments in conferring political legitimacy, thereby seeking to satisfy the public with the requirements prescribed in them". Hoffmann-Riem refers in this instance to Germany, but the point he is making is a general one and is equally applicable to the UK legislature. (Wolfgang Hoffmann-Riem, *Defending Vulnerable Values: Regulatory Measures and Enforcement Dilemmas*, in Jay G. Blumler (ed.) *Television and the Public Interest*, London : Sage, 1992, p 198)

What is unique about British broadcasting regulation, of course, which differentiates it from the classical model of regulation of private business, formed in the context of a more committedly capitalist political economy, is the extent to which democratic demands have been favoured at the expense of the accumulation of capital. Democratic demands in broadcasting were defined primarily as the right of the people to share in the communicational "goods" - freedom of expression, promotion of national language and culture, entertainment, information and education etc. - offered by the service, rather than the right to redistribution of wealth or other tangible social benefits, but the principle remains the same. In other words, unlike in the United States, the social purpose of broadcasting took precedence over economic/industrial purposes, except when a market-oriented government became convinced that the balance needed to be redressed, as in the 1950s and 1980s.

After an initial attempt to balance the two constraints on the British Broadcasting Company had proved unsatisfactory, accumulation of capital by developing a commercial broadcasting industry along US lines was rejected in favour of fulfilling what, at the time, was seen as more pressing social needs. The constraint of accumulation nevertheless obliged the state from time to time to make regulatory adjustments. The development of television technology and the expansion of broadcasting in the 1930s and 40s forced the government to pay more attention to the industrial potential of broadcasting, resulting eventually in re-regulatory measures to promote the commercial television industry. Similarly, economic considerations were influential in making room for Independent Local Radio in the 1970s, and most recently in dismantling much of the regulatory apparatus in order to develop the huge capital accumulation potential of the new media.

But legitimation, i.e. the attempt to satisfy the public by a system of broadcasting regulation designed to promote social and cultural benefits, was, until recently, the more powerful of the two constraints. It was only with the arrival on the scene of a strongly free market-oriented government dedicated to reinstating accumulation of capital as an overriding policy objective that the existing supervisory system began to be viewed critically as evidence that the balance had been tipped too far in favour of legitimation. Thatcherism in fact went considerably further than this in its belief that state intervention in any area of the economy was not the way to achieve legitimacy for the political

Whether, as Mosco believes, deregulation is ultimately " a powerful instrument of social control"[64] or a better way of serving the public interest through competition and choice, it is important to locate this activity in the larger political context.

Although political theory helps to shed light on both regulation and deregulation, Horwitz is right that it misses certain crucial facts about how regulation has actually worked in practice which can be better explained by an organisational approach. This takes into account the desire for autonomy both on the part of the state, which reserves the right to ultimate control over the actions of regulatory agencies, and the agency itself which, once properly established, tends to resist interference from the state, setting up its own agenda in parallel with its official remit. In its analysis of regulatory failure, the Thatcher government took the same position as MacAvoy, Bardach, Kagan[65] and others who claim that regulatory agencies in time become self-serving and more concerned with preserving and extending their domains than efficient and effective regulation. In their view, the bureaucracy and red tape inevitably accompanying regulatory activity has a disastrous effect on industry and ultimately on consumers.

James. Q. Wilson has summed this tendency up: "They are in the regulation business, and regulate they will, with or without a rationale. If the agencies have been 'captured' by anybody, it is probably by their staffs who have mastered the arcane details of rate setting and license granting"[66]. It is not hard to recognise at least a something of this attitude in the IBA, and by the 1980s there were many who accused it of precisely this failing. License granting seemed to follow obscure criteria and was conducted behind closed doors with little or no explanation given for decisions made. And although the details of advertising rate setting were the province of the television companies, the Authority was responsible for approving the form and manner of their publication, the arcaneness of which, along with the companies' rates policy as a whole, had for years been a source of grievance with the advertising industry.

The IBA/ITCA copy clearance procedures had also become exceedingly complex, and while the television companies blamed the ever-expanding Code of Practice and the IBA's too close monitoring of the system, advertisers and agencies blamed the companies for excessive zeal in

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[64] See: Chapter 1, p. 19
[65] Robert B. Horwitz, op. cit. p. 39 . See Chapter 1 p. 18
[66] J. Q. Wilson, *The Dead Hand of Regulation.* The Public Interest, Fall 1971, p. 48

applying the rules. The Authority's self-promotion as the right body to undertake yet more regulatory functions, such as responsibility for the fourth channel and for overseeing Cable and Satellite, its reluctance to share regulatory functions with any other body which might dilute its authority, and its opposition to deregulation are all examples of the behavioural features associated with organisational critique.

The constitutional independence of the regulatory agency has always been a double edged sword. The laudable aim in broadcasting of freeing the agency from state interference and control in its internal matters has resulted in both the public corporations developing their own institutional characters and operating methods which have not always served broadcasting in the best possible way. Although, as has already been pointed out, the connection between the state and the broadcasting authority in the UK is in some respects close, in practice there is still a very considerable degree of autonomy.

The consequences of this autonomy can be judged in two different ways. They can be seen as fulfilling the predictions of capture theory as formulated by Bernstein and Stigler, i.e. capture by industry. Bernstein himself believes that: "Independence from the political strength and support of the president provides for the maximum exposure of the regulatory commission to the most effectively organised parties in interest.....Forced to reach a working agreement with the regulated parties, a commission develops a passive outlook with respect to the nature of the public interest. It gradually permits the private parties to define the public interest for it, and its own search gives way to indolence and passivity"[67]. So independence from the state can lead to dependence on industry. Alternatively, they can be viewed in the opposite way as demonstrating the in-built tendency for regulators to become "regulation-minded" and, in effect, working against the regulated parties and obstructing the state's intentions.

No-one could seriously accuse the IBA of indolence or passivity. It was its tireless activity in the pursuit of regulation that provoked much of the criticism[68]. For the Conservative government, since the premise on which regulation is based is mostly false, merely arranging for the regulator to be more independent or less from the political system would not have been much use. Autonomy

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[67] Marver Bernstein, *Regulating Business by Independent Commission,* Princeton: Princeton University Press, 1985, p. 157

[68] In 1981, Marketing Week said of the television watchdog that it was difficult "to conceive of a body that was more scrupulous, even downright pernickety, in the discharge of its duties." *(Advertising must guard its watchdog,* Marketing Week, 26 / 06/ 1981). Some other representative comments about the IBA's behaviour from an industry point of view are quoted in Chapter 10

needed to be restored, not to the regulator, but to industry in order to given it more say in defining the public interest rather than leaving this task to the regulator and to the politicians. The advertising and television industries had to be emancipated from regulatory restrictions by a drastic reduction in the overall power and scope of the regulatory agency. So capture theories (apart from self-capture which is, strictly speaking, a variant of organisational theory) do not have a great deal to say about deregulation[69].

From a cultural angle, the deregulation policies represent a profound change in mood in British society, which the Thatcher phenomenon both reflected and inspired. By the end of the 1970s, the traditional socialist vision had lost its appeal. Statism and red tape in general, and militant trade unionism in particular, were becoming increasingly resented, even by working class Labour supporters. A more individualistic view of citizenship was replacing the old collectivist pattern. In broadcasting, before it, the move away from a monolithic public service system towards a more varied and "personalised" service was simply an idea whose time had come, together with the technology to realise it. Alan Peacock was correct, to an extent at least, in claiming that both the broadcasting system and the consumer had grown up enough to permit more diversity .

The legacy of the early regulators and broadcasters, especially John Reith, had always ensured that the broadcasting service was treated as a luxury product and a privilege; something of the highest quality which the mass of people must be educated to appreciate and which was worth paying a price for[70]. The licence fee still operates as a kind of cultural national insurance; through compulsory contributions towards its cost, everyone is able to receive the benefits of a first class broadcasting system with an enduring reputation for excellence. What broadcasting policy of the late 1980s and 1990s has made quite clear, however, is that although this "insurance" will continue for some time, it will not be guaranteed for ever. The concept of broadcasting as a privilege and the notion of vulnerable values are under threat. Broadcasting is seen more and more as a commodity not so different from the goods and services provided by advertisers. In television, as the commercial sector

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[69] *Note:* This depends to a certain extent on the perspective from which it is viewed. The consumer representatives on the AAC, for example, have alleged pro-industry bias and capture in advertising regulation in the period up to deregulation, and are concerned that deregulation will weight the scales even more heavily against the consumer in the area of advertising control. Their views will be dealt with in Chapter 13

[70] *Note:* In his memoirs *Into the Wind*, Reith wrote that from the outset the BBC's responsibility "was to carry into the greatest number of homes everything that was best in every department of human knowledge, endeavour and achievement; and to avoid whatever was or might be hurtful. In earliest years, accused of setting out to give the public not what it wanted but what the BBC thought it should have, the answer was that few knew what they wanted, fewer what they needed. In any event, it was better to overestimate than to underestimate". (J.C.W. Reith, *Into the Wind*, Hodder and Stoughton, 1949, p. 101). This, incidentally, is an excellent justification for a common interest rather than a majoritarian approach to broadcasting.

expands, competition may force ITV to lessen its commitment to the public service ideal in order to keep market share, now that the regulatory system makes it possible for the new media to ignore this ideal altogether.

Chapter 9

The Broadcasting Act 1990: Continuity and Change

9. 1 Introduction.

The 1990 Broadcasting Act, which dismantled the duopoly and opened up the broadcasting market in the UK was not quite such a radical document as had originally been envisaged. Fierce opposition from a wide range of interests persuaded the government to modify some of its proposals on process regulation, in particular the plans to dispose of the ITV franchises by putting them out to competitive tender. The Act retained a central role for both process and product regulation and devotes considerable space to outlining the constitution and duties of the new agency with overall responsibility for commercial television in the UK. This body - the third in line since 1954 - is in effect a restructured version of its predecessor, the IBA. Since one of the main changes instituted under the 1990 Act was to remove the functions of broadcasting from the regulator, the old name, Independent Broadcasting Authority, was no longer appropriate and the new regulator was re-christened the Independent Television Commission.

Because most of the provisions contained in the Act were not due to come into effect until January 1993, a transitional period up to this date followed its becoming law in December 1990. Until 1993, when it took statutory form, officially replacing the previous Authority, the ITC operated in shadow form, and because much of their work and membership overlapped the IBA and shadow ITC held joint meetings during this time.

The provisions of the 1990 Broadcasting Act were designed to introduce a different regulatory regime which would operate with the much "lighter touch" first recommended by the Hunt Committee for Cable television and later urged by Peacock. Several major liberalising measures opened up the television system to competition and gave a much greater degree of authority to the commercial sector to make its own decisions. These moves were in line with the general deregulation

policies of the 1980's which intended that responsibility for private business decision-making should, as far as possible, rest with business and not with regulatory agencies.

9. 2 Changes Instituted Under the 1990 Broadcasting Act.

The main changes in relation to commercial television effected by the 1990 Act, which repealed the broadcasting legislation of 1981 and 1984, were:

i) The creation of two new regulatory bodies, the Independent Television Commission and the Radio Authority, to replace the IBA and the Cable Authority. The ITC would be responsible for licensing and regulating all commercial television services (including terrestrial, Satellite and Cable) except for S4C in Wales.

ii) The removal of the broadcasting function from the regulator and its relocation with the individual licensees.

iii) The replacement of the previous contract-based regulatory system by a licensing system, each licence being subject certain conditions with penalties for non-compliance. Licences were to be awarded by competitive tender to the highest bidder after a quality threshold and a sustainability test had been passed, except in "exceptional circumstances". Complex restrictions on ownership also applied.

The second measure transformed the Authority into "a more classical regulatory ....and licensing body" according to Frank Willis, ITC Director of Advertising and Sponsorship[1] . This means that the regulator no longer has responsibility for broadcasting programmes and advertisements, and is therefore not obliged to view any broadcast matter, including advertisements, prior to transmission. The individual licensees, either as producer-broadcasters or as publisher-broadcasters, are now solely responsible for ensuring compliance with regulation governing programmes and advertisements before they go on the air.

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[1] Interview with Frank Willis.

The third relieved the Authority of the need to decide the criteria for awarding contracts, a process which had come in for much criticism in the past. Now, the only valid criteria, after the "quality hurdle" in programming has been passed and ownership conditions have been met, are commercial ones: the size of an applicant's bid and the acceptability of the business plan.

These moves entail a big shift away from the hands-on policy reflected in earlier legislation and carried out by previous authorities, but the ITC still has quite a number of statutory obligations. There is also a completely new statutory "advisory" body, the Broadcasting Standards Council, which actually increases the number of agencies involved in the oversight of television.

Two other statutory agencies have a role in the system: the Department of Trade and Industry's Office of Fair Trading and the Monopolies and Mergers Commission. Finally, there are the non-governmental interested parties such as the ITV Network Centre which operates the machinery for self-regulation, the advertising industry's trade associations and the consumer groups. All these different groups come together to form an important part of the broadcasting and broadcast advertising policy network; in-put from them shapes the day-to-day operation of regulatory activity in the UK. A brief summary of the constitution and functions of these bodies is given in this chapter before going on to a more detailed discussion of their activities in chapter 11.

9. 3 The Statutory Authority and the Advisory Bodies.

9. 3. 1 The Independent Television Commission.

Members.

The Act states in Part I Section 1 that the Commission shall consist of:

a) a chairman and a deputy chairman appointed by the Secretary of State; and

b) such number of other members appointed by the Secretary of State, not being less than eight nor more than ten, as he may from time to time determine.

The board of the Authority consists of a chairman, presently Mr George Russell CBE, a deputy chairman, and eight members.

Schedule 1 of the Act gives more directions on the composition of the board. A person is disqualified from being a member if he is a governor or employee of the BBC or is a member or employee of the Channel Four Television Corporation, Broadcasting Complaints Commission or Broadcasting Standards Council. Nor may the membership include more than one person who is either a member or an employee of Welsh Authority. Three members, other than the chairman and the deputy chairman, must be people who appear to the Secretary of the State to be suited to make the interest of the Scotland, Wales and Northern Ireland respectively their special care. Appointments are made for a maximum period of five years. ITC members are disqualified from sitting in the House of Commons and the Northern Ireland Assembly.

In appointing the members, the government maintained a degree of continuity with the previous regulator. The first chairman of the ITC is the former chairman of the IBA and some other members have also been carried over. In a period of upheaval, wide experience both of regulation and of the broadcasting scene was seen as a necessary stabilising element.

Function.

The Broadcasting Act requires the Commission "to ensure that a wide range of services is available throughout the United Kingdom...(and) to ensure fair and effective competition in the provision of

such services and services connected with them"[2]. It must also ensure that the services are of "high quality and offer a wide range of programmes calculated to appeal to a variety of tastes and interests"[3]. The strictures on competition "shall not be constructed as affecting the discharge by the Director General of Fair Trading, the Secretary of State or the Monopolies and Mergers Commission of any of his or their functions in connection with competition[4].

The Act also contains general provisions with regard to the awarding of licences, licensed services, and advertisements, which are the responsibility of the ITC.

The general provisions as to advertisements *(Section 8)* contain several restrictions carried over from *Schedule 1* of the 1981 Act. Advertisements on behalf of political parties or directed towards political ends are still prohibited. So is unreasonable discrimination either against or in favour of any particular advertiser. The Commission may not act as an advertising agency. There is a new prohibition on the inclusion, without the Commission's permission, of programmes sponsored by persons whose products or services are prohibited from being advertised under *Section 9* which deals with the code of conduct.

Unlike in previous Acts, religious advertising is not forbidden and the detailed restrictions on sponsorship or any appearance of advertiser supplied or suggested programming have been dropped. There is no separate Schedule devoted to Rules as to Advertisements.

With regard to control of advertisements, the Commission is required :

(Section 9)

a) after the appropriate consultation, to draw up, and from time to time review a code

i) governing standards and practice in advertising and in the sponsoring of programmes, and

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[2] Broadcasting Act 1990, Chapter 4, London: HMSO, Part 1 Section 1, Subsection 2
[3] ibid. Part 1, Section 1, Subsection 2
[4] ibid. Section 9

ii) prescribing the advertisements and methods of advertising and sponsorship to be prohibited, or to be prohibited in particular circumstances; and

b) to do all that they can to secure that the provisions of the code are observed in the provision of the licensed services. The Commission may make different provision in the code for different kinds of licensed services.[MTN1]

"The appropriate consultation" is defined as consultation with -

a) the Radio Authority

b) every person who is the holder of a licence under Part I

c) such bodies or persons appearing to the Commission to represent each of the following, namely:

i) viewers

ii) advertisers

iii) professional organisations qualified to give advice in relation to the advertising of particular products, as the Commission think fit: and

d) such bodies or persons who are concerned with standards of conduct in advertising as the Commission think fit.

Viewers opinions are solicited from the Voice of the Listener, the National Consumer Council, the Consumers Association, and the ITC's own Viewers Consultative Councils and Central Religious Advisory Committee; advertisers' and agencies' views are sought through their trade associations. Many relevant professional organisations are consulted, e.g. the British Medical Association for medical advertising and the AA and the RAC for motor advertising. Those concerned with standards of conduct include the Advertising Standards Authority, the British Code Of Advertising Practice Committee, the Office of Fair Trading, and the Securities' Investment Board and the Self Regulatory Organisations for the financial appendix to the Code[5].

[5] *Note:* This information was provided during a interview with Frank Willis.

Section 9 also allows the ITC to go beyond the requirements imposed by the code in discharging its general responsibilities in respect of advertisements and methods of advertising and sponsorship, and in securing compliance with code. It may give directions to licence holders -

a) with respect to the classes and descriptions of advertisements and methods of advertising and sponsorship to be excluded, or to be excluded in particular circumstances, or

b) with regard to the exclusion of a particular advertisement, or its exclusion in particular circumstances.

It may also give directions regarding the timing of advertisements, the minimum interval that should elapse between periods given over to advertisements and the exclusion of advertisements from a specified part of a licensed service. These powers over the process aspect of regulation are carried over from previous acts.

The Commission is also an administrative authority for the purposes of the *Control of Misleading Advertisements Regulations* (1988) and has a duty under the regulations to set up a complaints procedure. It must investigate all complaints about television advertising and take action to redress the situation if necessary. There is a scale of penalties for non-compliance with directions, the chief sanction being the banning of an advertisement. If a company fails to obey a withdrawal order it can be fined up to 3% of its annual revenue, up to 5% for a second offence, and ultimately may have its licence revoked.

With respect to advertising control, then, the basic function of the regulatory authority is threefold:

i) It sets standards through the Code of Advertising Standards and Practice and the Code of Programme Sponsorship.

ii) It enforces compliance through a combination of pre-transmission clearance requirements, retrospective action and penalties for non-compliance.

iii) It deals with all complaints received about advertising through an established complaints procedure.

So, although the 1990 Broadcasting Act still provides a fairly solid framework for the regulation of television advertising, it contains significantly fewer statutory requirements than previous acts. The regulatory agency must continue to draw up and keep under review a Code of Practice but, deprived of its broadcasting role, it can act only retrospectively in the case of breaches to the Codes. It is no longer mandatory to appoint advisory committees, such as the Advertising Advisory Committee and the Medical Panel, but merely to engage in "appropriate consultation". In the event, the ITC has, up to now, chosen to retain the committee system with relatively minor changes.

9. 3. 2 Specialist Advisory Committees on Television Advertising.

Following precedent, the ITC has appointed two specialist advisory committees to assist in the task of drawing up the Codes of Practice.

i) The Advertising Advisory Committee.

ii) The Medical Advisory Panel.

(i) The Advertising Advisory Committee.

Members.

The Committee has a Chairman appointed by the Commission, currently Professor Colin Seymour-Ure of the University of Kent. His predecessor was also an academic, Professor Geoffrey Stephenson of the same University. From 1964 until 1992 the Chairman was required by law to be independent of all advertising interests. The 1990 Act did not spell out this requirement but the ITC, playing it safe, has made it clear that he is still "independent, having neither industry nor consumer group affiliations"[6].

In addition, the Committee comprises nominees of consumer, medical and advertising organisations, representatives of terrestrial and Satellite broadcasters, and some members appointed on an individual basis. The majority have no connection with advertising interests.

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[6] Frank Willis *Television Advertising Control: the new UK system,* Consumer Affairs, March/April 1991, p. 23-26

On the non-advertising side, members include representatives of the National Consumer Council, the Consumers' Association and the British Medical Association. It has also recently invited the Chief Trading Standards Officer for Cumbria and a Minister of Religion involved in youth work in London's black community to join. From the advertising world, the Chairman of the BCAP Committee, the main standards-setting body in the wholly self-regulatory system run by the Advertising Standards Authority (ASA), is a member, along with representatives of the advertising industry, both agencies and advertisers. According to former chairman Geoffrey Stephenson, the Committee now has a more varied professional representation and has become less London based[7].

Function.

The AAC is not a decision making body but "the main forum for discussion of the rules relating to advertising standards"[8]. Its role is to debate the various issues presented to it by the ITC, who will have conducted prior consultations with interested parties, and to assess research. To assist it in this task, it looks at reports of complaints from viewers and reviews of existing literature on the effects of television advertising on audiences. It then passes on its advice to the board of the ITC. The Commission is not obliged to follow this advice, but rarely rejects it. Frank Willis denies that its role has been downgraded in practice following the 1990 Act. As he explained when interviewed, "although the AAC is not any more a statutory body we wish to maintain it because it is very important that the standards we enforce do represent an acceptable consensus of reasonable thinking people in the UK"[9].

ii) The Medical Advisory Panel.

Members.

The Medical Advisory Panel is made up of distinguished consultants in general medicine, pharmacology, chemistry, dentistry, veterinary science, nutrition, paediatrics, gynaecology, dermatology and other associated specialist fields. The Commission appoints the panel after consultations with professional organisations and with the agreement of the Minister of State.

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[7] Professor Geoffrey Stephenson *Sound Advice,* Spectrum: Quarterly Magazine of the Independent Television Commission. Summer 1992, p. 10

[8] ITC: *Annual Report and Accounts 1992,* p. 36

[9] Interview with Frank Willis

Function

To give advice both on the provisions of the Code bearing on medical and related advertising, and on the presentation of individual advertisements where a health claim is made.

9.3.3 The Broadcasting Standards Council

Members.

The Council has eight members appointed by the Secretary of State at the Department of National Heritage. According to its Director, Colin Shaw, they are intended to represent lay opinion (i.e. that of the average viewer or listener) rather than that of professional broadcasters or members of the advertising industry.

Function.

The Broadcasting Standards Council's constitution and duties are dealt with in detail in Sections 152-161 of the 1990 Broadcasting Act. Its remit is to monitor the portrayal of sex and violence and investigate the question of taste and decency in television and radio programmes and in broadcast advertising. It deals with complaints from the public about these matters and can initiate complaints of its own.

Its powers, although statutory, are limited. As Colin Shaw explained to me, it is not strictly speaking a regulatory body but an advisory body. Like the ITC, it has a duty to draw up and, from time to time, review a code of practice. If a complaint about a particular commercial is received the Council can require the broadcaster concerned to provide it with a recording of the offending item. It must then decide whether or not to uphold the complaint and has the power to compel its findings to be published, either in print or on the air, at the expense of the broadcaster. It has the resources to commission research into matters relevant to its remit.

Shaw went on to emphasise that the majority of the Council's work is concerned with programming and not advertising, since he regards the ITC's control procedures as more than adequate and the BSC actually receives few complaints about television commercials. Areas where it might become

involved include gender stereotyping, the inappropriate use of sex to stimulate sales[10] and the portrayal of disabled people in advertisements[11].

9. 4 Government Departments and Agencies .

9. 4. 1 The Department of National Heritage.

The Department of National Heritage was created by the Prime Minister in 1992 to gather under one roof a number of functions previously scattered among several government departments. It took over broadcasting from the Home Office and also oversees the arts, film, historic buildings, sport and tourism. The remit of the new department was described by John Major in May 1992 as having responsibility for "many of the central areas of our national life which enhance its quality or contribute significantly to its national identity"[12]. As broadcasting has always been regarded as one of the most important of these areas it seems appropriate that responsibility for it should have been given to this specialist department rather than remaining with the Home Office.

The Secretary of State for National Heritage represents the apex of the pyramid of broadcasting regulation: it is to him that the ITC must refer for guidance in problematic areas of advertising control. He may accept or reject proposals put to him by the ITC or deliver his own directions. The department is responsible for general broadcasting policy.

9. 4. 2 The Office of Fair Trading

The Office of Fair Trading is a regulatory agency with duties under the Fair Trading Act 1973, receiving funding and political direction from the Department of Trade and Industry. Its purpose is to "keep under review commercial activities in the UK and protect the consumer from unfair practices"[13]. It has had its powers extended by several additional pieces of legislation since its inception and now covers restrictive trade practices, resale prices, anti-competitive practices. It

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[10] *BSC Code of Practice 1989,* London: Broadcasting Standards Practice, p. 43
[11] ibid. p. 45
[12] Barrie MacDonald, *Broadcasting in the United Kingdom. A guide to information sources,* London: Mansell Publishing Limited. p. 71
[13] ibid. p. 74

operates the *Control of Misleading Advertisements Regulations* 1988, which implement *EC Directive 84/450 on Misleading Advertising* and, as such, it is an important consumer protection mechanism.

The Office's role in the regulation of television advertising is, in theory, confined to the process aspect since it deals only with relevant competition issues. Its publication, *Misleading Advertisements: the Powers of the Director General of Fair Trading*, states quite clearly that his powers do not cover the content of advertisements carried on commercial TV, Cable and Satellite services or on commercial radio. The authorities with duties in this area are the ITC and the Radio Authority. The OFT responds to complaints made to it by any of the commercial participants in broadcasting, advertising and related industries - licensees, independent producers, advertisers, agencies etc. - about alleged unfair competition or dubious trade practices. The ITC do, however, refer to the Office on a consultative basis when drawing up the codes which are concerned chiefly with advertising content.

The 1990 Broadcasting Act gives the OFT responsibility for approving the networking arrangements for the new Channel Three, worked out jointly by the ITC and the ITV contractors in consultation with the OFT[14]. The function of the OFT under Schedule 4 is to ensure that the network is able to compete effectively with other television programme services in the UK. The ITV networking arrangements must pass the "competition test", i.e. they must not have the effect of "restricting, distorting or preventing competition in connection with any business activity in the UK"[15].

In December 1992, the arrangements hammered out after much argument and debate, and approved and published by the ITC, were rejected by the OFT on the grounds that they did not pass the competition test. The ITC and the Channel 3 licensees referred the matter to the Monopolies and Mergers Commission. In April 1993, an MMC Report ordered a number of modifications to the scheme, the most important of which was to allow independent producers to submit programme proposals directly to the Network Centre. In September, the revised arrangements, currently in

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[14] *Broadcasting Act 1990*, Section 39 Schedule 4.
[15] ibid. Section 39, Schedule 4

operation, were published after receiving ITC approval. The MMC also recommended the Authority to monitor, analyse and report on the operation of the networking arrangements.

9. 4. 3 The Monopolies and Mergers Commission

The Monopolies and Mergers Commission is a body with statutory powers to investigate proposed mergers, alleged monopoly situations and any form of anti-competitive practice. It is funded by the Department of Trade and Industry but is independent of the government. Cases are referred it by the OFT; it then reports whether it believes there has been, or might be, an abuse of the market and recommends appropriate measures. The Commission is mentioned in the Broadcasting Act 1990 in connection with its competition regulation function, and with the Channel 3 networking arrangements. It was responsible for some of the amendments relating to competition necessary for the ITC/ITV Network Centre's scheme to be accepted by the OFT.

9. 5 Bodies Involved in Self-Regulation of Television Advertising.

9. 5. 1 The ITV Network Centre.

***Members*.**

The Fifteen Channel Three Companies.

The Channel Three Network comprises 15 companies; there are 14 regions corresponding to loosely defined cultural, political and geographical communities, one of which (London) is divided into a weekday and a weekend service[16].

***Function*.**

Set up under the 1990 Broadcasting Act, the ITV Network Centre is "a body outside the day-to-day control of the television companies yet integral to ITV's federal structure"[17]. It operates alongside the ITVA which continues in its role as the ITV companies trade association . The Network Centre

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[16] *Note :* The largest region - London - covers nearly five million homes; the smallest - the Channel Islands - some 50.000 The five companies serving the largest regions - the two London companies, one for the Midlands (centred on Birmingham), one for the North West of England (centred on Manchester) and one for Yorkshire (centred on Leeds) - have been given responsibility for most of the production for the network. (Jonathan Davies. *TV, UK Special Report.* Knowledge Research, 1991, p. 39)

[17] *The Network Centre Review,* 1994, p. 5

has sole responsibility for commissioning new programmes for the network, either from independent producers or from in-house production resources owned by the television companies themselves. "For license compliance reasons all programmes have to be contracted through an ITV company, even those supplied by independent producers, who have direct access to the Network Centre". [18] It is governed by the ITV Council, which is made up of the Chief Executives of the companies and is responsible for joint policy on industry-wide matters, including marketing and advertising copy clearance.

As self-regulation has now been given much greater emphasis within the statutory framework, the Network Centre plays a central role in the implementation of current policy particularly with respect to the statutory Codes of Advertising Standards and Practice and Sponsorship. Since 1993, it has had sole responsibility for pre-transmission clearance of television commercials which it carries out by means of the Broadcast Advertising Clearance Centre, though it may ask the regulator for advice. It is in daily contact with the advertising industry and provides an advisory service on the meaning and interpretation of the Code for those involved in the making of commercials.

The ITV Network Centre, like its predecessors, is also a member of the Code of Advertising Practice (CAP) Committee which administers the British Code of Advertising Practice. This general code is a voluntary method of maintaining standards in non-broadcast advertising, drawn up and supported by advertisers, agencies and the media. The Centre is therefore able to connect voluntary regulation of all other forms of advertising with the specific requirements of the statutory codes affecting broadcast advertising; both kinds of code are referred to in clearing copy.

9. 5. 2 The Broadcast Advertising Clearance Centre.

Function

BACC is the chief mechanism by which the Network Centre fulfils its duty to ensure compliance with the codes. It has two levels of authority. At the top is the Copy Clearance Committee, made up of six sales and marketing directors from the ITV companies, Channel 4 and BskyB, which meets monthly. It provides an "appeals court" function in the case of disputes. Routine daily clearance is

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[18] ibid. p. 5

of six sales and marketing directors from the ITV companies, Channel 4 and BskyB, which meets monthly. It provides an "appeals court" function in the case of disputes. Routine daily clearance is conducted by the Copy Secretariat which is composed of three groups, each consisting of five people experienced in advertising, who check pre-production scripts and provide advice. Agencies and advertisers have free access to the Secretariat to discuss problems and may contact Committee members at any time.

BACC has two principle functions: the examination and discussion of pre-production scripts and the pre-transmission clearance of finished television advertisements. With the exception of a minority of local advertisements which may be cleared by the broadcaster concerned, all finished advertisements must be viewed and given clearance by BACC prior to transmission. Although the submission of pre-production scripts is not compulsory, the vast majority of advertisers do this. It is therefore unusual for a finished commercial to be rejected and only a small proportion need amending before being cleared for transmission. In 1993, for television, BACC dealt with around 18,000 scripts and 12,000 finished advertisements[19].

BACC now has an expanded constituency to include Satellite and Cable stations. In its decision-making process the Clearance Centre relies on the expertise of a large number of specialist advisors.

9. 5. 3 The Advertising Liaison Group.

The old Advertising Liaison Committee continued to exist in its original form until 1992. The ITC then carried out a review of its consultative arrangements for the purely commercial aspects of the broadcaster-advertiser relationship. It decided to replace the ALC with "a broader forum on which, in addition to the ITV companies, other categories of ITC licensees would be represented." Its purpose is loosely defined as "an exchange of views" between the interested parties on issues of general concern connected with television advertising and sponsorship[20].

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[19] Broadcast Advertising Clearance Centre. *Regulation of Broadcast Advertising in the UK*, GCD 14/06/94
[20] ITC: Annual Report and Accounts 1992, op. cit. p. 38

9. 5. 4 The Advertising Association.

The Advertising Association is the chief trade organisation for all participants in the business of advertising. It represents British advertising interests both in the UK and worldwide and contributes to the voluntary system of self-regulation for all non-broadcast advertising operated by the Advertising Standards Authority and the British Code of Advertising Practice Committee.

9. 5. 5 The Advertising Standards Authority and the Code of Advertising Practice (CAP) Committee.

These two bodies together constitute the machinery for self-regulation of non-broadcast advertising. Although not directly involved in the control of television commercials, they nevertheless work in co-operation with the ITC's Advertising Control Office and the ITV Network Centre to ensure maximum consistency between the rules governing broadcast advertising those dealing with all other forms. The CAP Committee Chairman is a member of the Advertising Advisory Committee.

9. 5. 6 The Incorporated Society of British Advertisers.

Members.

More than *1000* UK companies, including most major advertisers.

Function.

The ISBA is an organisation which represents the interests of advertisers in the UK with respect to all media. It has been an important player in television advertising regulation since 1954. Both before and after deregulation of broadcasting in Britain (for which it lobbied forcefully) it has worked closely with the regulating authority in the area of general policy, and in the drawing up of the codes of practice through its presence on the Advertising Advisory Committee. It alsc· has a close working relationship with the commercial stations and the BACC who must regulate advertisements paid for by its members.

Among the aims of the ISBA as outlined in its 1993 Annual report are:

1) To promote the freedom of speech and commercial communication, and to defend the advertisers' freedom to advertise and promote goods and services in all media.

2) To ensure that British advertising is legal, honest, decent and truthful through active support for the Code of Practice, governing all forms of commercial communication, as agreed by the Society.

It furthers these potentially conflicting aims in the field of television advertising through its Radio, Television and Screen Advertising Committee.

As well as membership of the AAC, the Society is represented on the CAP Committee, on the Advertising Standards Authority, in the Advertising Association and the Advertising Liaison Group.

9. 5. 7 The Institute of Practitioners in Advertising.

Members.

Most major advertising agencies. Its member-companies handle over 80% of all advertising placed by UK agencies.

Function .

The IPA is the industry body and professional institute which represents the interests of advertising agencies in their relations with advertisers and the media. Like the ISBA it has been involved in both the formation of broadcasting regulation policy and in the practical operation of regulation since the inception of commercial television. It belongs to the AAC, the CAP Committee, the Advertising Standards Authority, the Advertising Association and the Advertising Liaison Group.

9. 5. 8 The National Consumer Council

Members

The Council has nineteen government-appointed members who also form the Committees of the regional councils of Scotland and Wales. The chairman of the separately constituted Consumer Council for Northern Ireland is also a member.

Function.

The National Consumer Council was set up by government in 1975 to give a strong, independent voice to consumers in the United Kingdom. Although the Department of Trade and Industry funds the Council and appoints its members the Council has no statutory powers. It does not deal directly

with individual consumer queries, nor does it test consumer products - these jobs are done by colleague organisations.

It is concerned with access to goods, services and information; with choice in making purchasing decisions; with safety issues and with systems of redress following complaints and disputes. It formulates policies to further and safeguard consumers' interests, based on appropriate information-getting and research, and takes action to promote these policies and ensure their implementation. It works in conjunction with other consumer groups in pursuing its objectives[21].

Monitoring advertising standards in all media is an important part of its work and it has been able to give advice to the regulatory authority for commercial television through membership of the Advertising Advisory Committee since 1964. It has therefore been involved both in drawing up and revising the codes and in day-to-day debates on standards and practice. It is concerned chiefly with preventing misleading advertising from being shown on air, and with ensuring that commercials are prepared responsibly without being "so framed as to abuse the trust of the consumer or exploit his lack of experience or knowledge"[22].

9. 5. 9 The Consumers' Association

Members

The Consumers' Association has around 800,000 members, either subscribers to its four "Which?" magazines, or ordinary members. It is governed by a Council of elected members and does not permit "principals from trade or industry" to sit on the governing council[23].

Function

The organisation has two arms: the Association of Consumer Research, a registered charity, and Consumers' Association Ltd., which publishes the research and conducts campaigns on behalf of consumers. It has a staff of 480 and its own testing laboratory where comparative research on a wide range of products is carried out and where claims made by advertisers are investigated. The

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[21] *NCC: Strategy Plan 1991; NCC: Annual Report 1992*
[22] *NCC. Advertising: Legislate or Persuade? A Consumer Statement .*
[23] Consumers' Association: *The Association for Consumer Research: Consumers' Association Limited.* p.1.

aims and objectives of CA are broadly similar to those of the NCC but it is financially wholly independent. It does not accept money either from government, or trade and industry, nor does it permit advertising in any of its publications .

It lobbies parliament and producers of goods and services for a better deal for consumers, and has been responsible for several Acts of Parliament which have improved the consumer's position. Like the NCC, it has been actively involved in the debates on broadcasting policy, particularly in the area of advertising control, and has a representative on the Advertising Advisory Committee.

9. 6 Conclusion

This brief summary shows that while there has been considerable re-structuring and a few name changes , the chief players in advertising control remain the same. The fundamental functional difference in the regulator/broadcaster relationship has not meant a big alteration in the general scheme of product regulation. Process regulation has been more drastically altered with the opening up of competition, the liberalising of restrictions on market entry and the introduction of the auction system all of which disrupted the established patterns of commercial television. The repercussions of this shake-up in the markets have yet to make themselves felt, however, apart from the loss of three television companies, including the popular and successful Thames Television and TV AM. It is nevertheless widely believed that these changes in the macro-environment of television economics will eventually filter through to the specific task of maintaining standards on the content side of advertising.

Chapter 10

The Dynamics of Regulatory Activity: Control and Resistance.

10. 1 Introduction.

Despite four years of upheaval in the television market following the 1990 Broadcasting Act, the various different bodies described in the previous chapters still have certain clearly defined functions within the system, even if some of those functions have changed, altering the nature of their relations. All the parties involved in regulation of commercial television in the UK have been anxious to avoid abrupt changes in practice even though far-reaching changes in policy have been made. The emphasis has been on maintaining continuity and proceeding with caution, reflecting the essentially conservative nature of British broadcasting regulation .

The regulatory scene is nevertheless far from static. The various different participants in advertising regulation come together to form a complex and shifting network of relationships within a power structure that is broadly hierarchical. The chief dynamic of these relationships arises from the opposing forces of control and resistance. It is the duty of the regulator to control the behaviour of the advertising and commercial television industries. The industries in turn resist, not so much the principle of control which they accept, but any particular controlling actions they consider unreasonable, unfair or unnecessarily damaging to their interests. The regulator is in a parallel relationship with the state which wields the ultimate authority. Within the hierarchy of authority the positions of the main players are fairly flexible, although they must remain within the boundaries set by the formal regulatory structures. Different sets of interests interact together in a variety of alliances and oppositions, each one manoeuvring to defend its own territory and to further its own objectives.

While the relationship of regulator versus industry is the central one, the secondary connections the different parties make on a more temporary basis are an important factor in the development of policy. The regulator and the television companies may join forces against the advertisers and the

government; the advertisers and the regulator may combine to control certain activities of the television companies; consumers may lobby Parliament for consumer protection measures affecting television advertising which neither the regulator nor industry wants. The involvement of other participants - independent producers, for example - with a stake in the outcome of regulatory decisions further complicates the background against which decisions are made. The different interest groups must negotiate their share of favourable regulation and try to limit the damage. It is a bargaining process entered into by all sides, the results of which must not distort the overall balance of advantage and disadvantage too greatly.

Although the players have an objective status based on a set of functions which are externally defined - their institutional remits - this does not prevent them from having rather different internal perceptions of what these functions are, and of their own and others' effectiveness in exercising them. How the intentions and objectives of others are perceived also varies depending on the player's position in the network.

Consumers, for instance, tend to be more critical of the system in general than advertisers, whom they see as relatively more powerful and often over ready to use that power against the interests of consumers. They sometimes see the Advertising Advisory Committee as ineffective in curbing some promotional practices which are unacceptable from their point of view. Advertisers have criticised the regulator for being too close to the television companies to be able to ensure a fair deal and too anxious to placate a small but vocal minority of consumers. These subjective opinions of the regulation game are also important in understanding how it works. Additionally, regulation of the kind used in television advertising, which relies to great extent on codes of practice, must allow space for interpretation of the codes; and any act of interpretation includes a strongly subjective element[1].

This chapter examines how all these organisations relate to one another in the actual practice of advertising regulation. I have relied on in-depth interviews with leading figures responsible for television advertising policy to discover how each of them views the purposes of regulation, and its effectiveness, from the perspective of his or her own particular interest group.

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[1] See : Chapter 12 p. 253

10. 2 The Operation of Television Advertising Regulation: A Definition and Some Illustrations.

The ITC's Director of Advertising and Sponsorship, Frank Willis, gave me the following definition of broadcast advertising regulation in the UK: "self-regulation within a statutory framework"[2]. The 1990 Broadcasting Act and the ITC itself make up the bulk of this framework, the ITC being the body legally constituted under the Act to implement regulation. Government agencies such as the OFT and the MMC are also a part of this framework, as is independent legislation relating to consumer, competition and advertising issues. The Broadcasting Standards Council, too, provides a marginal element of the statutory framework.

The "self" mentioned in the definition requires rather more careful identification. It is usually taken to refer primarily to the commercial television industry comprising the ITC's licensees - ITV, Channel 4 and the Cable and Satellite companies - who now have sole responsibility for broadcasting advertisements and for making sure that they comply with the statutory codes. At a secondary level, the advertising agencies and their clients are part of the process of self-regulation because they too must ensure that their commercials do not violate the statutory codes drawn up by the regulator. To assist them in this task, non-statutory guidelines are made available to them by the ITV Network Centre's Broadcast Advertising Clearance Centre. They may also refer to the voluntary system of maintaining standards of practice in non-broadcast advertising operated by the Advertising Standards Authority and the British Code of Advertising Practice Committee, which has its own codes. The activity of self-regulation, then, is the interpretation of, and compliance with, a set of rules, mandatory at the primary level and advisory at the secondary level.

The voluntary machinery for regulating non-broadcast media differs from the hybrid system that oversees television and radio in that it possesses no legal teeth to force those who contravene the codes to change their behaviour. If advertisers persistently breach the rules, complainants must take action through the courts. This is usually done through the Office of Fair Trading, which has powers to seek injunctions to stop publication of misleading or potentially damaging advertising, and to institute court proceedings under the relevant legislation. The ASA, a classical self-regulatory institution and a creature of the advertising industry, does not have any punitive powers other than

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[2] Interview with Frank Willis.

adverse publicity, suspension of trading privileges or appeals to publishers to refuse advertising space to persistent offenders[3].

Once more, it is worth emphasising the point that the hybrid system represented by the ITC is a logical consequence of the view that broadcast advertising, especially television advertising, is qualitatively different from other varieties. Its immediacy and invasive nature have always been taken to justify much more interventionist regulation than print advertising. This historically influential view is still strongly held in government and among policy makers elsewhere, despite the recent emergence of a liberalising ideology. But since the earliest days, the need for convenience from the government's point of view has been a significant factor in determining the practical arrangements for advertising control.

In the case of television advertising, although the quantity of non-broadcast advertising dwarfs the amount broadcast on television (some 25 million ads are published annually in the press and through direct mail etc. in the UK, while the number of commercials appearing on television has remained stable for several years at around 10-12,000) there is still far too much work for any existing government agency, such as the OFT, to handle. The solution has been a compromise. The regulatory agency, with its specialist department of advertising control, puts together codes of practice which are not themselves law, but are statutorily enforceable by means of legal sanctions. One of the regulated industries itself provides the apparatus of enforcement. Under the new Broadcasting Act, the regulator maintains a greater distance from those who are responsible for producing, policing and finally broadcasting the commercials than the previous Authority, which means an increased role for self-regulation. This mixed system may not be perfect, and the emphasis may shift from time to time, but it appears to suit the particular circumstances of broadcasting in the UK very well[4].

All the participants in the process whom I interviewed agreed that the combination of self-regulation and statutory back-up is, in principle, the right way to go about safeguarding standards in television

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[3] *Advertising Under Control: A Guide to the ASA*, pp. 2 - 3

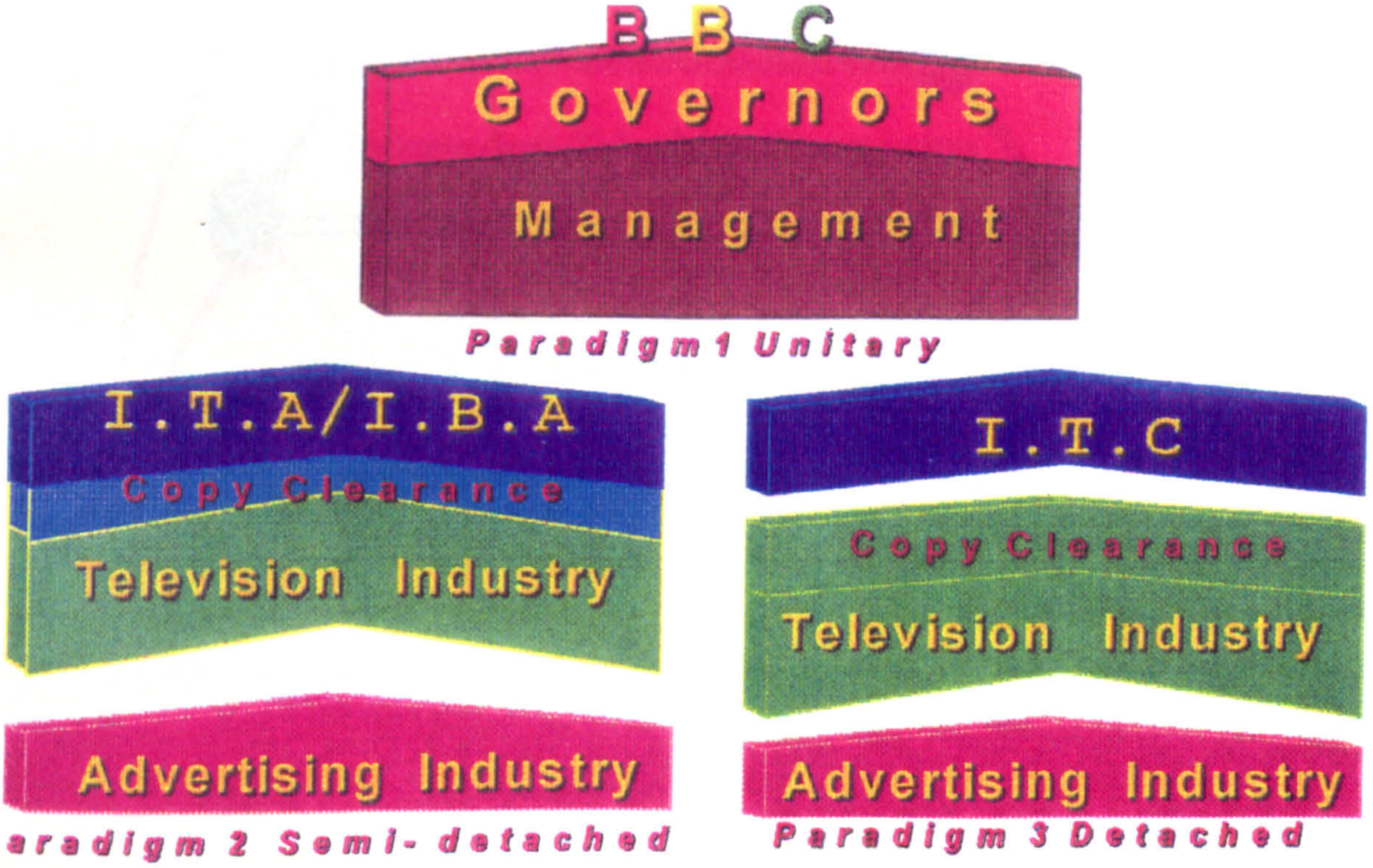
[4] *Note :* Lord Thomson of Monifieth, speaking as Chairman of the Advertising Standards Authority, in answer to his own question as to whether the mixture between state regulation and self-regulation was right for Britain, stressed that "the important principle to preserve is that the system should remain a genuine mixture" in order to complement the mixed economy it serves. (Lord Thomson of Monifieth, F.C, *The United Kingdom Voluntary Control System*, in Advertising Control under United Kingdom and the European Community Law, 28th-29th September 1978, Business School Conference, The City University, pp. 31-32)

advertising. It has the advantages of flexibility and speed of response, makes reaching a consensus easier, and provides a clear and well-defined set of parameters. The role of the ITC as an intermediate level of authority between the consumer, or any advertiser or agency who felt they had cause for complaint, and the legal system is appreciated. There is great reluctance to involve the courts which is both costly and time consuming[5] . This is why there was concerted opposition to the various moves by the European Commission in the 1970's and 80's to extend the law further into advertising control. Most people questioned thought that approximately the right balance had been struck between the two modes of operation, but the frontiers might sometimes need adjusting this way or that.

10. 3 Four Diagrammatic Representations.

As has already been mentioned, during its seventy year history broadcasting regulation has followed three different paradigms which are represented in Figure 10. 1.

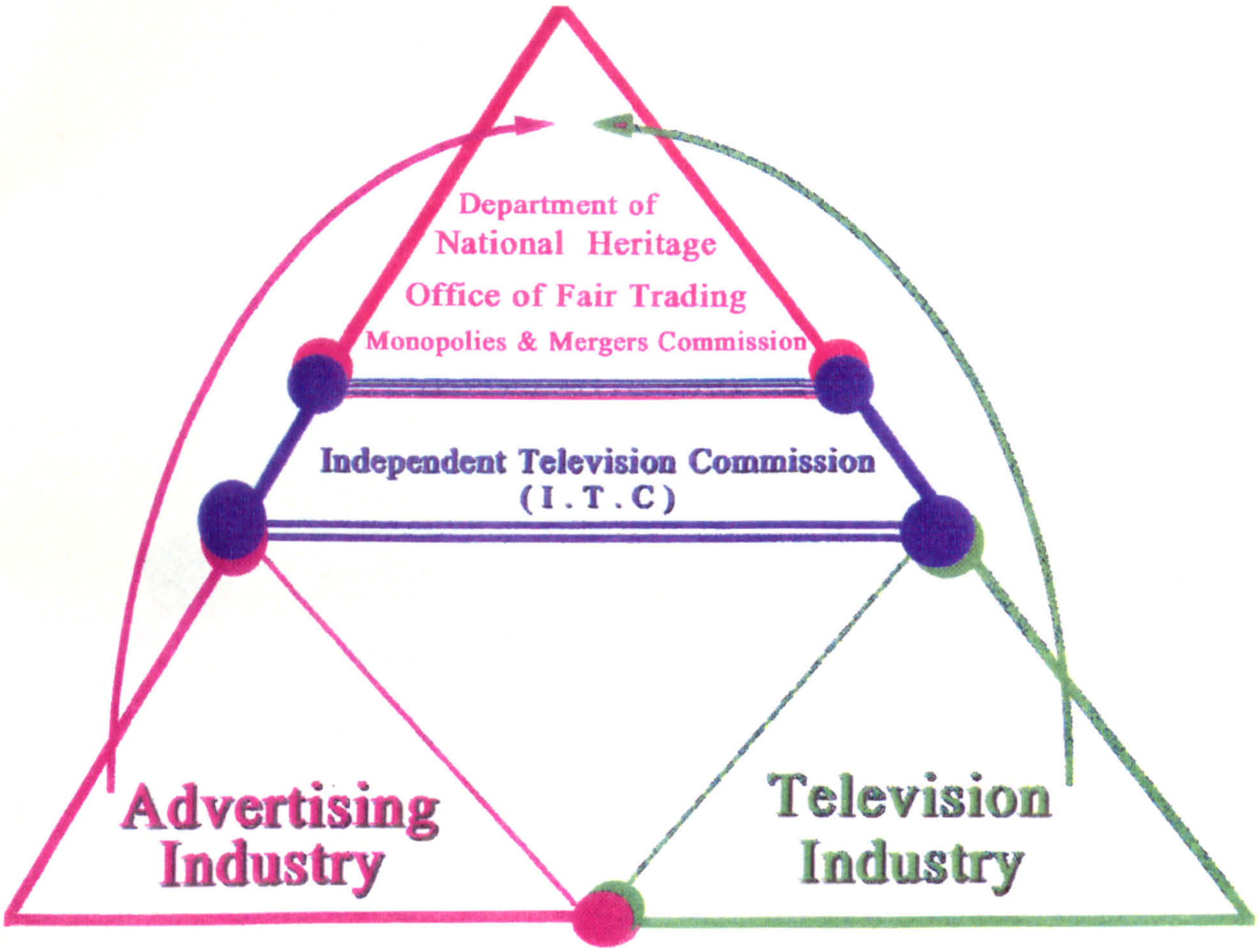
Figure 10. 1: The three paradigms of UK broadcasting regulation.



[5] The ITC believes that "the chief advantage of code-based systems of regulation is that they can aim for higher standards than, for example, criminal law". (Frank Willis, *Back to the boundary line*, Spectrum, Winter, 1992, p. 17). So not only is self-regulation quicker, cheaper and more flexible but more effective in terms of quality.

Under paradigm 1, the Governors, who are the BBC, are responsible for ensuring that the management complies with the terms and conditions of the Corporation's Charter and License, and with the requirements contained in any relevant legislation. The system is completely unitary with no separation of regulator and regulated. Under paradigm 2, the commercial television Authority is partly detached from the regulated industries. Although it is completely separate from the advertising industry, it is formally attached to the television industry by virtue of its broadcasting function, under which it has responsibility for regulation of all broadcast matter, including advertising, prior to transmission. Under paradigm 3, the Authority, no longer the broadcaster, is formally detached from both regulated industries[6] .

Figure 10.2: The hierarchy of authority in television advertising regulation.



[6] *Note:* The ITA, and its successor the Independent Broadcasting Authority, did not conform exactly to the type of regulatory agency discussed in Chapter 1 which is wholly independent of the privately owned business it supervises. As Wolfgang Hoffmann-Riem has pointed out, the British Authority, "in its role as broadcaster, could actively influence programme content in the directions it wished; more than a watchdog, it hunted with the hounds. The new Commission (the Independent Television Commission) is a classic, detached supervisory body". Wolfgang Hoffmann-Riem, *Defending Vulnerable Values: Regulatory Measure and Enforcement Dilemmas,* in Jay Blumler (ed.) *Television and the Public Interest,* London : Sage, 1992, p. 192)

Figure 10. 2 shows the pyramidal structure of the hierarchy of authority in television advertising regulation, with the Department of National Heritage and the two other relevant government agencies at the top, the regulator with its Advisory Committees in the middle, and the television and advertising industries at the base. Independent feedback from the regulated industries to the state is represented by arrows. Because the model includes the state the television and advertising industries are represented as on the same level, as allies with a united interest, because they are both subject to authority from above.

Figure 10.3: Power relations within the regulatory system.

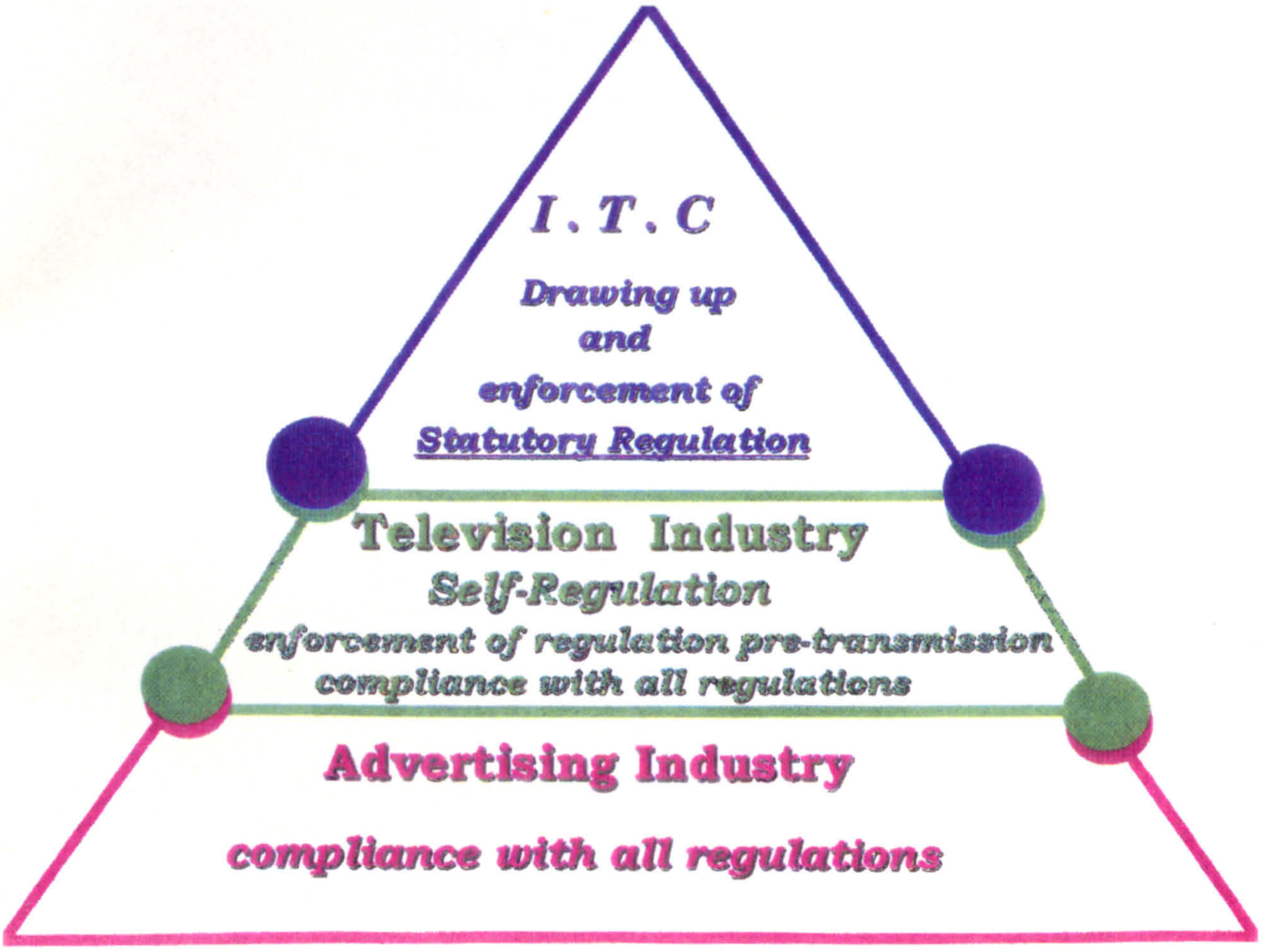


Figure 10. 3 takes a narrower view which excludes the state and focuses on the levels of authority within the regulator/regulated relationship. The television industry as the one responsible for self-regulation in the sense of enforcement of statutory regulation prior to transmission is shown above the advertising industry which must comply with both ITC and ITV Network Centre rules.

Figure 10. 4: The ITC as consumer protection agency.

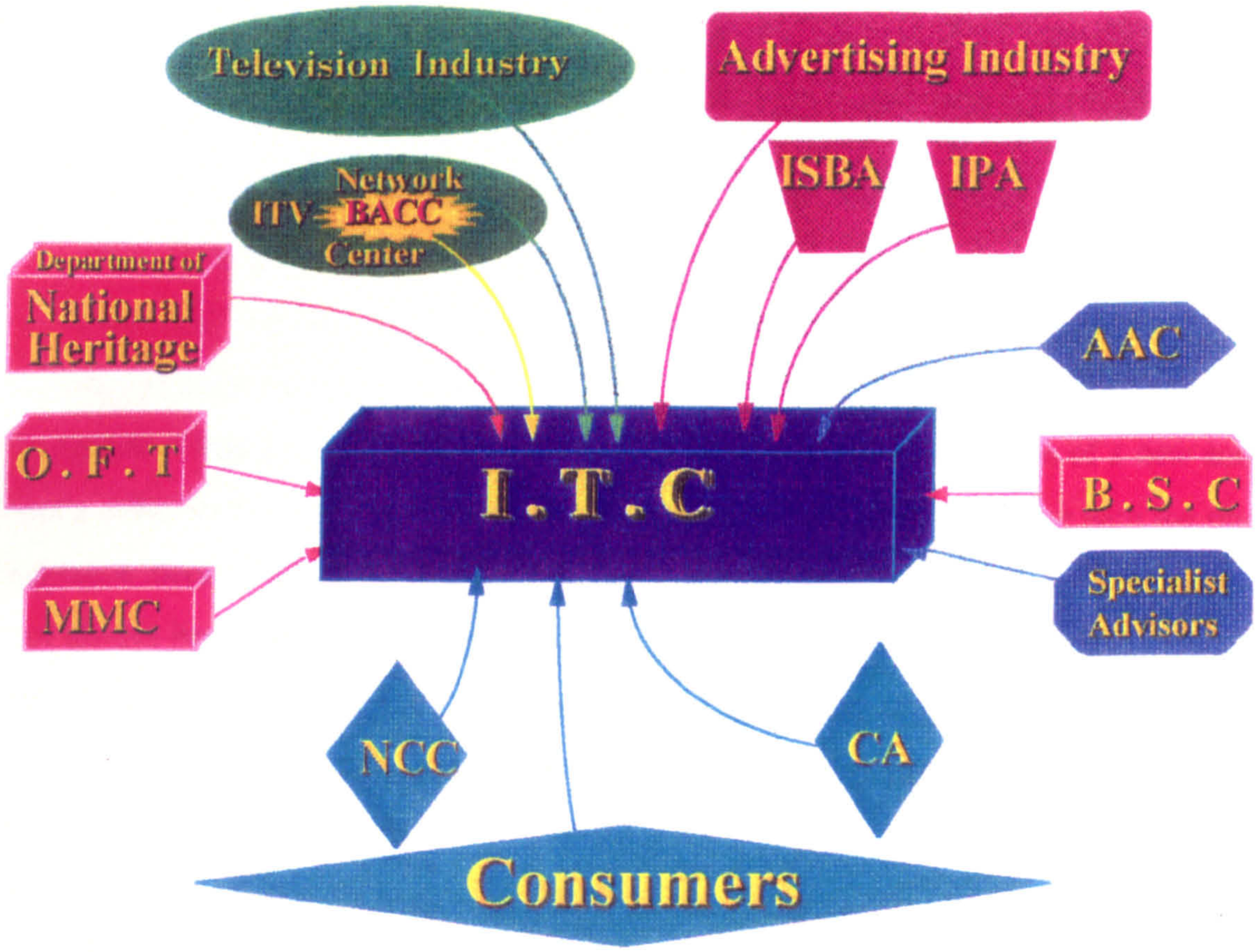


Figure 10. 4 represents the ITC in the traditional role of mediator between consumers and producers, with the various statutory and non-statutory informational inputs to the advertising regulation policy formation process.

10. 4 The ITC and the State.

10. 4. 1 The Department of National Heritage.

The ITC's formal relations with the state are set out in the Broadcasting Act. The Minister of State for National Heritage is responsible for general policy, with occasional advice from the Parliamentary Home Affairs Committee. He must be consulted on more specific issues such as classes of advertisement and methods of advertising to be permitted or excluded and so forth. At times of fundamental political change, however, policy generation may occur at the level of Prime Minister; the deregulation legislation of 1990 was a result of Margaret Thatcher's vision of a new social and economic order for Britain. The broadcasting system had to be brought into line with the prevailing Conservative ideology of the free market. Although the government has the last word, the regulator has not always been a mere passive partner in policy-making. In recent years, the IBA fought hard against the plan to auction off the ITV franchises to the highest bidder put forward in the 1989 White Paper, and the ITC campaigned vigorously to exclude the monitoring of advertising from the remit of the politically inspired quango, the Broadcasting Standards Council, and to prevent independent producers from having direct access to the ITV Network's Central Scheduler.

With the BSC, the Commission argued plausibly that, in the first place, its own control machinery was quite capable of coping with all aspects of advertising regulation, and secondly, that two different agencies with overlapping responsibilities would actually make matters worse by causing confusion in the minds of consumers. It was supported in this position by a grand alliance of the ISBA, the IPA, the broadcasters and the consumer organisations, none of whom wanted the BSC to interfere in advertising[7]. In spite of this formidable array of opposition the government sided with the Council, who were equally determined to keep advertising part of its brief. In this instance, the political agenda of the day decided the form of regulation without regard to the practicalities. Apart from the BSC, everyone else whom I questioned felt that the duplication of regulatory functions which would occur if the BSC became involved in advertising control would do nothing to improve regulatory efficiency.

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[7] Frank Willis told me: "it is no secret that we opposed the establishment of the Broadcasting Standards Council; its history was very political. The ITC argued strongly in Parliament that the BSC should not become involved in advertising because we (the ITC) regarded this as completely unnecessary".

10. 4. 2 The Office of Fair Trading.

The regulator's relations with the state in the shape of the Office of Fair Trading are more sharply defined than its relations with the Department of National Heritage, or with the government up to and including the Prime Minister. There is, in theory at least, a clear separation of powers between the two agencies. The OFT has a formal interest only in the process aspect of advertising regulation, i.e. in competition issues and the trade practices of the parties concerned, and leaves the product side to the Commission. Apart from its active role in setting up the network arrangements for Channel 3, under the Broadcasting Act, it is intended to be used only as a last resort. The ITC is encouraged to make every effort to sort out any problems itself before referring them to the Office. It is not intended that the OFT should become involved in the content of commercials at all; the ITC insists on using its own control machinery to deal with complaints of misleadingness etc[8].

The ITC, by contrast, has obligations in both areas. In a consultation document on airtime sales practices sent out in July 1992, the Commission explains its two generally expressed competition duties "which are relevant to the regulation of television advertising sales arrangements". These are the "fair and effective competition" duty, and the "no unreasonable discrimination" duty[9]. The former is an "overarching" obligation which governs interpretation of the latter. It is a condition of ITC granted licenses that the licensee "shall not engage in any practice or enter into any arrangement which is prejudicial to fair and effective competition in the provision of licensed services and services connected with them"[10]. A second condition of the license empowers the regulator to issue directions from time to time for the purpose of ensuring that licensees comply with the first.

The ITC identifies three possible areas where a licensee might be accused of not fulfilling the first condition: i) competitive advertising; ii) exclusivity; iii) price. The first relates to the denial of advertising facilities by any station to its competitors to advertise their services. The second relates to "negotiating a deal with one particular advertiser in a given category, whereby that advertiser enjoys the exclusive right to advertise for a given period"[11]. The third deals with circumstances where the premium charged to an advertiser is so high that it amounts to a refusal to sell at all or refusal to sell

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[8] Interview with Hugh Little. The OFT does in fact have the power, in theory, to deal with the content of television advertising. See below, p. 197.

[9] ITC: *Consultation Paper on "No Unreasonable Discrimination Clause"* News Release, 29 July 1992, p. 2

[10] ibid. p. 2

[11] ibid. p. 3

without imposing some other unreasonable or unfair conditions. All these instances could be interpreted as "unreasonable discrimination".

The Commission acknowledges that this is an extremely difficult regulatory area. The regulator should be very wary of laying down too many prescriptive rules in advance for as sophisticated and complex a market as television airtime. To do so could be to stifle legitimate business activities, such as the offering of incentives. But it must also be alert to the possibility of aspects of sales practice crossing the borderline into illegitimate activities. The consultation paper seeks the opinions of interested parties on how such difficult judgements should be made in future as the post-1993 market grows even more complicated.

The document also clarifies the ITC's position with regard to general competition law, emphasising that its powers under the 1990 Act are without prejudice to the remedies available under this legislation. It states that:

"In some cases the ITC may be able to use its powers of intervention to achieve solutions more swiftly and with wider application within the television industry than would normally be the case under competition law. But the ITC is unlikely to wish to impose more onerous restrictions than those likely to emerge from OFT/MMC procedures. Where the ITC does not conclude that it would be appropriate for it to intervene, it will still be open to interested parties to seek to invoke general competition law procedures, or indeed to do so without prior involvement by the ITC"[12].

This last remark notwithstanding, the Office of Fair Trading has made it clear that it would prefer complainants to go through ITC channels first, before involving the OFT[13].

The ITC's relations with the government's general competition regulator have not always been entirely smooth. In 1991, the ITC, in support of its licensees, entered into a long wrangle with the OFT over both *Section 39* and *Schedule 4* of the Broadcasting Act, which was not resolved until well into 1993. *Section 39* and *Schedule 4* contained clauses requiring the ITC to approve the proposals for a centralised scheduling network for ITV submitted by the companies. After extensive consultation and discussion with the OFT, the Commission duly approved what it considered to be

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[12] ibid. p. 1
[13] Interview with Hugh Little

an acceptable arrangement and referred it for final consideration by the Office in May 1992. The OFT issued a Report on 3rd December which concluded that in its view the proposals still did not satisfy the first part of the competition test set out in *Para 2 (1) (a) of Schedule 4* and must be modified. The Director General was of the opinion that "the arrangements are intended to have the effect of restricting and distorting competition in connection with business activities in the United Kingdom"[14].

Two reasons for this were given: (i) that the proposed scheme required all independent programme producers to contract with a licensee, not with the Network Centre, and (ii) that it imposed standard terms of contract for acquisition of programmes which sought exclusive UK transmission rights for 10 years, renewable to 15, or, in the case of 100 % funding by the licensee, in perpetuity. Both these features were considered by the Director General to be anti-competitive.

The second issue is a purely commercial one of no special interest to the regulator, but (i), the proposal to deny independent producers access to the Central Scheduler, which was objected to by the OFT, received strong backing from the ITC because it had important implications for regulation. The Commission argued that independent producers must contract with a licensee and not the Central Scheduler, because only then could the Commission ensure that "individual licensees generally carry responsibility for undertaking compliance with its regulatory requirements for broadcast programmes"[15]. The Director General recognised the force of the argument, but felt that compliance could be achieved in the case of independent producers by means of a separate contract between the Network Centre and a licensee. The matter was eventually resolved after the intervention of the Monopolies and Mergers Commission which sided with the OFT, ordering that independent producers should be able to submit proposals directly to the Network Centre, and that programme rights should not normally be acquired for more than 5 years[16].

In arguing against allowing independents direct access to the Central Scheduler, the ITC was mainly worried about the possibility that requirements affecting programming might be evaded if responsibility for compliance were to be delegated to third parties not initially in direct contact with the regulator. But delegation of responsibility also means that rules on indirect methods of

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[14]Office of Fair Trading, *Channel 3 Network Arrangements*, A report by the Director General of Fair Trading, under the Broadcasting Act 1990, Section 39 and Schedule 4, 3 December 1992, p. 1

[15] ibid. p 3

[16] ITC note 17. ITC Annual Report and Accounts 1993, p. 93 - 95 and Monopolies and Mergers Commission, Channel 3, etc.

advertising might also be more easily broken. This danger is negligible at present (1994) in terrestrial television since it has been the policy of ITV and Channel 4, with rare exceptions, not to commission programmes with a sponsor attached. Other stations, such as BSkyB, under less stringent regulation, can afford to be more relaxed about accepting pre-sponsored or advertiser supplied programming. But, as an official at the OFT acknowledged to me, when the market becomes much more competitive in the future, even Network companies might be prepared to "fight dirty" to retain or increase market share[17]. They may not then be so particular about the source of their programmes, or of their revenue, and consequently less concerned about the editorial independence of programme makers, the main concern of regulation policy.

There is nothing in the Act specifically to outlaw advertiser-supplied programmes. Already, as one of the exceptions, the European soap opera "Riviera", co-produced in association with Unilever, i.e. partly sponsored by the company, has been screened on British television. Sponsorship is on increase. Even if the present system persists under which licensees have strict control over the content and distribution of spot advertising and sponsorship is tightly regulated, there is still the danger that independently obtained programmes funded wholly or in part by advertisers might be treated differently. In insisting on allowing independent producers direct access to the Central Scheduler, the OFT demonstrates that it gives priority, in current market conditions, to maximum competition rather than safeguarding regulation in any future situation. The dilemma posed for regulation by this type of funding outside the safety net of the UK Copy Clearance system is considered in more detail in the following chapter[18].

The Office of Fair Trading's activities in the area of process regulation can be illustrated by the case of Thames Television in the early 198Os. In 1982, the Office, responding to complaints by a leading agency, J. Walter Thompson and several advertisers, looked into the supply of advertising time on Thames Television. The complaints centred on Thames' incentive discount scheme which entailed the tying of terms and conditions for advertising to the proportion of total expenditure on television advertising time in London committed to them by an agency. The OFT referred the matter to the IBA since overseeing the manner in which licensees' rate cards were published was one of the

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[17] Interview with Hugh Little

[18] *Note*: The ITC's 1992 Statement of Intent on bartering of programmes warned that: "the detailed consumer protection requirements in its code, both as regards the content and scheduling of advertisements, imply a level of editorial responsibility which might in practice be difficult for the broadcaster to deliver in conditions where airtime was sold other than to a known end user or his agent. In no circumstances will the ITC permit its licensees to delegate to others the responsibility for code compliance". See Chapter 11, p. 245

statutory duties of the Authority. The IBA duly issued a reprimand to Thames for not disclosing the discount scheme on its rate card[19].

The OFT was not happy to leave it at that, however, and commenced an examination of the operation of television incentive schemes in general "to see whether they seemed to be operating prima facie against the public interest"[20]. In his report issued in February 1982, the Director General concluded that "while the policy was discriminatory as between both advertisers and agencies it was not anti-competitive". No action was taken[21].

When I interviewed the IBA's Director of Advertising Control at the time, Harry Theobalds, he recalled that J. Walter Thompson had made their complaint directly to the OFT, by-passing the IBA, which caused the Authority some annoyance. It felt that the matter could have been sorted out by using its own consultation and arbitration procedures without bringing in another body. Theobalds admitted, though, that advertisers quite often complained to the IBA of unreasonable discrimination but the Authority seldom took a sympathetic view.

The OFT, then, has sometimes had occasion to intervene under the "unreasonable discrimination" clause featured in all the Broadcasting Acts. Most recently, it initiated an investigation into a complaint by Satellite broadcaster BskyB to the IBA that the ITV companies were refusing to accept its advertising. As a result of the investigation, the IBA ruled that refusal to run the ads was anti-competitive and discriminatory, a ruling confirmed in 1992 by the ITC. ITV was compelled to take BSkyB's advertising even though it was a competitor. The judgement was made in the light of the current undeveloped Satellite market; if circumstances changed it could be subject to review.

The examples cited show quite clearly that while the broadcasting regulator is intended to be the main actor, the state has the ultimate authority. It can direct the decision-making of the Authority or even overrule it. Recently, the OFT has clashed with the ITC over networking arrangements, and Hugh Little of the OFT told me that if it needs to exert its authority in future it will, although it prefers a co-operative approach[22]. The Commission, for its part, jealously guards what it perceives as

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[19] Brian Henry (ed.), *British Television Advertising*, London : Century Benhas, 1986, p. 219
[20] ibid. p 219
[21] OFT, *Anti-competitive Practices: a Guide to the Provisions of the Competition Act 1980*, London: OFT, March 1986, p. 20
[22] Interview with Hugh Little

as its specific preserve - the content of both programming and advertising - and is keen to keep government departments from interfering in this area as much as possible.

In the course of its normal duties the Office of Fair Trading liases with the National Consumer Council and the Consumers Association, providing them with information and seeking their opinions. But in spite of the Office's insistence that it does not exercise its consumer protection powers in respect of misleading advertising in field of broadcast advertising, the presence of a Trading Standards Officer on the Advertising Advisory Committee provides a link with this side of its work. A letter to The Times newspaper from the Chairman of the Copy Committee also makes it clear that "the Trade Descriptions Act, 1968, enjoins some 300 separate local authority inspectorates to enforce its provisions. Television advertising, like any other form of advertising, is subject to this nation-wide scrutiny"[23].

Hugh Little conceded that complaints to its Trading Standards staff may in fact be made concerning misleadingness in TV advertising, although this is more likely to happen in the regions where advertisements for local businesses are taken. A commercial for slimming products was investigated by Trading Standards Officers who, in this instance, did not consider the case worth pursuing in the courts[24]. So there is, formally, an overlap of functions with respect to advertising content which the OFT denies in its recent publications, although in practice it rarely exercises this function.

10. 4. 3 The Monopolies and Mergers Commission.

The Monopolies and Mergers Commission has an even more narrowly defined role in the regulation of commercial television than the OFT. Prior to deregulation in 1990 it had no reason to become involved in the tightly regulated television market. Post-deregulation it has contributed to the debate on the Channel 3 networking arrangements and has ordered certain modifications. It is possible, however, after the relaxing in 1994 of restrictions on mergers and take-overs, that a referral to the MMC could be made by individual franchisees, if they believed that a proposed merger posed a threat to competition. So far, two take-overs of licensees have occurred without any referrals being made.

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[23] James Shaw, *Claims of Advertising*, The Times, 30/ 06 / 1972. *Note:*. The letter goes on to say that since the Act came into force the ITCA had been aware of only one prosecution being brought in relation to a television advertisement; this prosecution had not been successful.

[24] *Note:* This information was provided by Hugh Little

Such a threat did appear to arise, however, when mergers were proposed between several of the television companies airtime sales houses in 1991. Advertisers became concerned that the monopoly of airtime sales broken up by the 1990 Act was being re-assembled by the back door. The ISBA and the Association of Media Independents (AMI) objected strongly to this new trend and requested the ITC to use its competition powers to rule against sales house controlling more than 25% of the market for airtime, for the time being at least[25] . Despite strong resistance from the sales houses, who argued that their operations should be treated within current legal restrictions on monopolies and merges only, the ITC ruled in favour of advertisers and media independents. A 25% ceiling on control of the total Channel 3 revenue was imposed until a general review of sales arrangements could be made in 1994[26] . In this case, since the regulator was able to negotiate a deal, neither the OFT nor the MMC needed to become involved.

10. 5 The ITC and the Advisory Bodies.

10. 5. 1 The Broadcasting Standards Council

Although it is generally acknowledged to be an ideologically motivated body set up by an administration anxious to counteract any negative effects of free market policies in broadcasting[27], the Broadcasting Standards Council is constituted as an independent agency. It reflects the values of its political creator but does not carry out government policy as do the Department of National Heritage and the Office of Fair Trading.

It has no executive authority and can only give advice. Its Director, Colin Shaw, confessed to me that he considered it "odd to have an advisory body dressed up in statute", an observation which could equally well be applied to the old Advertising Advisory Committee. The Council was determined that its remit should extend to advertising, in the teeth of strong opposition by the ITC and both regulated industries, on the grounds that it would be "illogical" not to include it. Shaw took a more relaxed

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[25] Karen Hoggan, *TV airtime sales code comes under attack from clients* Marketing 14/02/91, p. 2

[26] *Ceasefire agreed in ITC regulation battle*, Campaign 1/ 03 / 1991, p. 5. *Note:* The review found that restricting the sales houses to 25% of Channel 3 revenue did not work satisfactorily and extended this limit to include the total advertising revenue from all sources. The largest operator, TSMS, for example, now controls 35% of the Channel 3 market, and Laser 34%. (*ITV in 1995*, Marketing Week, 26/ 08/ 1994, p. 16)

[27] *Note:* The Thatcher government feared that the unleashing of market forces in television might result in an upsurge of sex, violence and general tastelessness as the companies came under increasing pressure to maximise audiences.

view of the spectre of regulatory clash than his opponents. In his opinion, the ITC had painted as black a picture as possible at the beginning for polemical reasons, but the expected conflict has not actually materialised, nor is it likely to. And in case of any disagreement, as the BSC has powers of exhortation and publicity only, the ITC has the final authority.

In the event, by 1992, the BSC had investigated a mere 25 complaints about television commercials and upheld only two of them. One had already been upheld by the ITC; the other, about an advertisement shown on BSkyB, had been directed to the BSC and not the ITC, which would have upheld it if it had had the opportunity. In Shaw's view, the insignificant numbers involved, and the degree of agreement so far between the two bodies, means that concern about regulatory duplication and possible conflict have not been borne out in practice.

Insofar as it touches on advertising at all, the BSC, in contrast to the consumer groups, has a particular interest in matters of taste and decency and is not concerned with the truth of claims made in commercials. According to its Director, the Council is anxious, for instance, that "there shouldn't be naked women advertising lawnmowers." It subscribes to the traditional view that unlike programmes, advertisements appear in the home without prior warning and this is one of the reasons why they need more careful monitoring. Colin Shaw believes that although "most television advertising is undertaken by large, reputable firms who have no wish to offend or alienate audiences", there are areas which are especially sensitive, and some sections of the public are in need of special protection.

For example, the Council received a number of complaints directed at a commercial for a Fuji Film product which featured a mentally handicapped person. It considered the complaints, but did not make any judgement in this case as there was insufficient completed research on the issue to inform a decision. The biggest charity for the mentally handicapped, Mencap, was carrying out a study at the time which was unfinished. Complaints were also received by the ITC and the advertisement was withdrawn voluntarily by the advertiser. The Council has not yet conducted any of its own research on presentation of the disabled in advertising, but has done some studies on gender stereotyping and monitors carefully the depicting of the sexes in commercials[28].

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[28] *Note:* This information was provided by Colin Shaw.

The Council does not have any formal contact with either the IPA or the ISBA, and only refers to the television companies if it needs material to investigate a complaint, or when it wants particular findings to be published on air. It does liase with the consumer organisations because it regards itself as representing consumer opinion rather than the "professional" opinions of the ITC's civil service staff, or representatives of the advertising and television industries. It has to be said, however, that neither the NCC nor CA are particularly enthusiastic about this "anomalous" body. Even though the BSC has the facilities for independent research that the consumer representative bodies have been calling for, it has no brief to investigate the truth of claims made in commercials which they feel should be a much higher priority than taste and decency[29]. In its defence, Shaw explained that the BSC's programme of research into offensiveness in broadcasting is intended to provide a factual basis for discussion so that simply "carrying on debate by assertion can be avoided"[30].

Practical experience so far suggests that the ITC is likely to suffer much less interference from the Broadcasting Standards Council than it had anticipated. According to Frank Willis, however, it is still prepared to resist firmly any attempt by the Council to extend its activities in the field of advertising control beyond the present narrow limits[31].

10. 5. 2 The Advertising Advisory Committee.

Despite losing its statutory status the Advertising Advisory Committee still plays an important part in the machinery of control. It is necessary for the regulator to be seen to have consultative procedures, and Frank Willis recently described it as the ITC advertising department's "flagship sounding board"[32]. And when I interviewed former Chairman Geoffrey Stephenson he argued that, far from being downgraded, the Committee has, in practice, become more effective. Stephenson maintained that while previously the expertise had been weighted in favour of industry, increased consumer representation has redressed the balance. In his view, the main part of the AAC's job is still to oversee changes in the Codes, but there is now a more co-operative and less confrontational atmosphere. Since assuming full responsibility for pre-vetting commercials the ITV Network Centre

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[29] *Note:* Both the NCC and CA would like to see a single completely independent body set up to safeguard consumer interests in broadcasting. Failing this - the idea has been around a long time and has been consistently rejected by government - they would like the ITC to conduct more independent research into advertising claims (not taste and decency) than at present. The issue is looked at in more detail later in this Chapter.

[30] Interview with Colin Shaw

[31] Interview with Frank Willis

[32] Frank Willis, *The ITC Does Not Pander to Every Piqued Complainant* Campaign 15/ 07/ 1994, p. 29

now has a more participatory and a less "complaining" role. The change in formal relations has therefore been a constructive one.

Stephenson also sees the Committee's task now as less to make specific recommendations than to debate the issues fully, arbitrate on points of dispute and arrive at a consensus. There is a lot of trust that under the present Director of Advertising and Sponsorship reasonable decisions will be made. The Committee tends to be "classically liberal" in the sense that it favours progressive change. It seldom takes a strict view on the potential for some advertisement, or classes of advertisement, to cause offence. But it may take a strong line on misleadingness, or on some traditionally difficult areas such as financial or children's advertising where consumers may be especially vulnerable. It supported the controversial advertisement for Vespre Silhouette sanitary towels, and did not advise that it be taken off the air; the decision to withdraw it was eventually made by the ITV Network Centre itself[33].

The AAC does not initiate research of its own but receives general information from the ITC, supplemented by papers summarising the full range of consultations conducted on particular issues. It sees the list of people and organisations to be consulted and can suggest additions. It can also ask specific questions. The majority of its work is concerned with the content of advertisements, but it also advises on distribution. It does not deal with the proportion of advertising to programmes; this is the preserve of the ITC. A breakdown of complaints is circulated to the Committee but the decisions as to whether to uphold particular complaints or not will have already been made by the ITC. Issues arising from complaints can of course be discussed.

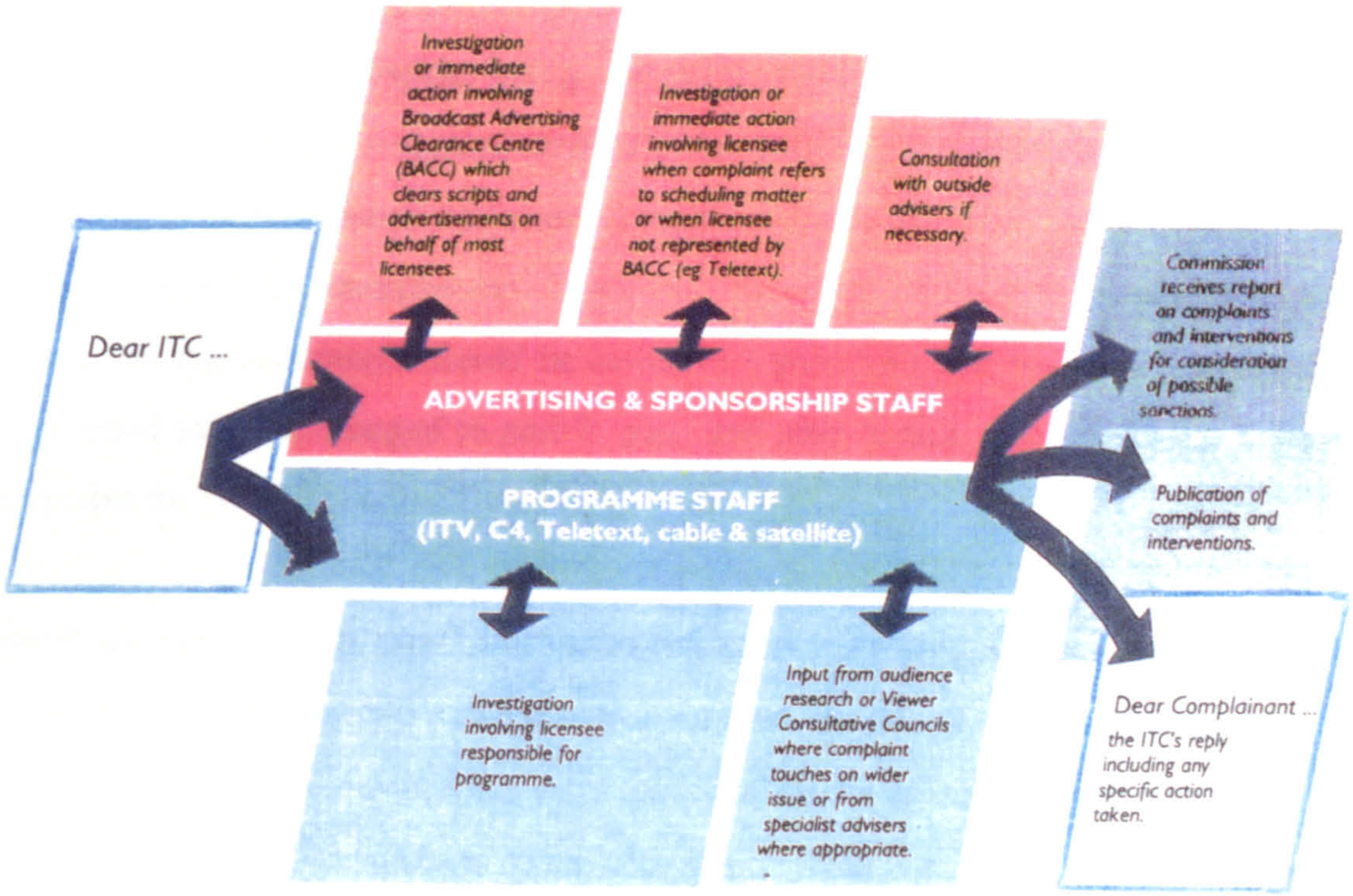
10. 5. 3 Dealing with Complaints: Policy and Procedures.

As a part of its statutory obligations under the *Control of Misleading Advertisements Regulations* the ITC operates a complaints procedure. It publishes a leaflet entitled *Programmes and Advertising on Commercial Television: how to comment or complain.* Broadcasters are expected to respond to complaints made directly to them but they must also advise complainants that they may refer their point to the ITC if they are not satisfied with the response[34]. Records of complaints must be kept for a period of two years and made available to the ITC on request.

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[33] *Note:* The advertising of female sanitary protection is treated in depth in the case study in Chapter 12
[34] ITC Note 11 - Complaints Handling

Figure 10. 5 : Diagram. How The ITC Deals with Complaints



Source: *Spectrum, Spring 1994.*

According to ITC Note 11 on Complaints Handling, all complaints are first assessed by a senior member of staff for urgency. Priority is given to cases where it is alleged that harm may arise from the advertisements (e.g. provoking dangerous copycat behaviour or triggering physiological reactions such as epileptic fits). As Frank Willis explained in Spectrum, "it was this system of prioritisation which last year helped ensure that we took off air an advertisement for Golden Wonder Pot snacks within a few days of receiving reports that it was provoking attacks of photosensitive epilepsy. This would not have happened with a first-in, first-out system. Instead of locating one of the country's few specialists on photosensitive epilepsy and seeking urgent advice, the ITC officer concerned might have been composing tactful replies to viewers objecting to the screening of advertisements for lavatory paper at tea-time"[35].

Willis used this instance to demonstrate that the ITC's complaints handling system is *action-oriented* and geared principally to its consumer protection responsibilities to the audience as a whole rather than being *correspondence-oriented*, with the main emphasis on providing swift feedback to

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[35] Frank Willis, *No Use Complainin'* Spectrum, Spring 94, pp. 17-18

individual viewers[36]. Another example of the Commission' policy of judging first of all whether intervention is necessary in case of complaints rather than a simple reply is the 1992 Tango fizzy orange drink commercial. This showed a jolly orange monster playfully slapping a man on his cheeks to illustrate the pleasant tingling feeling the drink produced. 28 complaints were received from "teachers, parents and the medical profession", who pointed out that this type of action could result in a perforated eardrum. Some complainants reported that actual harm had been caused as result of children imitating this advertisement. When the reports of copycat behaviour came in the ITC instructed that the commercial should be moved to a post 5.30 slot; when evidence of actual harm was presented this was changed to post 9. p.m., and after further reports of harm it was declared unacceptable for broadcast at any time[37].

Although complaints about harmful or misleading advertising are given a higher priority, this does not mean that viewers' objections to commercials on the grounds of taste and decency are neglected. This category of complaint is in some ways harder to handle as offensiveness is necessarily a more subjective criterion than harmfulness or misleadingness. What is offensive or tasteless to one viewer is perfectly acceptable to another. The ITC rarely upholds complaints about individual advertisements on the grounds of taste, largely because by the time something arrives on screen it has already been closely vetted against rigorous standards governing nudity and sexual references, bad language and violence. Until recently, the regulator operated general bans on certain categories of advertising such as family planning, female sanitary protection, undertaking and matrimonial agencies, but all these are now permitted. The only unacceptable products or services now are medically related ones such as treatments for alcoholism or hair loss.

People's idea of what is offensive is not something that remains the same, however. Social attitudes change in the course of time and the rules of the Code and their interpretation change with them. The ITC regularly discusses complaints in this category with those who do most of the vetting - the Broadcast Advertising Clearance Centre - so that sensitive areas and issues can be identified. It also consults the Advertising Advisory Authority, and supplements its feel for the issues by input from the regional Viewer Consultative Councils, by complaints analysis and by viewer research of its own[38].

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[36] ibid. p. 18
[37] ITC: *Complaints Report*, February 1992, p. 6
[38] Frank Willis, *The ITC Does Not Pander To Every Piqued Complainant*, op cit. p. 29

Gender stereotyping is one area where attitudes have become less tolerant, particularly among women. Many more complaints are now received about the sexist portrayal of women in commercials than in the 1960s and 70s. But there is now more tolerance of nudity in television advertising. A recent French made advertisement for a shower gel showed a glimpse of a woman's nipple, which provoked 82 complaints. This was a relatively high figure but, as Frank Willis observed in Campaign magazine, "ten or fifteen years ago, it was unthinkable that anything like this should get anywhere near our screens"[39]. In rejecting the complaints, the ITC explained that it believed the time had come to change its approach to nudity on the screen because there had been a change in public attitudes[40]. In this case, although the Commission did not uphold the complaints, it attempted to satisfy complainants by instituting a research programme into attitudes towards the use of nudity in television advertising. This was not enough for the National Viewers and Listeners Association, one of the complainants, whose General Secretary accused the ITC of "caving in" to commercial pressure. But Steve Henry, a creative partner at agency Howell Henry Chaldecott Lury, was delighted: "Good ads try to find out where the barriers are in order to break them. There will always be taboos to be broken"[41].

Whatever the nature of the complaint, the ITC replies to all who have made their views known giving the reasons for its decision to uphold or to reject a complaint. It also gives a public account of its decisions in the monthly complaints report it has been issuing since May 1991. In 1993, out of approximately 10,000 advertisements broadcast, the ITC received 2,581 complaints referring to 1,062 advertisements. 33% of complainants alleged misleadingness, 37% were offended, 18% were concerned about possible harm or harmful example, especially in relation to children, and the remaining 12% raised a wide variety of other aspects. The Commission upheld 44 complaints altogether - 31 'misleading', 1 'offensive', 5 'harmful' and 7 'miscellaneous'[42].

According to all three main sources that I contacted - regulator, consumer groups, and industry - there has been no discernible increase in complaints from the public since the 199O Broadcasting Act came into force, although it is still early days yet. This seems to indicate that, for the time being at

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[39] Michele Martin, *No Nipples On Our Screens Please, We're British*, Campaign, 15/07/ 1994, p. 13

[40] *Note:* The regulator's official line on its role as guardian of consumer interests in television advertising has been summed up by its press officer: "we do not form public opinion, we are only a barometer of it". (Barbara Argument, *The Last Taboo* Coventry Evening Telegraph 18 / 06 / 1992) But any institution responsible for setting standards in public life should be aware that such an activity is in part normative; its judgements do not merely reflect opinions in society, but to an extent form and reinforce them.

[41] Michele Martin, *No Nipples On Our Screens Please, We're British*, op cit. 13

[42] Frank Willis *No Use Complainin' ?* op cit. p. 18

least, the gradualist approach to change is working, and supports the contention that the results of regulation in practice, even with greater self-regulation, are so far much the same as under the old regime.

Relying on the number of complaints received as the sole indicator of consumer satisfaction with advertising control does not always give the full picture, however. Former IBA Director of Advertising Control, Harry Theobalds, expressed the opinion that people are less willing to make formal written complaints about commercials than they are about programmes or programme policy. Advertising is still seen as much less important than the substance of broadcasting - programming - and easier to ignore if standards fall. Even if relatively few complaints come in about a certain commercial this may still point to a more widespread unvoiced public disquiet[43]. Much depends, too, upon who is doing the complaining. The reverse phenomenon occurs when numerically small but influential pressures groups express their disapproval of certain advertisements, or categories of advertising, without necessarily representing a significant consensus of the viewing public[44].

While the majority of complaints come from members of the public, or organisations representing the interests of the public generally, some members of the advertising industry are themselves active complainers. Advertisers and their agencies keep a close watch on rivals' commercials and are quick to point out any potential breaches of the Codes. According to Theobalds, in the early days of ITV when giant soap manufacturers dominated television advertising, the two biggest, Unilever and Thomas Hedley (owned by Proctor and Gamble), regularly complained to the regulatory Authority about each other's campaigns. At that time the Authority (the ITA) was more concerned about complaints from viewers that the screens were being saturated with "hard sell" advertising from these two sources than adjudicating inter-company quarrels[45].

At the beginning of the 1980's, however, the IBA was obliged to become involved in a very public disagreement between two rival makers of lawnmowers, Qualcast and Flymo, who were in dispute

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[43] Interview with Harry Theobalds

[44] *Note:* The difficulties surrounding the analysis and measurement of complaints are explored in full in the case study in Chapter 12

[45] *Note* : Brian Henry describes the so-called 'Kitchen' and 'Laundry' rules drawn up by the ITA in September 1960. Because the repetition of a forceful sales message in a single product field out of a still limited total range was likely to cause irritation, all products in the washing field (soap powders and liquids etc.) were classified as "Laundry", and those in the cleaning field (scourers, cleansers etc.) as "Kitchen". Not more than one product out of each field was allowed per hour, although the rule was relaxed a little later on. This caused the "utmost difficulty" for contractors in distributing the airtime fairly between the rival soap manufacturers. (Brian Henry op. cit. p. 77)

over claims made in each other's advertisements. The IBA refereed their complaints for nearly three years, making a series of rulings that culminated in a dramatic midnight ban on one of Qualcasts commercials in April 1983 . The IBA' s advertising control staff, including its Director, were then invited by both companies to attend demonstrations of their respective machines' capabilities in order to judge for themselves if the complaint that had provoked the ban was justified.

The dispute had arisen from a relaxation on the rules on comparative advertising. Qualcast had taken advantage of this relaxation to pursue a very aggressive comparative line, which it justified on the grounds that it was providing information to the public. Flymo complained that the Qualcast advertisement in question was actually misleading the public and eventually succeeded in getting the IBA to order modifications[46] . This story illustrates not only the lengths to which some advertisers are prepared to go in using the complaints procedures to attack their rivals, but the much more 'hands on' style of the old regulatory regime[47] . Nowadays, in the new era of increased self-regulation and less Authority involvement, inter-industry (i.e. competitor complaints) are usually directed to BACC, which deals with them on a basis of confidentiality, only the parties concerned being informed of the outcome[48] .

10. 6 The ITC and the Regulated Industries.

10. 6. 1 Regulator/ Industry Relations.

Following the usual pattern for regulatory bodies, the Commission's relations with its licensees and with the advertising industry are much more intimate than with its political masters. From an external perspective, the closeness of this relationship has caused considerable disquiet over the years both to consumers and to politicians. This feeling is echoed internally, as the regulated industries themselves have on occasion believed that the regulator was favouring one of them at the other's expense. This complaint has more often come from the advertising industry as the previous regulatory regime was

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[46] *How cut and thrust of lawnmower business went public,* The Times 26 / 04 / 1983, p 19. John Kay, *Hover Bovver TV Ad Banned in Big Mower War,* The Sun 14/ 04/ 1983

[47] *Note:* With reference to the flood of complaints against the female sanitary products test campaigns screened in 1979-80, Marketing magazine reported: "industry rumour suggests that most of the 1,200 letters of complaint sent during the test were "orchestrated" by a leading manufacturer." While the rumour is almost certainly false, it does say something about the highly competitive atmosphere in which expensive television advertising campaigns are conducted. (*IBA Gives Backing to San-pro Ads,* Marketing 13 / 0 6 / 1985, p. 10)

[48] BACC, Regulation of Broadcast Advertising in the UK 14/ 06 / 1994, p. 2. *Note:*. Some representative complaints, together with the relevant ITC decisions, are given in Appendix 5

structurally biased towards the television companies. The history of regulation reveals a whole series of measures designed to reduce, within the structural boundaries of the system, the potential for capture of the regulator by any vested interest, and to encourage impartiality and objectivity in making and implementing policy.

The provisions of the 1990 Broadcasting Act have fundamentally changed the form of regulator/industry relations by removing the broadcasting function from the regulator, and by placing the burden of pre-transmission enforcement of advertising control on the licensees. The detachment of the regulator from the television industry places them in a more traditionally adversarial relationship, and some recent unexpectedly tough decisions by the ITC suggest that the television companies will not be allowed to abuse their increased powers of self-regulation[49]. According to the interviewees from television, advertising and the consummer lobby, this structural separation of powers and a generally less controlled environment have yet to have much impact on the day-to-day operation of advertising regulation. With product regulation, apart from the inclusion of a wider range of permitted categories of advertising, the Code of Practice governing standards in spot advertising has not greatly altered. There is, of course, a whole new Code dealing with sponsorship, and although this area is potentially a source of greater regulatory difficulty and has so far done more to provoke the ITC's anger than spot advertising, it still represents only a small proportion of regulatory activity. The Broadcast Advertising Clearance Centre shoulders the main burden of ensuring compliance with the Codes, including the new Code of Sponsorship, and forms the main nexus in the regulator/industry relationship.

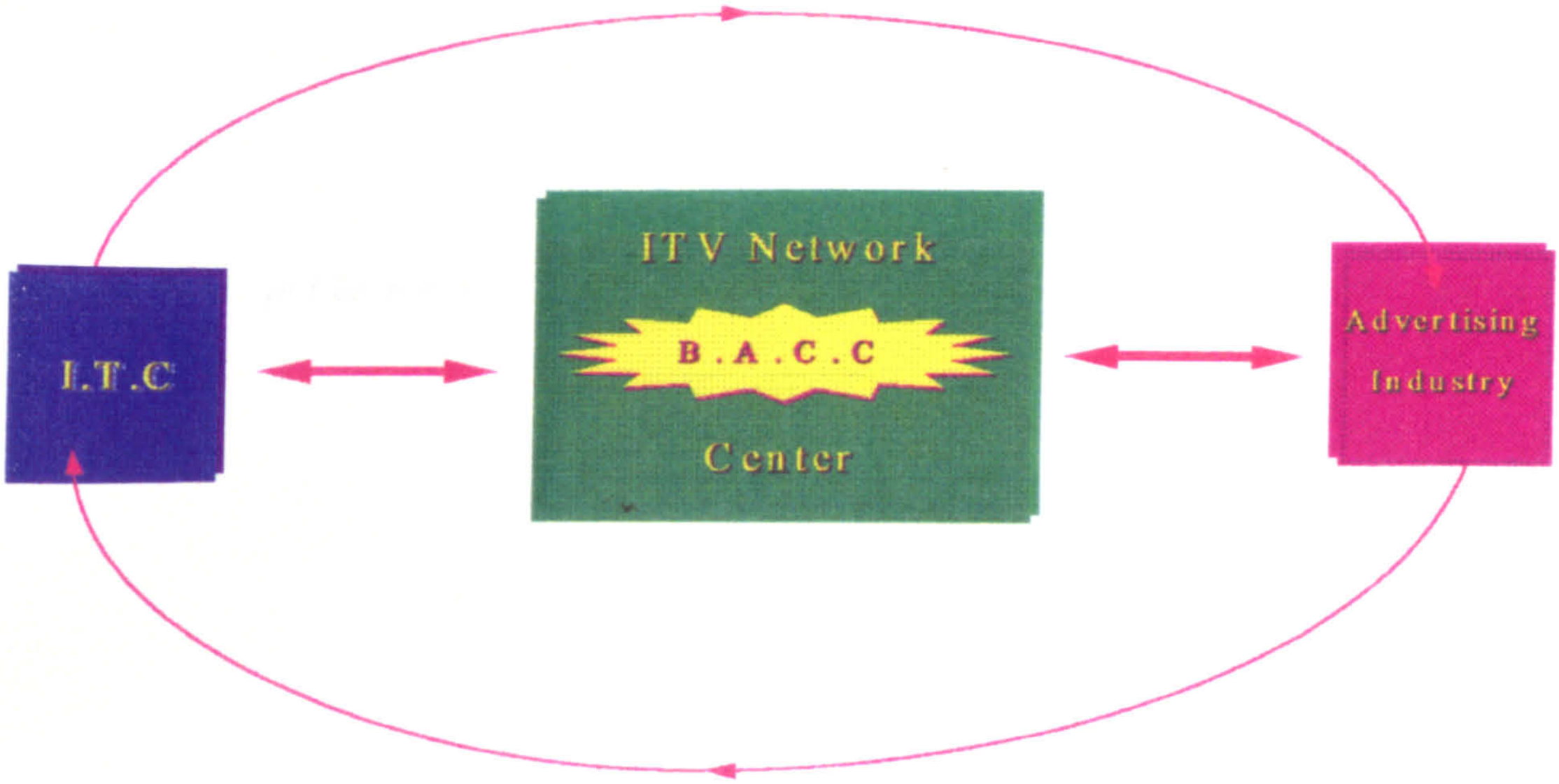
10. 6. 2 Copy Clearance.

Despite having a more detached formal relationship, the ITC's advertising control staff still keep in regular contact with the ITV Network Centre, and the Director of Advertising and Sponsorship has regular meetings with the IPA and the ISBA representing the second regulated industry. He told me that he sees the role of the ITV Network Centre, which represents the interests of broadcasters, as to act as a "buffer" in the three-way relationship of regulator/licensees/advertising industry. This is yet another perspective on the regulator/regulated relationship which is modelled in Figure 10. 6.

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[49] *Note:* See Chapter 11, p. 243 and Chapter 14 p. 320

Figure 10. 6 : The ITV Network Centre as buffer between the ITC and the advertising industry.

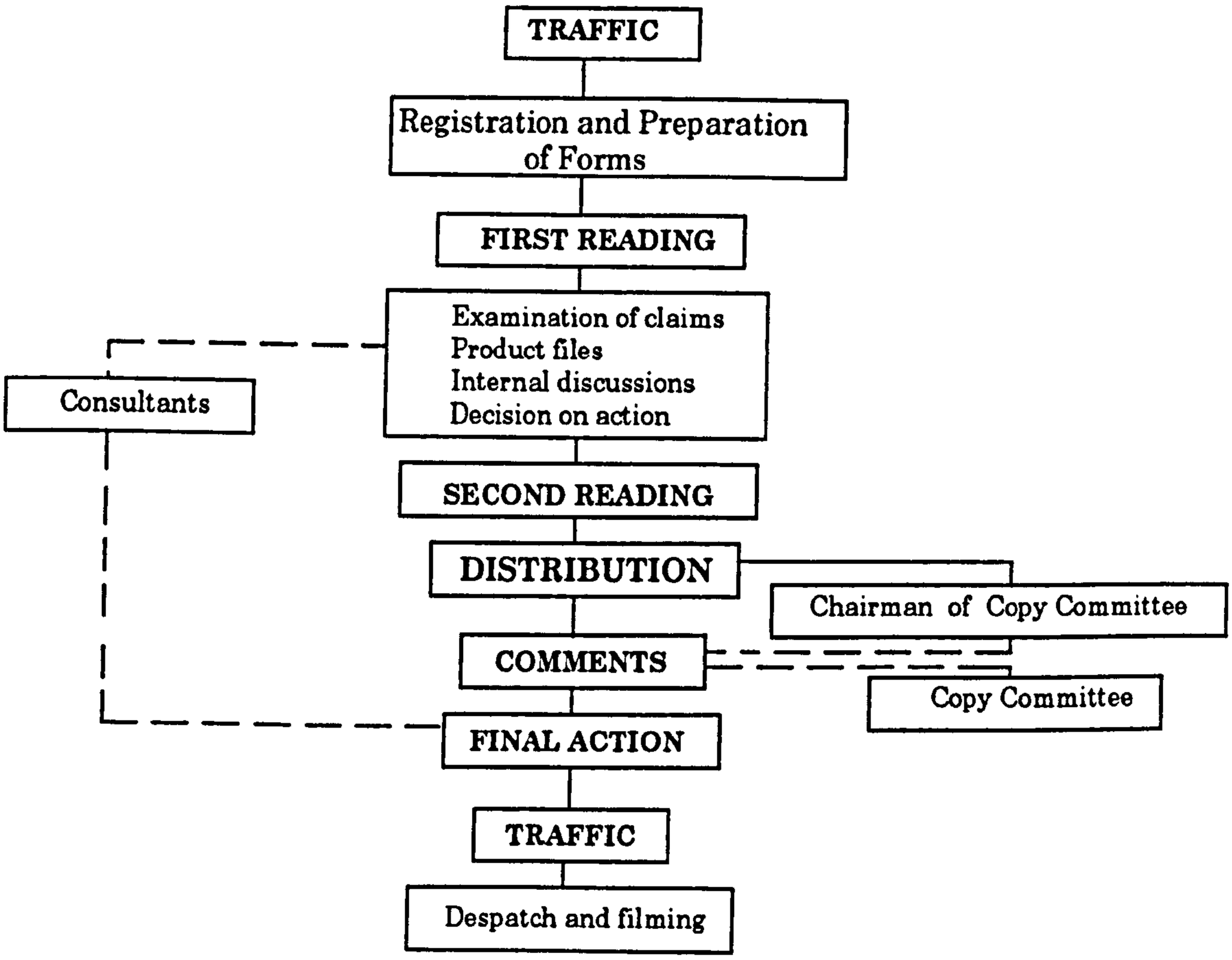


According to this view, as it was explained by Frank Willis, the advertisers push to get particular advertisements through the clearance system, and to extend the limits of what is generally acceptable to the regulator. The ITC resists this pressure and, in turn, pushes the industry to accept its codes and guidelines. It is up to the ITV Network Centre, with a professional staff trained as problem solvers, to mediate between the two. They must try to find solutions and compromises and reduce the overall level of conflict. Right at the heart of the relationship stands the Broadcast Advertising Clearance Centre through which up to 12,OOO commercials a year pass. It operates a series of procedures to deal with pre-transmission vetting of television commercials intended for broadcast on ITV and on other client stations, including Channel 4, GMT, BSkyB and UK GOLD, who pay a fee for the clearance service.

BACC Secretariat now has three copy clearance groups consisting of a group head, three executives and a group assistant, and a five-strong 'traffic' department. Each works on a portfolio of agencies who submit proposed scripts at as early a stage as possible. These are then checked to see if they comply with the Code. If a script cannot be cleared at group level, it goes to a twice-weekly meeting

consisting of the Head of Copy Clearance, his deputy and the group heads[50]. Amendments will then be suggested to the agency to bring the script into line with the rules. A problem script may ultimately need to be discussed by the Copy Committee at its monthly meeting. When a script has been approved, the BACC gives the official go-ahead and a videotape is made.

Figure 10. 7: Script Clearance.



Source: Independent Television Companies Association, Copy Clearance, Why and How

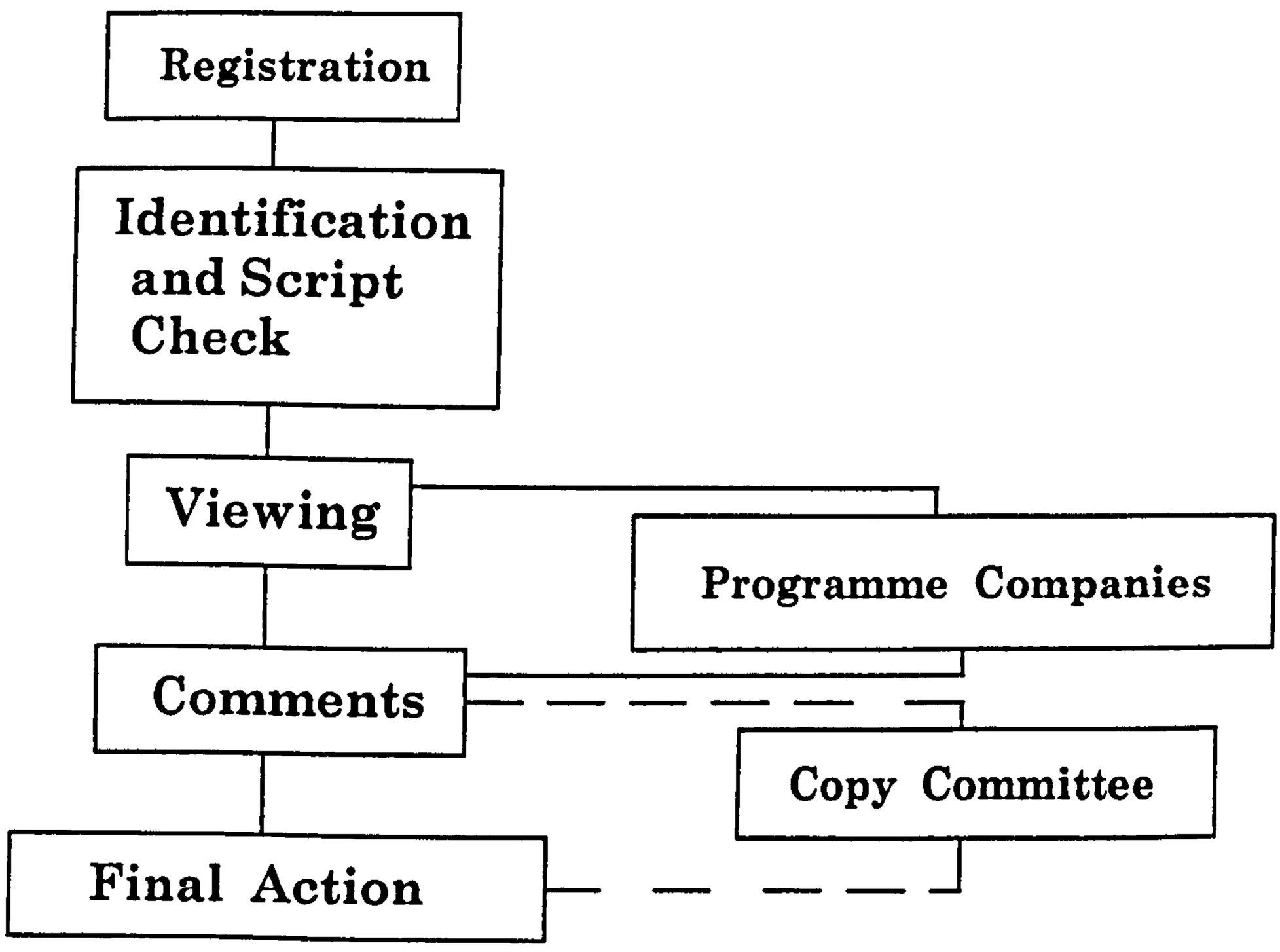
When the videotape is finished, BACC will make arrangements for it to be viewed by the clearance staff, and by any programme company executives who may wish to attend the viewing, in order to check that it has been made according to the script and that no problems have arisen from the visual treatment. Viewing sessions are conducted daily via a closed circuit line. Strict precautions are taken to ensure that the existence and detail of all new commercials are kept confidential until the first

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[50] Independent Television Companies Association, *Copy Clearance, Why and How,* Number 8, in a series of notes guidance on television advertising, (revised January 1985), p. 9.

public transmission of the campaign. At this stage every programme company has the chance to comment to the Network Centre to make sure that each commercial carries the approval of all the companies. If a commercial passes this final test it receives certification for broadcast. On average, 97-98% of filmed commercials submitted at this stage are accepted and many of the remainder need only slight amendments.

Figure 10. 8: Film Clearance



Source: *Independent Television Companies Association, Copy Clearance, Why and How.*

Members of the ITC's advertising control staff also view finished commercials but for monitoring purposes only. This is not considered as involvement in pre-vetting as "decisions to accept for broadcast no longer depend on ITC reactions. Although the ITC does from time to time begin investigations as a result of this monitoring the ITC would not, except in the most compelling circumstances, direct the companies to suspend approval pending the outcome of such investigations"[51]. This is a significant admission that the regulator still considers that it has the power to override the television companies in exceptional (but unspecified) circumstances. It would hardly

[51] Letter from Frank Willis, 7 January 1994

be possible to infer this from the descriptions of the ITC's post deregulation role in advertising control to be found in any of the relevant literature.

The advertiser is always asked to substantiate any new factual claims for a product and Copy Clearance staff have a number of specialist consultants on whom they can call for advice. These include the Medical Advisory Panel and additional consultants in the fields of general engineering, soaps and detergents, analytical chemistry, finance, motor engineering, dental prosthetics, law and agriculture[52].

Routine clearance normally takes three working days but more complex assessments can take several weeks. The Notes of Guidance published by BACC include advice on copy submission requirements, visual treatments, financial advertising, medicines, treatments and health claims, food and drinks and special problem areas such as children's advertising, portrayal of the royal family, testimonials and comparative advertising.

The recent experience of an advertising agency in Bristol illustrates the kind of problems accounts managers and creative teams have to deal with in getting an advertisement through clearance. The Bristol agency submitted a script on behalf of their clients, a West Country cheese maker, for a new cheese commercial. The copy included the phrase "made by man not by machine" to emphasise the fact that the product was hand-made on the farm and not factory produced. They were asked to re-word it as the word "man" might be considered sexist in this context. The word "machine" was also unacceptable because it implied that cheese made by other manufacturers was machine-made and this might be thought to constitute a "disparaging reference". They were also asked to substantiate the claim that the product was entirely hand made, and a further claim that the cheesecloth wrapping used by the maker left it in better condition than the plastic vacuum packing used by competitors. After these requirements had been fulfilled the advertisement was accepted for broadcasting on HTV, Meridian and Channel 4[53].

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[52] ITVA Notes of Guidance. Copy Clearance: Why and How?

[53] *Note:* This information was given to me in private conversation with the account manager, who wished to remain anonymous.

10. 6. 3 The Advertisers' View.

Advertisers and agencies have a slightly different perception of the regulator/industry relationship depicted in Figure 5, particularly the role of the Network Centre. If they share broadly the same notions as the regulator of what regulation is designed to achieve, they sometimes differ from it with respect to the methods of implementation. When I asked Kenneth Miles, Director General of the Incorporated Society of British Advertisers, if he saw it as the job of the Network Centre to act as a buffer between regulator and advertisers, he replied, "not quite", although he is aware that the regulator sees it that way. His organisation would like to see "a little more self-regulation", which he defined as the ITV companies sharing more of the responsibility for control with advertisers and agencies. The advertising industry is not happy that its co-regulatees have sole responsibility for enforcing compliance with regulation; they would prefer a more balanced distribution of power. Advertisers evidently feel that the "self" in self-regulation should not refer primarily to the companies, but should be extended to include the advertising industry on a more equal basis.

The ISBA is also calling for more accountability on the part of the Network Centre and the ITC. They should explain their decisions more fully and be more open to discussion. When I put this point to Frank Willis of the ITC, he commented that often instructions or explanations are passed on by telephone and the message might be garbled or misunderstood. This is a reminder that regulation is carried out by human beings in a complex environment where good communications are essential. However well thought-out the structures may be, they are only as good as the people who work within them and a certain amount of "interference" is inevitable where information has to be relayed between a number of different institutions each with its own agenda. The ISBA, however, would prefer greater clarity of communication so that the regulator is unable to hide behind the "noise" factor.

While some individual members of the ISBA may feel that certain advertisers do receive favourable treatment, and complaints have been made on these grounds, their trade association does not acknowledge that there is a real problem with discrimination. Kenneth Miles assured me that his organisation has faith in the objectivity of the Network Centre in carrying out copy clearance procedures. It is also broadly satisfied with the performance of the regulator, recognising that the broadcasting codes were drawn up after full consultation with all interested parties, so they do in fact represent a good consensus of opinion.

Traditionally, advertisers in the UK have not taken a confrontational approach to advertising regulation, and have not been particularly keen to run controversial campaigns on British television. Deborah Morrison, director of marketing and communications at the ISBA, told Campaign that most companies err on the side of caution: "No-one wants controversy and pressure groups coming down on them. A few even phone us up for advice because they feel cautious about the creative work they are being offered by their agencies"[54].

Advertisers are not always happy with regulatory decisions, however. The television authority's refusal to allow general acceptance for advertising of the category of female sanitary protection until 1988 angered at least one large manufacturer, Lilia-White. The company spent £30,000 on the first experimental campaign in 1972 only to be told after three months that the experiment could not continue because of adverse public reaction. Its marketing director criticised the IBA for leading it into an expensive test which had to be cut short, and was reported to be "absolutely furious" at the way in which the ITCA had handled the situation[55].

After a second experiment ended in a further ban in 1980, manufacturers Johnson and Johnson were extremely dissatisfied with the decision, which they publicly opposed[56]. By this time, however, Lilia-White had come round to the IBA's point of view. Its marketing director said he believed the decision was right, and that in 1972 test results had showed that people did not want to see San-pro ads in a family situation[57]. Kimberly Clark, a third big advertiser, also accepted the regulator's judgement, saying it did not want to go on television "until the time was right"[58].

So although they may disagree with particular decisions, especially if a lot of money has been spent on a campaign, advertisers on the whole support the gradualist approach to relaxation of the rules, and the trial and error philosophy that has served the regulation business in the UK well in the past. Even though British advertisers have become enormously more aware of the potential of broadcast advertising since their first cautious involvement in the 195O's, and have exploited this potential enthusiastically in the boom years of the last decade, they are still not looking for a revolution.

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[54] Michele Martin, *No Nipples On Our Screens Please, We're British* op cit. p. 13
[55] *IBA bans 'Offensive' commercials*, Ad Weekly, 3/11/72
[56] Gail Kemp, *Sanpro Chiefs Clash Over IBA Ban*, Campaign, 28 / 11/ 1980
[57] ibid. Gail Kemp
[58] Yorkshire Post Reporter, *TV Debut For Sanitary Product Commercial*, Yorkshire Post 14/ 02 /1979

10. 6. 4 The Agencies' View.

The Director General of the Institute of Practitioners in Advertising, Nick Phillips, giving the agencies' point of view, a took a similar line to the ISBA. He claimed when I spoke to him that his organisation does not see any great need for change and finds the Codes satisfactory. The IPA agrees with the ITC and others that the self-regulatory aspect of the UK system makes for speed and flexibility, and helps to get the participants committed to it. The continuing role of the AAC in dealing with traditionally difficult areas is appreciated. The agencies' special concern, as those most directly on the receiving end of regulation, is that there should be consistency and coherence in copy clearance policy, and uniformity of interpretation of the rules. This has been facilitated recently by bringing all UK broadcasters into the system. Phillips criticised the Broadcasting Standards Council, in this context, as confusing and "totally irrelevant to advertising".

As official representatives of advertising interests who must deal with the television regulating Authority on a regular basis the chiefs of the ISBA and the IPA are naturally more diplomatic and conciliatory when speaking on the record than some of their members. Advertising agencies in particular, who are responsible for the creative side of the business, often find the rules and regulations extremely frustrating. What agencies have to say in the advertising and media trade journals possibly gives a more accurate picture of their views on the impact of regulation on advertising's front line.

Inevitably, it is the ruling on taste and decency and avoiding "offence to public feeling" - Rule 12 of the Code of Practice - that causes the most difficulties. The regulating authority and the television companies' copy clearance staff have often interpreted this rule much more strictly than agencies feel is necessary. Campaign magazine reported in December 1987 that "agency people often berate the IBA and the ITCA for setting themselves up as arbiters of taste and morality. A typical remark is that the two bodies pander to the "vicars, idiots and Mary Whitehouses of this world". There is a feeling that the control organisations are out of touch with the consumer"[59] .

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[59] Gail Amber reports on the tussles between agencies and the IBA and ITCA over TV commercials: *The Great Creativity Battle*, Campaign, 4 / 12/ 1987. The ITCA had in fact changed its name to the ITVA (Independent Television Association) in September 1987 in an evidently not entirely successful bid to gain wider public recognition.

showing a publican, appearing at first sight to be a vicar, with the sound of church bells in the background, was rejected as potentially offensive to religious feelings, even though the Bishop of Birmingham had approved the idea. An advertisement for Hamlet cigars, where a man attempts a world record for keeping ferrets down his trousers, was rejected on grounds of tastelessness. And an advert showing a brand of small mints falling into an aquarium of fish was refused clearance by the ITCA, first, because the mints might poison the fish, and then, when the agency proved that this would not be the case, because "falling mints might constitute a danger to fish"[60].

Not all agencies are so unsympathetic to the copy clearance system or the general principle of regulation of advertising in general. During the great San-pro debate, a director of Leo Burnett, the agency handling the account of sanitary protection manufacturer Kimberley-Clark at the time of the second TV test campaign, approved of the IBA's decision not to lift the ban on this category. Speaking of the complaints received by the IBA and the television companies about San-pro commercials appearing on television he said: "We were astonished by the level of complaint and the startlingly well-argued and intelligent nature of the complaints"[61]. An account director for agency Allen Brady and Marsh made the observation that working within regulations can actually provide a spur to creativity. "Cigarette advertising is definitely a challenge. You have to do outstanding, creative work which gets noticed - all the time with your hands tied behind your back"[62].

10. 6. 5 The Television Industry's View.

The ITV Network Centre, representing the Channel 3 licensees, has yet another perspective on recent events in the broadcasting world, and on its own position in the regulatory scheme. As the ITV companies, apart from the aggressively market-oriented new franchise holders with no history of public service broadcasting, have been the losers under deregulation they are, understandably, much less happy with the situation than those who have gained - the advertising industry and rival non-terrestrial commercial stations.

In the run up to the 1990 Act, the existing ITV companies joined forces with the regulator (then the IBA) to oppose key parts of the proposed legislation. They both particularly objected to the auction

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[60] ibid. Gail Amber
[61] Gail Kemp, *San-pro Chiefs Clash Over IBA Ban* op cit.
[62] Tony Cohen, *Indecent Exposure*, Marketing Week 15/ 09/ 1989, pp. 42-43

In the run up to the 1990 Act, the existing ITV companies joined forces with the regulator (then the IBA) to oppose key parts of the proposed legislation. They both particularly objected to the auction system and the companies' trade association believes that its initial fears have been justified. According to Trevor Barton, Secretary of the ITVA (successor of the ITCA) several licensees bid far too much money for their franchises and will be unable to sustain their programme plans. They may face collapse and take-overs are already happening. All this means "uncertainty and disruption to the Network and in consequence a threat to viewer services"[63].

When I asked Trevor Barton if the television companies were satisfied with deregulation as it affected advertising, he replied: "in a word - no". Barton stressed that deregulation had had no impact on Satellite broadcasting, but that ITV still had at least twenty points of regulatory difference from BSkyB and other stations outside the Network. They have the advantage in terms of longer permitted advertising minutage (an average of 9 minutes per hour instead of 7), more flexibility with commercial breaks, more categories of advertisements permitted etc., which gives them a competitive edge over the terrestrial channels.

To add to the problem from ITV's point of view, since the historical relationship between ad-spend and GNP over time does not reveal any significant increase in the former over time, the proliferation of channels means more competition for a fixed advertising market. Previously, there had been a reasonable balance between the BBC, ITV and a few marginal Cable systems, which led to competition for quality and an escalation in programme excellence. Now the balance is distorted, there will be increasing competition for revenue that is already being eroded by sponsorship and niche marketing. The ITVA believes that "25 years of regulatory custom and practice and carefully built up case law is in a state of flux"[64].

Consequently, the majority of the Network companies, especially the old-style producers-broadcasters are fairly uncomfortable with some aspects of deregulation, particularly on the process side. They certainly do not want to see any speeding-up of the pace of change in the advertising market, but at the same time feel resentful that they do not have a level playing field with regard to non-terrestrial stations. If they did have the same loose regulatory regime as BSkyB and other competitors, however, they fear that the downward trend of programme services would be

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[63] Interview with Trevor Barton,.
[64] Interview with Trevor Barton.

would inevitably have an effect on their programming values, and "companies may feel pushed to clear a particular commercial because they need the money"[65]. This seems to imply that the clearing system is not in fact as immune to pressure as it is claimed to be, nor as objective as the ISBA maintains. Some advertisers and agencies already suspect this, but on the slightly different grounds that large influential advertisers are believed to be getting a better deal with copy clearance[66].

The programme companies also have an ambivalent attitude to their new relationship with the regulator. On the one hand, they appreciate the fact that the task of pre-vetting should become easier, in one sense, now that there is less interference from the regulator. This will result in more flexibility and less bureaucracy, and the ITVA firmly resisted an attempt by the ITC to install a computer monitoring system to give ongoing coverage of clearance procedures. The regulator had to be satisfied with an invitation to view the videotapes of finished commercials, without, of course, having any veto at that stage. The companies' attitude was that if they were to carry out self- regulation as directed by Act, they must be trusted to do the job without routine supervision by the regulator. By the end of the year, the ITC would know if regulatory policy was being properly implemented or not[67]. On the other hand, removal of the backstop of the ITC's active involvement in pre-vetting might encourage the temptation to go too far too soon. If the result were an increase in complaints this would have a negative impact on viewer credibility. The clearance staff have to be careful to tread a middle course.

Acting as a buffer between the regulator and the advertising industry, though they accept that conception of their role, is not something that the television companies find particularly easy. There is no suggestion yet, though, that they particularly wish to accede to the advertisers' desire for a further sharing out of the responsibility for self-regulation. The observation by Trevor Barton that the regulator still wants to keep as much power for itself as it can under the new regime is equally applicable to the ITV licensees themselves. Deregulation has already shifted the balance of power significantly in favour of the advertisers who lobbied hard for it. The licensees will strongly resist any

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[65] Interview with Trevor Barton.

[66] *Note:* In 1987, pre-deregulation, Campaign reported a "worrying opinion" expressed by agencies about copy clearance. "They believe the ITCA is interested more in money than in morality. There are numerous stories about the ITCA which give the impression it would far sooner upset a small spender than a big one." (Gail Ambor, *The Great Creativity Battle*, op cit.) The post-deregulation increase in competition is likely to make this impression even stronger. Even now, seventy years later, Sykes' warning that smaller advertisers would resent the power of the big spenders is still valid with respect to the high cost medium of television.

[67] Interview with Trevor Barton

further moves to reduce their power-base as competition hots up, and primary responsibility for regulation is an important element in that base.

10. 7 The ITC and the Consumer Organisations.

10. 7. 1 The Consumer's View.

The consumer groups have always occupied a different territory from the professional regulators, and from broadcasting and advertising executives involved in regulation. In the past, the IBA had a deliberate policy of inviting on to the Advertising Advisory Committee individuals who were thought to represent ordinary people - leading figures in the Women's Institute, the Townswomen's Guild and so on - rather than those working for official consumer organisations. Often, as Harry Theobalds told me, it was "just somebody one happened to know".

The effectiveness of this undoubtedly well intentioned approach was questioned by one of the permanent staff of the National Consumer Council whom I interviewed, Diana Whitworth, who recently served on the AAC. She believed that as complete amateurs these ladies, though very worthy, were at a disadvantage when it came to holding their own against experienced professionals from the advertising and television worlds. As a result the consumer's voice was not heard as forcefully as it should have been.

The NCC representative herself felt that she was regarded rather as an outsider when she first joined the AAC, in the days of the IBA. She found it hard for a while to penetrate the "cosy relationship" enjoyed by the regulator and the regulated industries. But an extensive background and training in consumer affairs gave her the confidence and expertise to take a more active part in fighting the consumer's corner. In fact, such was the degree of her eventual acceptance as one of the team that after several years service she resigned, on the basis that too close a relationship between parties with responsibilities towards different constituencies was not conducive to effective regulation. It is now the NCC's policy to change representatives on the Advisory Committee fairly regularly to keep the consumer perspective fresh. NCC philosophy is that there should always be someone present who is not wholly absorbed into the system, and who does not take things for granted - regulation as usual - but challenges the system. This shows an unusual degree of sensitivity to the problem from the

inside. It is rare, if not unique, to find anyone involved in regulation who is willing to admit that they might personally be susceptible to influence by the dominant interests.

Both the National Consumer Council and the Consumers Association believe that it is too soon to say whether deregulation will result in a decline in advertising standards, but they are watching carefully to see if more "borderline cases" slip through. According to Diana Whitworth, on the whole they are satisfied with the principle of self-regulation because it leaves room for experimentation and is sensitive to public opinion and to new problems. For consumers, the new roles of the ITC and the Network companies have both advantages and disadvantages in the implementation of this principle. The more "arms length" relationship between regulator and regulated may be an improvement; less "cosiness" and therefore less possibility of capture. The Network Centre is nevertheless still paid for by the companies and is their servant. It may not be strong enough in interpreting the rules without the pre-clearance backing of the ITC. Consumer organisations expect the clearance staff to show their independence and earn their credentials.

The system of rectifying errors or withdrawing commercials only after they have been broadcast also causes some disquiet in the consumer corner because of the invasive nature of advertising, its lack of warning and constant repetition. Corrections are much easier to make in the print media. The large amounts of money which would be lost if an advertisement had to be scrapped could make the regulator reluctant to take drastic action. The ITC's swift response to the Tango orange drink advertisement was a positive sign, however, and the potential cost of withdrawal may mean that even greater care will be taken with clearance procedures in the first place.

With respect to the advertising industry, the NCC believes that there is a possibility with self-regulation that consumers might perceive it as too powerful. In its opinion, while there might be some truth in this perception, advertisers in the UK have historically been very committed to getting things right, in their own interests if nothing else. They have sometimes been more cautious than the consumer organisations for fear of alienating potential customers. The point about self-regulation, that it can only work if industry is fully committed to making it work, was made by all the interested parties that I spoke to, and is a generally accepted pre-condition for all voluntary regulatory systems to work.

As part of the practical apparatus for carrying out regulation, the Advertising Advisory Committee came in for some criticism, although the NCC agrees that with a broadening of representation in the last couple of years it has become more effective. The perception of the old IBA that the Committee was well balanced between industry and consumer interests is not shared by the consumer groups. The balance may be better now but the ITC and the industry still set the agenda and the Committee consequently has too passive a role. For the most part, it merely considers what is put before it. With the exception of the publication *Your Food: Whose Choice*, edited by the NCC, which was discussed at two meetings, no issues initiated by outsiders, (i.e. those outside the regulator/industry axis) have been examined. As a result of concerns raised in this book, advertising of sugar and fatty foods will be reviewed regularly. The consumer representatives on the AAC hope that the ITC will allow more items to be initiated by others rather than always creating the agenda itself.

Complaints were not just directed at what was seen as bias on the part of the regulator in setting the agenda for debate too narrowly. The lack of quality independent research was also heavily criticised. The Consumers Association in particular felt that research tended to be industry originated and yet too easily accepted by the regulator as impartial. Its spokesman Sue Bloomfield cited to me the recent campaign for Mars chocolate bars as an example of what CA believed to be a tendency by the ITC to be too accommodating to industry at the expense of consumers. Mars had resurrected an old advertising slogan: "a Mars a day helps you work, rest and play" for its new campaign, but the consumer pressure group, Action and Information on Sugars, lodged a complaint that it was misleading. The ITC rejected the complaint, influenced in part by a study done by Mars on consumer impressions of the advertisement. CA, although in this instance it supported the Commission's decision, was disappointed that no-one was allowed to see the advertiser's response to the complaint or the relevant research. The refusal by the ITC to make either of these available was seen as unnecessary secrecy [68].

Sue Boomfield also cited another instance where the advertiser (again a large and powerful one) had been given the benefit of the doubt. This concerned Abbey National Bank using an endorsement from an obscure specialist magazine, "Which Mortgage?", that had given Abbey National a 'Best Lender' award. The presentation of the commercial misleadingly suggested that the mass circulation Consumers Association publication, "Which?", was the source of the endorsement. CA lodged a

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[68] *Note:* The ITC's account of its actions in this case is given in the concluding paragraphs below

very strong objection to this presentation after conducting its own independent research which clearly showed that a significant number of consumers were being misled. The ITC, however, "dismissed the complaint out of hand, without testing the findings of CA".

These two cases raise two separate issues in television advertising regulation of concern to consumer organisations. One is the specific problem of who conducts research. The NCC, the Consumers Association and other groups with similar aims would like to see a single consumer body taking on the functions of the Broadcasting Standards Council and the Broadcasting Complaints Commission, with proper resources to carry out completely independent consumer research. Otherwise they believe that the existing "information asymmetry", where the regulator appears to be over dependent on industry generated research which inevitably presents the industry's case in the most favourable light, will only get worse. The other is the more general problem of openness, accountability and access, which has caused concern to other participants in the regulatory process.

From the consumer groups point of view, the need for more pro-active research that is independent of the regulated industry in question is not met by the BSC. Its remit to consider only the taste and decency aspects of advertising and not the truth of claims means that it cannot uses its resources to this end. Since the NCC does have a duty to safeguard the interests of more vulnerable consumers, it supports the use of resources to investigate the potential offensiveness of advertising when it touches on areas such as gender or racial stereotyping or the disabled. CA does not take a view on the subject, but does take a strong position on misleadingness and industry bias. In particular, it feels that the ITC should not follow the example of print advertising where, for example, market research provided by the motor industry is accepted as consumer research on cars even though it is patently far from neutral[69].

With regard to accountability, consumer organisations, like advertisers, would prefer the regulator to be more open in discussing what has caused it to reach particular decisions. Complainants should be able to see the response of advertisers, which at present they are prevented from doing. If industry research is accepted against independent findings, or in the face of valid consumer objections, this should be made available for consumer representatives to see, and to respond to. There must be no doubt in any one's mind as to the complete independence of any consultants appointed by the

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[69] Interview with Sue Bloomfield.

regulator, especially if they are drawn from within the regulated industries. Full information on all consultants should be available to ensure that they are impartial and will not display any bias towards industry in their advice.

There also was a feeling that the ITC's Advertising Advisory Committee operates too much "behind closed doors". While they realise some degree of confidentiality is necessary for members to feel able to speak freely, the consumer representatives I spoke to regret that there are at the moment no externally published minutes of committee meetings. They feel that the case of openness would be served by the publication of a summary of the proceedings at least. According to Sue Bloomfield, one recent representative was very unimpressed by the performance of the AAC and questioned the use of having such committees at all. This appeared to be a minority opinion, however, and the others have appreciated the opportunity for consumers to be on the inside of the decision making process.

On this point, Diana Whitworth considered the case of regulation requiring that commercials for children's toys should also include an indication of the price of the toy to be a partial success for the consumer representatives. The rule, long a source of irritation to toy manufacturers who repeatedly lobbied for its abolition, was reviewed from time to time by the Committee. The majority of Committee members eventually agreed that the time had come to rescind this requirement and advised the ITC accordingly. The consumer representatives presented a strongly worded minority report to the ITC dissenting from this view. The ITC supported them and rejected the advice of the Committee. The advertisers continued to exert pressure and finally a compromise was reached: toys costing more than £15 would have to retain price indications. The episode offers proof that regulator can sometimes be more rigorous than the AAC in terms of consumer protection[70].

The consumer organisations also perceive regulation as on occasion biased in favour of industry on a more general level. Although programmes devoted to consumer issues provide a valuable counterbalance to the flow of positive images that advertising strives to present, there is little scope for actual "anti-industry" advertising. Sue Bloomfield referred to the Food Commission's claim, for instance, that if they were to run informational advertisements to counteract industry claims, the ITC would be much harder on them. The fact that some of their draft commercials were rejected by the

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[70] *Note:* The same case is also quoted by the ITC as an ideal example of the type of consensus decision-making practised in the British system of regulation, and as one of the very few instances where the advice of the AAC has been rejected.

ITC as "offensive" was given as evidence for this negative perception. The Food Commission's response to the regulator was that "this was the whole point. They were meant to be - to the food industry"[71] . Environmental groups are not allowed to broadcast advertisements criticising the nuclear industry, because the ITC judges that this would be crossing the boundary into political advertising which is still prohibited. But the nuclear industry is permitted some kinds of indirect promotional advertising which nevertheless brings it to public awareness in a favourable light. While it is perfectly acceptable for advertisers to use the "green" angle to persuade people to buy their products, it is viewed with suspicion when used as an argument against products which may be environmentally damaging. The regulator's policy on these matters seems to consumer organisations to be somewhat inconsistent.

10. 8 Conclusion.

The extent to which the dynamic of control and resistance propels the regulatory process forward and channels its direction is evident not only from the ongoing series of issues raised and debated, and decisions made and implemented, but by the language the participants in the process use. Words and phrases such as "push", "resist", "buffer", "pressure", "break barriers", "cave in" come up regularly in the context of television advertising regulation. The various parties affected by regulation see themselves either as trying to extract concessions from the regulator in order to reduce the burden of restrictions on them, or as utilising the existing rules as much as possible to their advantage. The regulator, in turn, has to ensure that if concessions are made they do not go too far, and that if barriers are to be broken this should be done in a controlled way so as to cause as few repercussions on other individual participants as possible and a minimum of shock to the system as a whole.

What also emerges clearly is that most of the participants do accept that this process of negotiation has to take place within a certain framework of rules. There is almost universal support for the principle of advertising regulation and recognition that the system as a whole is more advantageous to the regulated parties than disadvantageous. The majority of rules are perceived as sensible and fair. Resistance takes place more at the periphery of the system than at the core, which is not to say that it is not extremely active at times.

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[71] Interview with Sue Bloomfield

The ITC, who is chiefly responsible for the forces of control in regulation, is always anxious to emphasise that control is exercised with maximum restraint. The regulator has constantly stressed that consensus, conciliation and compromise are the key features of its decision-making process. The complexity and multi-directional nature of the operation of control is also evident. It is not just a question of the ITC controlling the regulated industries on behalf of consumers. The advertising industry often puts pressure on the Commission to control the activities of the television companies, particularly in the still disputed area of airtime sales practices. The television companies themselves have considerable control over the behaviour of the advertising industry, especially since deregulation. And the ITC, itself, is ultimately controlled by the state and its agencies, who may be on the receiving end of lobbying from the regulated industries or from consumers.

Perhaps not unexpectedly, some of the heaviest criticism has come from the consumer side. The Commission is concerned to answer the complaints made by the NCC and CA that it displays industry bias and is not sufficiently open or accountable in its decision-making processes. In response to the first criticism, particularly with reference to the issue of whose research informs regulatory decisions, Frank Willis made the following points. Industry research is by no means the only factor to be taken into account in making decisions, and this was true in the Mars case cited by CA. The ITC has its own professionally qualified research staff who are not likely to take at face value research commissioned by interested parties. The Department of Advertising and Sponsorship has "the experience and expertise to make a proper assessment of material of this kind and will not accept as admissible evidence any surveys which appear to have a pre-determined bias"[72]. In addition, he emphasised that the ITC does commission research of its own "although for reasons of expense this is geared to policy issues rather than individual enforcement cases"[73].

On the subject of openness and accountability, particularly with respect to criticisms of the way in which the Advertising Advisory Committee operates, Willis explained that "consensus is important for the ITC.....and the committees which make the most progress and are most successful at building consensus are those which do not conduct their deliberations before a public audience". This is why the minutes of the AAC are not formally published. He feels that, in any case, the breadth of membership of the AAC gives a good standard of accountability.

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[72] Letter from Frank Willis, 27 June 1994
[73] ibid.

There are also difficulties attached to making industry research available for inspection by outsiders. Unlike the Trading Standards Officers, the ITC's powers enable it to require advertisers to satisfy it as to the accuracy of claims. This involves the ITC being shown commercially confidential material such as test protocols, product specifications, and consumer research crucial to a company's advertising strategy. The regulator, therefore, does not find it surprising that "that advertisers prefer (it) to respect the confidentiality of material such as this when it comes to the question of publication of decisions which may in part be based on it"[74].

There is considerable justification in the ITC's argument that AAC meetings need to have a degree of confidentiality for members to be able to speak freely, without feeling that their opinions could be used for factional purposes or the polemics of vested interests. It is perhaps an exaggeration to suggest that the consumer groups want the AAC to deliberate "before a public audience"; the request was merely for a summary of the proceedings to be made available which need not contain opinions attributed specifically to any named members. There is slightly less justification for the Commission's position on the confidentiality of industry research. It is rather a circular argument to state that material cannot be shown because it is confidential, when the need for confidentiality is itself being questioned. Again, it is a question of degree. CA, which raised the point, was not asking for a blank cheque to see every piece of genuinely commercially confidential information, simply to see the industry's "response" to independent research if two sets of research results appear significantly divergent.

The NCC's complaint that the regulator sets the agenda for AAC discussions, which reduces the possibility for the Committee to take a more active role in regulation, is a valid one. The problem has been highlighted by political theorists Barach and Baratz who studied the exercise of political power in the formation of policy by examining the decision-making process. They concluded that there are two types of power. The first is positive, where one faction exercises power over another by imposing its preferences on its rival. Power is then reflected in concrete decisions made after a plurality of options have been put forward for consideration. The second is negative, where one faction limits the scope of the decision-making process to considering only those issues which are not potentially damaging to its interests, excluding from the agenda rival plans which might reduce its

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[74] ibid.

chances of imposing its preferences. So whoever is able to decide what appears, or what does not appear, on the agenda for debate and eventual decision possesses considerable power.

This is not to say that the ITC deliberately suppresses topics which are controversial or unpopular with the regulated industries, but the regulator nevertheless has its own perspective. It is bound to be, to a degree, regulation-oriented, and to be inclined to consider only those issues which do not cause too many difficulties for regulation. Enabling 'outsiders' to contribute to the agenda would give the AAC a more pro-active role and make the power relations between it and the statutory regulator more equitable, but possibly at the cost of making the decision-making process less smooth. Merely broadening the membership of the Committee does not automatically guarantee accountability. If consumer representatives and independent members cannot formally introduce for discussion issues in advertising which they believe to be important (health issues in food advertising and 'green' issues are often mentioned) then their presence is not as meaningful as it could be[75].

McQuail's definition of the public interest is again extremely useful in analysing the operation of television advertising regulation in the UK. Detailed analysis of the ITC's activities demonstrate how it actually adjudicates the competing claims made on it by different groups each with a prima facie case for representing the public interest in some aspect or other. Consumer representatives claim that rigorous control of advertising is in the public interest; advertisers claim that the freedom to impart commercial information unhampered by too many restrictions, and competition in general, are in the public interest; and broadcasters claim that regulation which protects their ability to provide a quality service and at the same time satisfy their shareholders is in the public interest. All these claims are potentially, but not necessarily, in conflict with one another. For the regulator, it is a question of deciding the order of priority among the claims at any given time, but the fact that all of them are considered to be to some extent justifiable affects the way in which decisions are made. Extreme

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[75] *Note:* Regulation moves on; since this paragraph was written consumer representatives seem to have made advances on the food advertising front. Whereas before, the regulator was reluctant to use its powers actively to promote objectives such as dietary reform or improvements in public health which are not specifically part of its remit, new guidelines have just been introduced which will force advertisers to pay more attention to the government's Health of the Nation diet strategy. Commercials showing people consuming an excess of fatty or sugary foods, such as a recent chocolate bar advert where a TV personality crams a shopping trolley with the product, will no longer be acceptable unless it is clearly established that the purchase is "not for individual use". Some have questioned the right of the regulator to "indoctrinate" the public, and the ITC insists that it is "against using its medium as a tool for change and denies it is prey to the whim of well organised lobby groups". (Nicholas Hellen and Tim Rayment, *When Nanny Knows Best*, Sunday Times 5/ 02 / 1995, p. 14) The Commission clearly has government backing for these moves, however, and it is possible that in the future, given the increasing evidence that poor diet is related to a number of serious medical problems and that advertising plays some part in determining what people, particularly children, choose to eat, it may take a more pro-active role in the regulation of food advertising.

measures which have the effect of excluding certain claims altogether are rarely taken; they all have to be looked at seriously and most are validated and then satisfied to some degree in the ongoing process of bargaining and negotiation between claimants.

The ITC's task is more complex than the analogous Office of Fair Trading, which also has both competition and consumer protection obligations, because in broadcasting the relationship between process and product regulation is much closer. The OFT does not have to consider, except in the most general terms, the effect of its competition activities on consumers, acting on the basic assumption that the promotion of competition benefits consumers. Its competition and consumer protection arms operate separately. The ITC, by contrast, must always take into account the implications for the broadcasting and advertising product of decisions made with respect to the process. Policy on advertising minutage, distribution of commercial breaks, and commercial activities such as sponsoring, broking and product placement all have a potential impact on programming, as well as on advertising as a series of commercial messages received by consumers. Too much emphasis on the rights of consumers and too many restrictions on the content of advertisements, however, will have a negative impact on the ability of industry to do its job properly, i.e. on the process.

Although the new regulatory system has not been in operation long enough to judge whether it has succeeded or failed in any final sense, there are definite structural stress points. It is possible to argue, as many have done, that the 1990 Broadcasting Act, by re-structuring the regulating authority so as to reduce bias towards the existing broadcasting industry at the expense of new entrants and advertisers, and to introduce more objective criteria in the awarding of licences, simply shifted the bias towards business interests at the expense of broadcasting. If, in the long term, a more competitive market results in advertisers wielding excessive power and destroying quality public service broadcasting this could be seen in the future as an much greater regulatory failure .

The structure of the Advertising Advisory Committee has been attacked periodically for being weighted in favour of industry rather than consumers. In order to compensate for losing its formal statutory powers, it, too, was re-structured in order to broaden its base and counter-balance industry influence. So although its formal powers have been weakened, its practical role in the operation of regulation has been increased.

Detaching the regulator from the television industry may have clarified the regulator's function and made it easier to implement from that point of view, but it has not completely resolved the old difficulty, identified by Beveridge and Pilkington, that the television companies are obliged to serve two masters at the same time. The ITC itself restated the problem in its January 1992 Complaints Report. With reference to its decision not to uphold complaints from a significant number of viewers about a controversial sanitary towel advertisement, the Commission spoke of the dilemma faced by the companies in trying to reach the right balance between "consideration (or courtesy) to viewers" and the commercial interests of advertisers, given that they must "supply two types of product to two types of customer (programmes to viewers and viewers to advertisers)"[76]. The attempt to supply one satisfactorily cannot always be reconciled with the attempt to supply the other and responsible policy-making, as the Report emphasised, must necessarily be "something of a compromise"[77]. The problem of theoretical incompatibility of objectives is nevertheless inherent in the structure of a commercial television system which is at the same time a public service, and will not be resolved until one or other function is either removed or seriously downgraded. This is not considered either likely or desirable in the UK and so the balancing act will continue to be a feature of terrestrial commercial television regulation in this country for the foreseeable future.

Instrumentally, it is clear that individuals do have considerable influence on how regulation is carried out in practice within the structural boundaries that limit their actions. Generally speaking, for consumer representatives, there does exist a feeling of "them and us", although what the Director of the Broadcasting Standards Council referred to as "the professionals" of the television and advertising industries and the regulation business might be reluctant to admit it. Consumer groups perceive the leading figures in industry and regulation as being likely to share similar views and objectives, and to enjoy an more intimate relationship with one another than with anyone from the consumer side of the fence. There is a belief, justified in part, that consumers do not have the kind of real power that the regulated industries have, and that the presence of consumer representatives on the AAC, for example, has sometimes been tokenism rather than genuine power sharing.

The present Director of Advertising and Sponsorship nevertheless appears personally to command a high degree of respect and trust from all sides. It takes a considerable degree of imagination and communicational skills to obtain a consensus from such widely differing sets of interests as those

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[76] ITC: *Complaints Report* January 1992
[77] ITC: *Complaints Report* January 1992

involved in commercial television regulation, particularly when it is people's aesthetic and social values and creative judgement which are affected by regulatory decisions, rather than business practices and profits. So far, although the present regulatory system gives much less scope for individual values and idiosyncrasies to affect the outcome of regulatory practice than under previous "hands on" regimes, the personalities of those at the top levels of regulation policy-making, from both regulating and regulated sides, appear to be making a positive contribution to the process.

Chapter 11

Deregulation or Re-regulation? The Paradox and the Problems.

11. 1 Introduction.

One of the most interesting questions to arise from the 1990 Broadcasting Act is whether deregulation has, in fact, resulted in any significant decrease in the amount of regulation taking place. This, after all, was the whole point of the exercise. Is the situation in Britain the same as elsewhere in Europe, where many of those involved in broadcasting, when asked what their experience of deregulation has been, simply reply: "deregulation? What deregulation?"[1] The implication, of course, is that deregulating legislation has often had the opposite effect from what was originally intended. But when the question is posed like this it becomes apparent that regulation is not easy to quantify.

11. 2 Deregulation: More or Less?

In considering the problem it is important to remember first of all that the general definition of regulation is the imposition of rules which limit freedom of action in certain areas, including the freedom not to do something when a rule takes the form of a positive requirement. Deregulation entails the removal of rules to enable greater freedom of action, which is why the term "liberalisation" is often used synonymously with "deregulation". So, at the level of the primary regulatory structures, i.e. at the process level, if there are fewer rules to restrict action it can be said that the amount of regulation is less. However, in the case of television advertising, when it comes to the secondary level of product regulation, the amount of rules do not necessarily decrease just because there has been a reduction at the primary level. In reality, the opposite has been the case.

This paradoxical aspect of deregulation was noted by Sir Bryan Carsberg, Britain's current Director General of Fair Trading and first Director General of telecommunications regulator OFTEL, in connection with the recent privatisations of nationalised industries[2]. Although the privatisations

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[1] Peter Goodwin: *The Myth of Freedom*, 9/ 02/ 1990, p. 28.
[2] Business Comment: *Regulating the Regulators*, The Sunday Times, 29/ 08/ 93, Section 3, p. 2.

themselves were intended as major pieces of deregulation, a series of new regulatory bodies had to be created alongside the privatised companies to control their behaviour, chiefly with respect to competition[3]. This irony is also noticeable in the deregulation of commercial television, and especially of advertising. It would be hard to argue that the amount of regulatory activity has decreased overall since 1990, despite the lessening of restrictions at the primary level. The ITC still has seven members in its Advertising and Sponsorship Division who are directly responsible for regulation, and BACC maintains 23 professional staff in the Clearance Secretariat. Frank Willis of the ITC, and Uisdean MacClean, Head of Copy Clearance, assured me that neither of their respective organisations envisages reducing the level of staff involved in regulation in the future.

Although the ITC has withdrawn from one area of regulation altogether - the pre-transmission vetting of commercials - this has not resulted in less activity for the regulator in general. It now has an additional area of responsibility - sponsorship - which is likely to take up more resources as the importance of sponsorship to the television market grows. For the television companies, the amount of regulatory activity has actually been increased by including non-network stations in the clearance system, by having to deal with more categories of advertising with associated rules contained in the new Code of Practice, and by sharing responsibility with the ITC for control of sponsorship as well as spot advertising. And the creation of a new body, the Broadcasting Standards Council, to all intents and purposes with a regulatory function even though officially it can only give advice, adds to the impression of increased regulation[4].

The paradox as it applies to the control of television advertising lies in the expansion of the scope of regulation that deregulation has brought. Relaxing the restrictions at one level (process) to admit not just extra categories of advertising to be policed, but a whole new way of bringing in revenue for a wide variety of programmes, has resulted in more rules having to be codified at another level

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[3] *Note:* Concrete evidence of regulation actually increasing post-deregulation, in spite of the government's intention to reduce it, is provided by Carsberg in his contribution to *Regulators and the Market.* He admits that when OFTEL was being set up the government were thinking of staffing levels of around 50 but "when we demonstrated a need for more, we had strong ministerial support and were able to increase our numbers steadily to the present level of about 130". (Sir Bryan Carsberg, *OFTEL: Office of Telecommunications: Competition and the Duopoly Review*, in Cento Veljanovsky (ed.) *Regulators and the Market,* Institute of Economics Affairs, 1991, p. 98)

[4] *Note:* Jay Blumler comments: "if the free market ideology behind the 1990 Act was deregulationary in intent, other enactments moved in the opposite direction. These had to do with standards of taste and decency, as well as with public morality itself." Referring both to the Broadcasting Standards Council and the inclusion of broadcasting under the provisions of the Obscene Publications Act for the first time, Blumler emphasises that it is "no longer left only to the Governors of the BBC or the Board of the ITC to safeguard the public good". (Jay. G. Blumler (ed.) *Television and the Public Interest,* London : Sage, 1992, p. 74)

(product). A separate code has had to be drawn up to cover the particular issues that programme sponsorship raises that spot advertising does not.

The paradox only arises, however, if the deregulation is a partial one; complete deregulation which gets rid of all rules is self-consistent. Partial deregulation of commercial television in the UK, while increasing the number of options available to broadcasters and advertisers (more competition, more kinds of trading practices, more forms of advertising etc.) still retained a substantial role for the regulator[5]. Politically and socially, the UK is not yet ready for absolutely unregulated television advertising, relying only on the legal system to protect consumers, as Alan Peacock recommended. When I discussed the problem with Frank Willis, he summed it up as follows: "if you liberalise an area you must still have rules and standards for it. But just because the Code is thicker it does not mean that the system is more restrictive"[6].

One of chief ways in which deregulation can be said to have taken place is the move to full pre-transmission self-regulation by the programme companies. This liberalising measure enables them to exercise their own discretion in accepting or rejecting commercials for broadcast, rather than the decision resting with the regulator. So it is also possible to measure regulation qualitatively by looking its intensity, or the degree of its application, rather than its scope or its amount. In fact, the words most often used in describing regulation in the context of both broadcasting and advertising in the UK are "light", and "heavy" or "tight". Prior to 1990, the system of advertising control was "tightly" or "heavily" regulated. The Hunt and Peacock Reports, the 1989 White Paper and the 1990 Broadcasting Act all speak of introducing a "lighter", regulatory regime, which would be less intense as well as having fewer primary restrictions. The freedom for industry to use its own judgement, even though that judgement must still be based on regulatory criteria as well as commercial ones, is a crucial element in defining what constitutes lighter rather than heavier regulation. Heavy regulation entails a high degree of statutory involvement by the regulator at all stages. With lighter regulation regulator can only intervene after the event of broadcasting, but has strong punitive powers which it can exercise if its rulings are disobeyed.[7].

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[5] *Note:* As David Mellor, Minister responsible for getting the 1990 Broadcasting Bill through Parliament, explained, the Bill "deregulates in some matters, but where it regulates it does so firmly".(David Glencross. *ITC: The Reform of Broadcasting Regulators*, in Cento Veljanovsky (ed.) *Regulators and the Market,* Institute of Economics Affairs, 1991 p. 141)

[6] Interview with Frank Willis

[7] *Note:* This is what is implied in David Mellor's remark about doing less regulation but doing what remains "firmly". See: *Note 5*

In the light of the above, it is clear that there can be no simple one word answer to the question of whether there is now more advertising regulation or less. There is less as regards the basic liberalising of the system to allow more freedom of action for industry; more taking into consideration the number of extra rules covering the increased scope that must be drawn up and enforced. Deregulation has brought about both qualitative and quantitative changes, and partial deregulation has inevitably resulted in a certain amount of re-regulation to ensure that standards are still maintained within the looser overall framework.

11. 3 Sponsorship: A Slippery Slope?

The new area of sponsorship is one of the most complex problems for regulation posed by deregulation. It has its own code, drawn up by the ITC after "the appropriate consultation", including advice from the AAC, which aims to preserve as far as possible the axiom that any promotional message should be kept distinct from programme content.

The Code commences with a definition of sponsorship:

> *"A programme is deemed to be sponsored if any part of its costs of production or transmission is met by an organisation or person other than a broadcaster or television producer, with a view to promoting its own or another's name, trademark, image, activities, products, or any other direct or indirect commercial interests"*[8].

The basic principles in summary are:

1) Sponsorship is allowed only for whole programmes or substantive programme strands.
2) Any television programme may be sponsored, unless it falls into one of the excepted categories listed in rule 8
3) No sponsor is permitted any influence on either the content or the scheduling of a programme.
4) Any sponsorship must be clearly identified at the beginning and/or at the end of the programme.

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[8] *ITC Code of Programme Sponsorship,* January 1994, p. 2

5) No promotional reference to any advertiser or sponsor, or to any products or services, is permitted within any programme .
6) No programme may, without the previous approval of the Commission, be sponsored by any person whose business consists in the supply of products or services prohibited from being advertised by the Code of Advertising Standards and Practice.
7) Product placement is prohibited[9].

There are also a number of more specific requirements. Two programme categories are unsponsorable: news programmes and current affairs programmes, including business and financial reports containing interpretation and comment. Cultural, sports and weather reports may be sponsored. On sponsor influence: no-one may sponsor a) a programme or series which contains within it material which has the effect of promoting the sponsor's product or service (with the exception of game shows for which there are separate rules); or b) which, had it not been sponsored, might reasonably have been expected to contain editorial content which might conflict with the sponsor's interests, e.g. consumer advice programmes. There must be no promotional reference within the programme itself to the sponsor or any of the sponsor's products or services[10].

The Code contains quite detailed rules on sponsor credits: there must be front or end credits or both (visual or aural), and may be bumper credits entering and leaving a commercial break. Front credits must precede, and not be integrated within, any element of the programme, apart from its title sequence provided that sequence does not include extracts from the programme itself; end and bumper credits must not overlap for more than five seconds. Only expressions like "sponsored by", or "in association with" are acceptable to explain the sponsor's connection with the programme; those such as "brought to you by", which suggest that it has been made by the sponsor, are not. There must be no visual or aural extracts from, nor elements which closely resemble, the sponsor's advertising campaign in any credit, trailer or programme; trailers may have only one simple reference to the sponsor. Unlike other classes of licensee, ITV and Channel 4 have special restrictions on length of credits - 15 or 20 seconds for a front credit, for one sponsor or more than one sponsor respectively, and 10 seconds for end or bumper credits.

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[9] ibid. p. 3
[10] ibid. p. 4

There are rules for televised sponsored events, which were the only kind of sponsorship allowed prior to deregulation (apart from some factual programming on Channel 4), for game shows and viewers' competitions, and an appendix on sponsorship by religious bodies. These rules are more rigorous for ITV and Channel 4 than for Cable and Satellite.

Prohibited sponsors are:

1) anybody whose objectives are wholly or mainly of a political nature .
2) any person whose business consists wholly or mainly in the manufacture or supply of tobacco products; pharmaceutical products available only on prescription; any other product or service which may not be advertised under the Code of Advertising Standards and Practice (without the prior approval of the Commission)[11]

Sponsorship, long a major form of advertising in the United States and elsewhere, has had a quite different history in the UK. Until the government began to prepare for commercial television in the early 1950s, obtaining an income from sponsored programmes was regarded by policy-makers as potentially less harmful than from spot advertising. It was partly an aesthetic argument: discreet sponsorship - a brief acknowledgement that a prestigious firm had supported a quality programme, as it was envisaged by early supporters such as Sykes, Selsdon and Ullswater, or even many of those who called for it in the Beveridge Report - was considered less intrusive than repeated commercial breaks. When the implications of sponsorship for the editorial integrity of programming were more thoroughly examined by those responsible for setting up the structures for commercial television, its potential dangers became apparent.

From a strictly commercial point of view, sponsorship is less attractive to most advertisers than spot advertising as it communicates much less quickly. Instead of offering a direct message with instant impact, it relies on slowly building familiarity with the product[12]. The process can, of course, be accelerated by much more aggressive pushing of the sponsor's commercial message in and around the programme. But this would have been unacceptable in Britain in a broadcasting environment hostile to US-type 'hard sell ' commercialism. A fairly strict regulatory regime was planned for advertising at the start of ITV, and quite apart from its inability to bring in much revenue to the

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[11] ibid. p. 9
[12] N.C.Walford, *How it works - sponsorship effects and advertising comparison,* Admap July/August 1992, p. 32

fledgling companies in a "discreet" form, sponsorship posed, and still does pose, exceptional difficulties in the context of British regulation policy.

This is first of all because it blurs the boundary between programme and advertising which has always been the cornerstone of British policy, and secondly because of the open-ended nature of the sponsor's involvement in the programme he funds. As soon as a direct financial connection is made between an advertiser and a particular programme, the incentive is there for the advertiser to try to get more value for his money by more exposure for his product. This puts pressure on the television company to be more accommodating and ultimately on the regulator to relax the rules. This why even those who have welcomed the arrival of sponsorship after deregulation have referred to it as a slippery slope.

It is tricky to regulate in practice, not just because it is far from easy to judge where to draw the line on the amount of exposure the commercial message should have, but because it is much more difficult to ensure compliance with any decisions made than with spot advertisements. Once an ordinary commercial has been cleared for broadcast there is no scope for anyone to exert any influence on it afterwards. But there is always scope in the sponsoring of a series of programmes, either new or existing, for the advertiser to try and influence the programme makers, over a period of time, in ways that are not easy to detect, even with rigorous monitoring. So there are problems not only in drawing up the rules, but in implementing them too.

The ITC's Code of Programme Sponsorship was described to me by Professor Geoffrey Stephenson as "sophisticated", and it appears to reflect the regulator's objective of preventing "manipulation of programme editorial by commercial interests"[13]. Its provisions are directed at making it as difficult as possible for sponsors to manipulate anything at all. The limiting of the message to brief product or service mentions preceding and following the programme (plus bumpers), but not integrated with any element of it, makes the distinction of message and programme quite clear to viewers. The rule prohibiting any programme from being sponsored if it "contains material which, intentionally or otherwise, has the effect of promoting (the sponsor's) product or service"[14], in line with the *EC Directive on Broadcasting*, addresses the more complex and subtle question of where

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[13] Michael Kavanagh, *TV sponsors de-code IBA's message* Broadcast, 2/11/ 1990, p. 10
[14] *ITC Code of Programme Sponsorship*, op. cit. p. 4

appropriateness of fit crosses the boundary into an identification with the programme's subject matter close enough to constitute promotion.

This matching of the sponsor's message with the theme of the programme - "the art of affinity which spot advertisers have never mastered, but still feebly yearn for"[15] - is something that needs judging carefully. From the sponsor's point of view, compatibility of product/service with the subject matter of the programme is one of the keys to successful sponsorship, while from the regulator's perspective too close a link could represent either the effect of promotion, or a conflict of interests, or both.

Two recent cases illustrate how the ITC assesses whether the sponsoring of a programme contravenes the Code by giving the effect of promoting the sponsor's commercial product. In one, the ITC ordered a pet food manufacturer to withdraw as the sponsor of an animal welfare series, because although the animals would not have been seen eating that particular brand of pet food (strictly forbidden) there would have been too strong a connection in viewers' minds between promotional message and programme content. In the second, the ITC reversed a decision to allow PPP, the private medical group, to sponsor ITV's top-rated drama series Peak Practice, about the life of a country doctor, after viewers complained that PPP's name was displayed prominently and that a help line was given out at the end of the programme to enrol customers. In this instance the company had overstepped the boundary by promoting its product too aggressively.

On the question of possible conflicts of interest, Barclaycard is an acceptable sponsor for a travel programme because a credit card is a useful thing to have when going abroad, but is not something actually produced by the travel industry. A member of the travel industry itself, on the other hand - a tour company or hotel chain - would not be acceptable because its financial involvement with the programme might make the presenter reluctant to criticise its products or services on air, even if no influence was overtly exerted[16].

Two of the most famous cases of sponsorship, Beamish Stout's association with Inspector Morse and Croft Port's association with Rumpole of the Bailey, have achieved their success by a subtle marriage of the brand's image to the values and life-style expressed by these popular programmes.

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[15] *Broadcast programmes sponsorship - a medium still in search of messages?* Admap July/Aug 1992, p. 28
[16] *Note:* I am indebted to Frank Willis for these examples.

Naturally, neither Morse not Rumpole are permitted to be seen actually drinking Beamish or Croft's, which would break the "no promotion in the programme" rule, although, interestingly enough, market research has shown that viewers often assume in spite of this that the claret favoured by Rumpole is port[17]. There are, of course, some programmes the content of which is so neutral, or so difficult to influence, that sponsorship presents no threat at all, weather reports being the most obvious case. It is not very likely that Legal and General would try to persuade weather forecasters to predict more storms so they could sell more insurance.

The advertising trade associations and the ITV Network Centre are reasonably satisfied with the Code and with the ITC's general policy on sponsorship. IPA Director General Nick Phillips told Campaign that the Institute was "having continuing meetings with the ITC with a view to ensuring there's a sensible interpretation of codes". He added that he believed "the codes should be organic things that grow with usage" and urged the ITC to keep them flexible and not get tied down too much with numbers[18]. With programme credits, for instance, the IPA is asking for integrated credits, and permission to show the actual product in the credit, not just an animation or graphic representation as the rules dictate at present[19]. Individual agencies may wish to see the regulator take a less cautious line, but the IPA received support from a media account director at BMP DDB Needham, who felt that the Code is "fair at the moment, but as sponsorship grows the rules will become more relaxed. The only danger is when companies push it too hard, because that will bring a greater resistance to change"[20].

Trevor Barton, speaking for the ITV companies, told me that they still want sponsorship to be tightly regulated to avoid upsetting viewers and attracting adverse reaction, but the Controller of Sponsorship at Thames Television maintained that "clients will continue to seek the extension of sponsor credits wherever possible. We don't want to go as far as the Americans or the Australians, but there are certain things we could say in a strapline format"[21]. This is a very moderate position in comparison with that of Satellite channel BSkyB. Its Controller of Sponsorship claimed that his company would like to see the Code "become much more commercial, along the lines of the US or the Australian approach". He said that although BSkyB was "not at war with the ITC, if the rules

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[17] N.C.Walford, op. cit. p. 31
[18] *Can the ITC control the reins of TV sponsorship?* Campaign, 5/ 06/1992, p. 13
[19] Interview with Nick Phillips
[20] Campaign 5 /06/1992, op. cit. p. 13
[21] ibid. p. 13

were not reviewed, the industry would soon be regulated out of existence"[22]. The station took this hostile stance after being reprimanded by the ITC for giving undue credit to the sponsor within the programme format of Cricket World Cup coverage instead of confining it to the title sequences and break bumpers.

All broadcasters and agencies are very anxious that sponsorship should represent new money coming into the system, and not just a recycling of existing advertising budgets. It only constitutes a small percentage of revenue so far, but all see it as a growth area, perhaps eventually accounting for 10% -12% of the market. The advertisers and the television companies differ on whether sponsorship money should be distributed among the companies as a percentage of their net advertising revenue, with a 'finder's fee' for the one who arranged the deal, as at present, or should be directed towards the programme sponsored. Kenneth Miles of the ISBA has said that advertisers "take the view that the sponsorship contribution should go to the specific programme, not the general pool of programming money"[23]. If this is not done there is no particular benefit to the consumer. Sponsorship should be used to create programmes that would otherwise not be made, or to improve existing programmes. The Network companies resist this suggestion. Trevor Barton argued that it must be up to the individual companies to decide whether to put the residue of sponsorship money towards offsetting programming costs or not; it should remain in their gift.

Consumer organisations are not unduly concerned about the principle of sponsorship, provided that it is carefully regulated. Sue Bloomfield of the Consumers Association told me that CA wanted research to be done on the effects of sponsorship on viewers, particularly how they receive messages. She explained that while qualitative research on viewers' attitudes and responses to sponsorship in the UK, has been commissioned by the broadcasters and the advertising industry, this has been done from a commercial rather than a consumer angle. Consumer groups feel that the receivers of sponsors' messages should also be considered for their own sake.

The general opinion on sponsorship so far is that we should "wait and see". Unlike campaign advertising, it is an immature method of communication on television, though it has arrived in a mature and sophisticated medium. When ITV was set up in 1954, regulation was strict in order to

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[22] ibid. p. 13
[23] Michael Kavanagh, op cit. p. 10

allow enough time for a tradition of quality programming to be built up in the commercial sector without undue interference from advertisers. If regulation of sponsorship in the 199Os follows a similar pattern, evolving gradually and not imitating American methods, a decline in programme standards or viewer enjoyment will not necessarily occur. The regulator sets the pace for change within the television industry and its careful approach gets particular support from programme makers who are by no means as keen on sponsorship as sales executives. The creative teams responsible for programming production are still "deeply fearful of threats to their editorial integrity"[24]. Even nowadays, neither public service broadcasters, regulators nor consumers wish to see British television becoming too American in style. The majority of the advertising industry, too, is close to this view, even though large US based conglomerates, such as Proctor and Gamble, would be unlikely to sponsor in the UK as they would not be permitted the kind of editorial control of programmes they are accustomed to exercising across the Atlantic.

In America, sponsor influence is a very real threat. Episodes of the popular series "Rosanne" and "Thirtysomething" were not broadcast because of advertiser pressure. Both dealt with controversial social issues: teenage drinking and AIDS respectively[25]. Regulation is designed to reduce the possibility of such intervention occurring here. Robin Duval, now Deputy Director of Programmes at the ITC, has nevertheless alleged that some advertisers have already been sufficiently worried by the criticisms made by Mary Whitehouse of certain programmes to threaten to withdraw their advertising from in and around these programmes[26].

11. 4 Additional Problem Areas: Broking, Bartering and Product Placement.

While sponsorship may now be broadly acceptable, the situation with its adjuncts - broking, bartering and product placement - is quite different. Product placement - the inclusion of a product or service within a film or programme in return for payment in cash or kind - is categorically forbidden by the Sponsorship Code and by the *EC Broadcasting Directive*, which refers to it as "surreptitious advertising". The ITC is still firmly opposed to it. So, too, are consumer groups. Consumer policy advisor Jeremy Mitchell of the Voice of the Listener (UK) criticised it as "a state-of-the art deceptive marketing and communication technique, where the danger does not lie in advertising of

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[24] Admap July/August 1992, op. cit. p. 28
[25] Robin Duval, *The Regulatory Environment*, Admap, October 1990, p. 12
[26] ibid. p. 12

brands, but in the concealment of this fact"[27]. He was referring in this instance to American made feature films, but expressed anxiety on behalf of consumers in the UK that, despite the ITC's prohibition on product placement both in British made programmes and those acquired from outside, feature films "may deviate from the Code where this is unavoidable"[28].

The ITC Code allows the programme maker to acquire a product or service "at no, or less than full, cost" if it is essential to the programme. Even under the previous tight regulation it was acknowledged that well known commercial brands would always be visible in programmes, especially larger items such as cars, but they must only occur in a natural way and not be given "undue prominence". But the integrity of the programme should not be destroyed by focusing the camera too obviously on a product, which would inevitably be part of the deal if a sponsor had paid to have it included. The provisions of the Code are aimed at removing the incentive from television companies to do this by prohibiting them from getting paid for allowing named brands to be seen on air. The only people who can receive money for placing products on air are PR firms and specialist agencies who organise props for television.

While the regulator and the consumer groups are emphatically against the practice there are mixed views among broadcasting and advertising professionals. As usual, the advertising trade associations take a fairly moderate line - the IPA do not want it and are against "secret deals"[29], and the ISBA believe the principle is right but perhaps there could be some relaxation[30] - but some individual advertisers and agencies are more enthusiastic. The magazine PR Week claimed recently that a growing number of top UK brands now have organised product placement strategies. This benefits television companies as well as advertisers because budget levels have not risen to keep pace with costs and producers are keen to have a source of free or cheap props[31]. An editorial in the journal Media Week called for the ITC to legitimise product placement so that underground deals could be eliminated and the revenue generated ploughed back into production budgets. Media Week argued that "as production budgets shrink, there will be an ever stronger pressure towards advertiser-

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[27] *Product placement,* Consumer Affairs, September/October 1991, p. 17
[28] ibid. p. 18
[29] Interview with Nick Phillips
[30] Interview with Kenneth Miles
[31] *Product Placement*, PR Week, 9 / 06/ 1994, p. 8

supplied programming; at least placement allows editorial control to rest with the producer, who in turn is answerable to a commissioning editor[32].

The regulator was not impressed by this warning, however, and Frank Willis rejected the call in the same magazine a fortnight later, listing substantive objections to the editorial's arguments. Most importantly, if product placement were to be allowed, broadcasters "would not stop at selling fortuitous 'opportunities to communicate', they would actively create inventory to sell. Each programme would then rapidly acquire its mandatory allocation of brand slots"[33]. In his view, this would eventually have a profound and detrimental effect on the way in which programmes are made, and the ITC has no intention of going down this road. In arguing against the practice, Willis might also have said that it is ultimately self-defeating to try to "improve" production values using money obtained from a practice which attacks the very roots of quality programming.

The television companies are perhaps the most divided on the issue. Trevor Barton told me that the companies' trade association does not support the practice officially, but it is aware that while the creative people, the programme makers, are mostly vehemently opposed to conditions being imposed on their artistic freedom, sales executives are in favour of any device that can increase sales and revenue. This clash of interests is a long-standing one in television. He also admitted that it is not always easy to prevent product placement from going on covertly, and often managing directors of Network companies will denounce it in public but encourage it in private[34].

There have already been several notorious cases where the practice has been uncovered. The presenter of a cookery series on TV-am, Rustie Lee, was sacked after the Sun newspaper exposed the fact that she personally accepted thousands of pounds to use a number of culinary products in her programme. In this case there was not even the justification of production improvements to benefit the consumer[35]. A programme commissioned by London Weekend Television on the opening of the Euro Disney theme park was severely criticised for the excessive amount of promotion for Disney

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[32] *Productive Placements*, Media Week, 4/ 06/ 1993, p. 15

[33] Frank Willis *The unacceptable face of advertising* Media Week, 18/ 06/ 1993, p. 14

[34] Interview with Trevor Barton. The PR Week article quoted above also claimed that "deals are being struck behind the cameras". The same article nevertheless made the point that under the present rules the placement agencies are intermediaries and have no ability to change scripts. Because advertisers have no direct control, products they donate are frequently "abused and misused" by being presented in a detrimental light, or simply never seen at all. So advertisers do not have it all their own way.

[35] PR Week 9 June 1994, op. cit. p. 9

that it contained, amounting, according to some observers, to one long advertisement for Disney and its products. Makers of other programmes such as Brookside, Aspel and Company and Surprise Surprise have also been reprimanded by the ITC for overstepping the mark and focusing too obviously on, or even pushing, branded products. LWT, one of the worst offenders, has been told by the regulator to expect a fine if it persists[36].

This illustrates just how difficult it is for the ITC to regulate effectively in this grey area. What constitutes "undue" prominence of a product or service is a matter for debate, especially when, as BBC Radio correspondent Torin Douglas has pointed out, sponsors are unsure what "due" prominence might be[37]. What is a blatant plug to some might be a natural occurrence to others.

The practice of airtime broking - the buying up of television airtime in bulk on a speculative basis in order to sell it on, whether by advertising agencies or specialist media-buying firms, if not actually illegal in Britain before 1993[38], was not permitted by the regulating Authority and has never been practised in the UK since the vague attempt by agencies to do something resembling it was firmly squashed by the television companies themselves in the very early days[39]. Even now, despite some independent interest shown in the idea, it is strongly opposed by the advertising industry's trade associations. Kenneth Miles of the ISBA gave the following reasons for its opposition to the practice. In the first place, it threatens the advertiser - agency relationship; an agency is expected to give objective advice on media buying and if it is in the business of selling television airtime as well as recommending it to clients there could be a conflict of interest. The ISBA also fears that the involvement of middlemen would result in higher costs. It does not want a repetition of the French and Australian experiences where broking is widely practised and large brokers have a significant hold on the airtime market[40]. Despite conflicting views within its Media Policy Group, the IPA came out against the practise in a statement to the ITC in 1991[41].

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[36] Tony Douglas, *ITC pull the offending plug,* Marketing Week, 23/ 07/ 1993, p. 20
[37] ibid. p. 20
[38] *Broking 'is not illegal' - lawyer,* Media Week, 11/10/ 1991, p. 3. While legal opinion is divided over whether broking would have broken the law before the 1990 Broadcasting Act, the 1990 Act says nothing on the issue and therefore gives no legal powers to the regulator to prohibit it.
[39] See Chapter 5 p. 95
[40] Interview with Kenneth Miles
[41] Sarah MacDonald, *ITC to impose broking curbs?* Marketing Week, 6 /09/ 1991, p. 14

The Network companies are not in favour of broking for the sound commercial reason that they have no trouble in selling their airtime. Despite more competition, supply is still limited which stimulates a healthy demand. All the potentially interested parties pointed out to me that broking is only attractive to small, financially insecure stations who need a guaranteed income or are suffering cash-flow problems. This situation does not apply in the UK at the moment and broking is unlikely to be needed as a solution in the foreseeable future, for ITV and Channel 4 at least[42]. This is partly because the ITC, while not opposed in principle, would be concerned if large scale broking were to distort the market for airtime, as would the OFT.

The ITC held consultations with all interested parties in 1991. It followed this up with a statement of intent which made a number of important points.

"This consultation exercise revealed a strong consensus within the advertising industry that media broking is unlikely to be in the best interests either of advertisers or most television broadcasters. On the other hand, the argument was advanced to the ITC that media broking offered, especially for smaller satellite broadcasters, an opportunity to secure revenue without in any way damaging the interests of advertisers at large, for whom the advertising opportunities which such stations can offer are at best marginal.

The ITC has concluded that it would be difficult to justify a blanket proscription of sale to media brokers and accepts there could be cases where such action would be excessive and disproportionate. However, the ITC wishes to make the following points clear:

a) sales of airtime to media brokers, particularly on stations accounting for significant shares of advertising opportunity, either nationally or regionally, could make it very difficult for broadcasters concerned to satisfy the statutory requirements that "there shall be no reasonable discrimination either against or in favour of any particular advertiser";

b) the "unreasonable discrimination" clause [Section 8(2)(b) of the 1990 Broadcasting Act] protects the interests of advertisers, not other categories of media buyer, and cannot be invoked to oblige television companies to sell to media brokers;

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[42] David Harrison, *Even if it's broking don't try to fix it*, Media Week, 25/ 10/ 1991, p. 13. *Note:* This article explores the possibility of Satellite and Cable companies being willing to engage in airtime broking as an additional means of securing revenue.

c) the ITC reminds its licensees that the detailed consumer protection requirements in its code, both as regards the content and scheduling of advertisements, imply a level of editorial responsibility which might in practice be difficult for the broadcaster to deliver in conditions where airtime was sold other than to a known end user or his agent. In no circumstances will the ITC permit its code licensees to delegate to others the responsibility for code compliance"[43].

ITC policy has not changed since then, and the threat of widespread broking and the arrival of large French media buyers eager to break into the British market appears to have receded for the time being[44].

Airtime bartering, which is big business in the US and spreading in Europe, is virtually non-existent in the UK. Barter is "the exchange of a programme for commercial advertising time in and around that programme, via a third party.....There is no explicit link between the programme bartered and the advertiser"[45]. With cash barter the programme is exchanged for a combination of cash and airtime. The seller - the third party - may be an advertising agency, an advertiser wishing to promote his own goods or services, an independent production company acting in association with an advertiser, a media-buying group acquiring the airtime on behalf of one or more clients, or a distributor who will sell the airtime on to a third party. Barter is popular in the United States syndication market where programmes are sold to more than one market. As Ford and Ford have pointed out, the distinction between barter and sponsorship can be blurred. When a programme format and concept are offered to an sponsor before a pilot is made, advertising spots and specified airtime can be pre-sold on the basis of the formats alone. The advertiser in this case is, in effect, underwriting the programme[46].

Although any barter combined with a broking element would not have been possible before 1993 as this was prohibited under the 1980 Broadcasting Act, direct deals between TV company and advertiser/agent could in theory have been done. The 1990 Broadcasting Act appears to permit barter in the fuller sense of selling on airtime received in exchange for a programme to a broker, but the commercial broadcasting environment in the UK has not up to now made bartering an attractive

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[43] *Media Broking.* ITC: News Release, 22/ 10/ 91
[44] Suzan Leavy, *Brokers warning* Television Today 24/ 09/ 1991, p. 21
[45] Bianca and James Ford, *Television and Sponsorship,* Oxford: Butterworth-Heinemann, 1993, p. viii
[46] ibid. p. ix

proposition. The dominance of in-house production, albeit gradually being eroded by the independents, and the ease with which good cash deals could be obtained made bartering unnecessary from a strictly business point of view. Even if it made good business sense there are still very considerable problems for the licensees in ensuring compliance with regulation.

The ITC's Code of Programme Sponsorship, Section 15, has this to say about advertiser-supplied programmes: "the constraints set out in the European Directive upon editorial influence by an advertiser are especially hard to reconcile with any programme made for, or substantially funded by, an advertiser. Before accepting such a programme licensees must therefore fully satisfy themselves that it conforms with the provisions of this Code other than those relating to the provenance of the programme"[47]. It goes on to say that licensees must take particular care in the case of factual programming and be alert to the possibility of indirect attempts by commercial interests to influence public opinion. Without prior approval of the Commission no programme "wholly or substantially funded, co-produced, or provided to a licensee by an advertiser, an advertiser's agent or a company (including a production company) closely associated to an advertiser" may include promotional references to the advertiser or his products or services[48].

There is a note appended to Section 15 which states that in order to avoid any doubt, the provision of a programme in exchange for advertising airtime (barter) does not in itself bring the arrangement within the definition of programme sponsorship and therefore make it unacceptable. But licensees should note that "commonality between a programme's content and an advertiser's advertising might constitute grounds for regarding the programme as having a promotional purpose"[49]. The ITC is clearly determined to prevent sponsors from using barter as a means of evading the strict rules on separation of promotional message from programmes, and trying to sneak their own commercial agendas in through the regulation system's back door. The Deputy Director of Programmes has made it clear that "any advertiser-supplied programme is likely *per se* to be in breach of the ITC requirement of editorial independence from advertisers"[50].

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[47] *ITC Code for Programme Sponsorship* op. cit. p. 10
[48] ibid. p. 11
[49] ibid. p. 11
[50] Robin Duval, *The Regulatory Environment,* Admap October 1990, p. 13

There is a considerable difference of opinion between the regulator, the broadcasters, the advertisers and the agencies over the acceptability of barter in the UK. The ITC accepts it in principle, but still not in association with broking. Media consultant Chris Quinlan, writing in Admap about barter in Europe, observed that advertisers welcome the practice because it can not only secure them a better deal than buying airtime direct, but may give them more control over the programme environment in which their commercials will be shown. Broadcasters are against it because they are reluctant to lose control over programming and advertising scheduling[51]. The spokesmen for British advertisers and broadcasters whom I interviewed expressed the same differences of opinion. The ISBA find barter "reasonable" provided that there is a good framework of control, but the ITV Network Centre states categorically that there will not be bartering on any scale; like broking it is unnecessary in the flourishing UK television industry where good programmes are not in short supply, and it causes too many problems for regulation. The IPA agrees with this view as regards the UK, but a number of large British agencies are active in the barter market in Europe and elsewhere, where the television industry is more fragmented and less stable than in this country[52].

Another problem that barter poses for the regulator is in calculating the value of bartered airtime for the purposes of the Treasury levy. Frank Willis told me quite firmly that the ITC's accountants are prepared to challenge any licensee who might use the barter system to devalue the proportion of its qualifying revenue to be paid to the Treasury. This prospect will not affect Cable and Satellite channels as they do not pay the levy.

11. 5 Advertising Minutage: The Right Balance?

The amount of advertising on television has always been a matter of concern to the regulating authority, and often a matter of dispute with the regulated industries. It has, however, remained relatively stable for ITV since 1955, increasing only a fraction at a time to its present limit of an average of seven minutes per hour over a single day, and seven and a half minutes in any one hour. Channel 4 has always had slightly more flexibility in arranging the distribution of its airtime minutage, and Satellite and Cable channels now have a daily average of 9 minutes per day, and a maximum of 12 as permitted under the *EC Broadcasting Directive*, and *Council of Europe Convention*.

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[51] Chris Quinlan, *TV programme barter*, Admap June 1993, pp. 46-48
[52] Interviews with Nick Phillips and Kenneth Miles

As with so many other aspects of television regulation it is a question of finding the right balance between conflicting demands. There is some survey evidence that a considerable percentage of viewers actually enjoy advertisements and only a minority find them irritating[53]. The regulator has nevertheless tended to take a conservative stand on the amount of advertising it will allow and the issue has always been a politically sensitive one. Successive governments have adopted the policy line that large amounts of advertising are antithetical to the public service ethos, and broadcasting legislation has always given explicit responsibility to the regulating authority for keeping it to a minimum. The 1990 Act is no exception.

The advertising industry is also well aware, from a commercial perspective, that this largely favourable response on the part of viewers could well be jeopardised if exposure to advertising were to increase beyond certain limits. This limit of toleration beyond which the process becomes self-defeating has to be finely judged. The current minutage is the result of a compromise negotiated between the advertisers, who initially pressed hard via the ISBA for ITV to be allowed to sell airtime up to the EC limits as well as Cable and Satellite channels, and the ITC, which was reluctant to grant more than a maximum of seven minutes[54]. Agencies are slightly less keen than advertisers on increasing the amount and the IPA definitely do not want to extend it any further. Director General Nick Phillips explained to me that "while having up to twelve minutes in a clock hour may reduce costs by 20-30%, the impact of the message becomes diluted and viewers cease to pay attention". The television industry, while originally supporting the ISBA's bid for EC timings, now claims to be satisfied with the present limits, and change as regards ITV is not envisaged for the foreseeable future[55]. This is welcomed by the consumer groups who were unhappy about the proposed increases. The National Consumer Council, in particular, believes that "the amount of children's advertising is already excessive, especially around Christmas". Spokesperson Diana Whitworth told me that the Council wants the regulator not only to take into account timing, but to curb over-exposure to certain categories of advertising as well .

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[53] Mallory Wober and Barrie Gunter, *The Public's View About Advertising on Television.* April 1988, pp. 6-16

[54] Interview with Trevor Barton. *Note:* Channel 4 had its permitted airtime minutage increased in 1993. It can now show advertising breaks of up to four minutes, and can show more than the 7.5 minute average in off-peak hours, a relaxation which allows it 14 minutes a day extra. The ITC granted the channel the extra minutage to make up for revenue lost by having to show between two and three hours of educational programming daily under its remit. (*ITC gives C4 go-ahead for longer breaks,* Media Week 12 February 1993, p. 4)

[55] Interview with Trevor Barton

A further aspect of the amount and distribution of advertising which occasionally causes disagreement is programme promotion, partly because there are no explicit regulatory rules to tell the television companies what they should do. The companies have recently increased the quantity of their own advertising in line with the more competitive environment, but the promoting of programmes in advance, despite being a form of advertising, does not count as such for the purposes of calculating the minutage. It can be added on to the maximum making actual commercial airtime per hour as long as nine minutes This is causing some unease among advertisers and agencies who feel that the resulting "clutter" on the air is distracting from the main commercial messages, airtime for which has been bought at very high cost[56] . Although they recognise the legitimacy of programme promotion and the benefits to advertisers if audiences are built in advance, the IPA has requested the ITC "to put pressure on the Network companies to make their promotions more systematic and less bitty and confusing"[57] .

11. 6 Conclusion.

In answer to the question posed in the title of this chapter, it would appear that the broadcasting policy which was presented to the British public in the 1980s as a liberalising response to the revolution in media technology has resulted in re-regulation almost as much as deregulation. Although at the process level there has been a removal of previous regulatory restrictions on market entry in television, and on certain forms of advertising practice, and the regulating Authority has had two important functions removed from it - broadcasting and pre-transmission control of advertising - the scope of regulatory activity has increased and with it the number of rules.

Deregulation and re-regulation in Britain have presented the regulatory system with a number of new challenges. Not everyone is convinced that the structures put in place by the 1990 Broadcasting Act will be able to cope with these challenges in the long term. Wolfgang Hoffman-Riem, for example, finds that broadcasting supervisory bodies throughout Europe deal uneasily with the difficulties presented by product placement, concealed advertising and sponsorship: "the advertisers, testing the regulator's tolerance, are always shifting their ground, devising new forms of advertising as soon as the regulators have come to terms with the old"[58] .

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[56] Mark Edwards, *Real "first -in-breaks" vanished,* Campaign 27/ 03/ 1992, p. 17
[57] Interview with Nick Phillips
[58] Wolfgang Hoffmann-Riem, *Defending Vulnerable Values: Regulatory Measures and Enforcement Dilemmas,*

In Britain, there is a high level of awareness of the potential threat to programming standards represented by the newly expanded class of advertising practices. The ITC is very determined that the integrity of programmes will not be sacrificed for economic ends. It depends to a much greater extent than before, however, on the co-operation of its regulatees, particularly the ITV companies who are responsible for ensuring on a practical level that the rules are enforced. At present sponsorship is still a relatively low key business, and none of the participants is in favour of broking, bartering (except advertisers who are not against in principle but are not enthusiastic) or any form of concealed advertising.

A strong tradition of doing both television and regulation in a certain way in Britain means that those involved regard what is acceptable practice here differently from elsewhere. Advertising agencies, for example, who are eager to become involved in broking and bartering in Europe do not see it as particularly appropriate for this country. So long standing attitudes and values with respect to the primacy of programme making in television still prevail in this country, in spite of the changes made to the basic framework, both commercial and regulatory, within which programme production takes place. Whether these attitudes will be able to resist erosion in the long term through lack of strong statutory regulatory support, combined with increased commercial pressure, is a matter for conjecture.

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in Jay. G. Blumler (ed.) *Television and the Public Interest*, London : Sage, 1992, p. 191

Chapter 12

Case Study:

The Regulation of Female Sanitary Protection (San-pro) Advertising on Television.

12. 1 Introduction.

The history of process regulation reveals some interesting features about the social and cultural attitudes instrumental in shaping the broadcasting system in Britain. But decisions about structure have always been very general ones about what kind of system and what kind of regulation is most appropriate for Britain, given a particular set of political and economic circumstances. It is product regulation of advertising which provides a more detailed picture of how viewers and regulators actually feel about what appears on their screens during the commercial breaks.

As attitudes and expectations in society change over time, so do peoples' views about what they find acceptable on television. This applies to the content of both programming and advertising, although programming has tended to take the lead in extending the boundaries of acceptability and breaking down taboos, leaving advertising to follow more cautiously behind. This is partly for sound commercial reasons - offending potential customers is bad business - and partly because advertising has always been more tightly controlled with respect to content than programming. Things that would be unobjectionable in a scheduled programme are not permissible in an advertisement.

This chapter, which looks at how the advertising of an individual product category has been regulated over a twenty year period, focuses on how regulators exercise control in practice, especially the key decision-making body the Advertising Advisory Committee. It examines the ways in which public reaction to this category is tested, measured and assessed, and the contribution the information obtained through this process makes to the task of adjudicating between various competing sets of interests.

The category of female sanitary protection is exceptionally interesting as its treatment by regulators reflects a set of peculiarly British attitudes towards bodily functions in general, and sexual matters in particular, which sets this country apart from other Western European countries[1]. British social and legal history demonstrates that attitudes to sexuality here have, at least since Victorian times, been far less open than on the continent[2]. The UK still has tough obscenity laws, which in the past have been used in attempts to censor serious works of literature as well as pornography, and following the 1990 Broadcasting Act, broadcasting has been brought under the provisions of the Obscene Publications Act. The theatre was subject to censorship by the Lord Chamberlain until 1968, and the cinema and video industries are still controlled by the British Board of Film Classification, which can refuse to classify films or videos containing "excessively" violent or pornographic scenes unless modifications are made. Some may not be shown at all.

In the case of television, although the regulators have directed their attention to the portrayal of violence, especially in the last few years, and are concerned about offending religious sensibilities[3], the treatment of sex and other intimate matters on television has traditionally borne the brunt of official censorship and public disapproval[4].As recently as 1994, a journalist writing in a Sunday newspaper complained that compared with the French, Germans and Italians "sex on our television is stripped of all joy, fun or adventure. Instead, it is dressed up as education, introduced by chipmunk earnest anthropologists and sexologists, and is about as erotic as a blancmange"[5].This translates in television advertising regulation terms into bans on family planning advertising of any kind by the IBA until 1972, on mentioning specific methods of contraception or branded products until 1987, and on all advertising of female sanitary protection, except on a limited experimental basis, until 1988.

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[1] *Note:* Many of the press articles covering the San-pro debate referred to the taboos associated with these subjects in this country. Sophie Bate in Marketing Week, for instance, maintained that "embarrassment is lodged deep within the British psyche. The big taboos surround sex and death, though in the UK pretty much any sort of bodily function is a source of embarrassed amusement." (Sophie Bate, *Taboo, or not taboo,* Marketing Week, 4/ 10/ 1991, p. 28)

[2] *Note:* Comparisons with more liberal continental attitudes were often made by advertising executives defending their right in the media trade journals to be allowed to advertise sanitary protection products on television

[3] *Note :* Blasphemy is still a common law offence in Britain, although no state prosecution has been brought for over 70 years (ITC Notes, No. 34)

[4] *Note :* According to ITC research, since the 1980s violence has overtaken sex as a cause of offence on ITV but not on Channel 4. (ITC Notes, No. 35)

[5] Jonathan Miller, *Around the world in 80 positions,* Sunday Times , 28/ 08/ 1994 , section 4 , p3

12. 2 The History of San-Pro Regulation.

Rule 12 of the IBA's Code of Advertising Standards and Practice, which states that "no advertisement should offend against good taste or decency or be offensive to public feeling", has been the one responsible for restrictions on advertising in the area of sanitary protection as well in other sensitive areas such as contraceptive advice, bereavement and disability. But as Stuart Patterson, advertising press officer at the IBA in 1989 commented then, "the Code isn't the Bible. It's subject to a great deal of interpretation.....Thirty years ago, for instance, an ad which showed a woman being wolf-whistled at by a gang of workers on a building site would not have caused offence. Now we might well object to that under Rule 12 as offensive to public feeling"[6]. He went on to comment that while San-pro products had previously been deemed offensive in broadcasting they were now allowed. Incontinence pads, on the other hand, which were worn by a significant percentage of the adult population at some point in their lives, were likely to cause embarrassment in the target audience if they were advertised. So although the San-pro taboo was gradually being broken down, others still remained firmly entrenched.

The change of heart on the part of regulating Authority which finally brought this category of advertising on to both commercial television channels nationwide took a long time to come, however. The first experimental screening on ITV of a commercial for a brand of sanitary protection, Lil-lets tampons, took place in the Thames area in 1972, in response to requests by advertisers for the ITA to lift the ban. The decision to allow this controversial product to be advertised on television was greeted with horror in Church newspapers, particularly the Catholic Press. Yvonne Millwood, ITA Advertising Control Officer and Secretary to the Advertising Advisory Committee at the time, told me that the ITA immediately received a number of letters complaining that the advertisements were "foul" and "obscene," and their presence on screen was "corrupting". She was obliged to write and explain that the campaign had not yet started[7].

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[6] Tony Cohen, *Indecent Exposure,* Marketing Week, 15/ 09 / 1989, pp. 42 - 43

[7] Interview with Yvonne Millwood , ITA/IBA Advertising Control Officer. Note: A similar phenomenon occurred during a 1987 IBA survey which asked the question: *"Do you ever see adverts on ITV/TV-am or on Channel 4/S4C which you find offensive?"* Top of the list of named, unprompted items were adverts for sanitary protection products, (interesting enough in itself) followed by those concerning AIDS and for contraception. The IBA commented that "the latter is a most interesting finding because this survey was carried out before any condom advertisements had been shown on television". (Mallory Wober and Barrie Gunter, *The Public's View About Television Advertising*, IBA Research Document, 1988, p. 40)

When it did appear the commercial was so discreet - an extremely oblique script and a brief glimpse of the product in a woman's handbag - and contained so little information that it was difficult to tell what product was being advertised unless the viewer was already familiar with it. Even so, there was considerable negative reaction. By the end of the campaign the ITA had received 50 letters of complaint, including one from Mrs. Mary Whitehouse, influential campaigner on questions of taste and decency in the media and President of the National Viewers and Listeners Association. Mrs. Whitehouse claimed that a number of women had written to her to say that they felt that the advertisements left them no privacy by intruding into a "mixed family situation" while watching television. She condemned the decision to permit television coverage of the product as "insensitive", and claimed this was a result of the ITA being "predominantly male"[8].

In line with routine procedure, the IBA referred the matter to the Advertising Advisory Committee, which had earlier approved the experiment, for discussion at its October 1972 meeting. According to Yvonne Millwood, the Committee, whom she described as a "sophisticated set of people," was astonished by the unexpected strength of feeling against the advertisements. Although no individual member of the Committee admitted to being personally offended by the ad, the ladies representing women's organisations such as the National Union of Townswomen's Guilds reported that embarrassment at seeing this subject on television, however tactfully handled, was widespread among their membership. Male AAC members, on the other hand, thought that, in principle, the advertising of sanitary protection for women would not be generally offensive to women if there were greater restraints on the content of advertisements.

After much discussion, the consensus of opinion on the Committee was that the Lil-lets advertisements themselves had not been generally offensive, since the research results showed that only 2.4 percent of those interviewed made spontaneous mention of the Lil-lets advertisements as ones which they found to be particularly unpleasant or in bad taste, with a further 2 percent objecting to their timing. But this had to be balanced against the fact that 30 per cent of the sample of viewers surveyed registered objections in principle, and that a number of letters and telephone calls had been received by the Authority, the programme company concerned and individual members of the Committee, including the Chairman, expressing strong opposition to this category of advertising. It was therefore decided to recommend to the Authority:

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[8] *Few protest over Lil-lets,* Campaign 8 / 07 / 1972

(i) that the evidence from this experiment would not justify an immediate decision to open television advertising to the general advertising of sanitary towels and tampons;

(ii) that the Lil-lets advertisements should be repeated in London if the advertiser so wished, until the end of January, and reviewed thereafter;

(iii) that simultaneously, the experiment should be extended to another area - for example, the North;

(iv) that more research into viewer reaction should be carried out at the end of the further period of experimentation in the two areas to see whether the results were more conclusive[9].

The October 1972 deliberations of the Advertising Advisory Committee give some idea of the kind of considerations which Committee members and the regulating Authority have to take into account when making their decisions. Chief among these is ensuring that the data presented on viewer reactions is as accurate as possible and that the interpretation they have put on it is correct. This is not an easy task. The most obvious method of ascertaining public opinion is from an analysis of complaints received. An attempt is made to gauge the overall level of dissatisfaction from the letters and telephone calls made directly to the regulator, the television companies or even, as in this instance, to the Chairman of the AAC. But this method presents difficulties as such complaints can be misleading in two quite different ways.

They may be numerically small; but concrete evidence that only a small number of viewers are unhappy relative to the audience as a whole does not necessarily imply that all other viewers are completely satisfied. The complaints may be representative of many more people who dislike what they see but do not actively express their disapproval by writing or phoning in. Supporting this interpretation, a spokesman for the regulator claimed in 1992 that "If we get 500 complaints, you can be sure that there are at least 500,000 out there who object"[10]. While this may be an exaggeration, both former IBA Director of Advertising Control Harry Theobalds, and former Advertising Control Officer Yvonne Millwood suggested to me that in their experience people generally regard advertising as trivial and are reluctant to write in and complain about commercials, particularly if they feel the ads are merely offensive or tasteless and not actually dangerous or misleading. This does not always mean that they are happy with particular advertisements or categories of advertising[11].

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[9] The Advertising of Tampons - AAC Paper 13 (72).
[10] Barbara Argument, *The Last Taboo,* Coventry Evening Telegraph , 18 / 06 / 1992
[11] Interviews with Harry Theobalds, Former IBA Director of Advertising Control and Yvonne Millwood, former Advertising Control Officer

The opposite inference can also be drawn in the case of a large number of letters or calls of complaint, several hundred for instance: that it is unrepresentative of the general mood of the public and may even be part of an orchestrated campaign by an influential and vocal minority with a particular ideological standpoint, often with media support[12]. It is difficult for regulators to prove conclusively that certain complaints have not originated spontaneously with individual viewers but have been channelled through organised pressure groups. Nevertheless, pointers such as the "tone" of the letters or calls, the use of common phrases, a large number of complaints originating from a single area, and the mention of things contained in press coverage of the advertisements but not actually shown on screen, help to give staff a shrewd idea of how representative complaints are of the general viewer[13].

Because complaints can be misleading in these ways the Authority and its advisors place greater reliance on the results of research. Qualitative and quantitative surveys are regularly commissioned by the Authority, the television companies and, more recently, by the Broadcasting Standards Council. The Authority also sounds out audience opinion by regular public meetings, but such meetings can be packed with supporters of special interest groups whose attitudes are not necessarily those of average viewers.

At the end of 1972, although the AAC had recommended that the test be repeated, the regulator (by then the IBA) felt that, taken together, both their own research and the level of complaints showed that the time was not yet right to lift the prohibition on San-pro advertising. It was unwilling to offend the significant number of people, almost exclusively women, who found this category offensive in principle. The IBA told Ad Weekly that it had come to the conclusion that because of adverse public reaction "this kind of advertising is not yet right for the medium of television"[14].

In 1978, the ITCA approached the IBA to ask if approval could given for another test campaign to be conducted on ITV, since this category was now permitted, subject to certain guidelines, on

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[12] *Note :* A director of David Williams and Ketchum, the agency who made the Lil-Lets commercial, complained in the November 10th 1972 issue of Campaign magazine: "I suspect there are minority pressure groups at work here. If the IBA has had 50 letters we need to know a bit more about them...The extent of the objection and relevance of these letters is known only to the IBA". (*Row grows over IBA ban on Lil-lets ads*, Campaign, 10 / 11 / 1972)

[13] Interview with Yvonne Millwood

[14] *IBA bans "offensive" commercials*, Ad Weekly , 3 / 11 / 1972

now permitted, subject to certain guidelines, on Independent Local Radio[15]. As there had been little negative reaction to tests carried out on radio in the previous two years, the Authority had decided in 1978 to accept the category on ILR "subject to tight control on copy and suitable timing restrictions to avoid giving offence"[16].

The ITCA evidently hoped that attitudes towards San-pro on television had become less hostile since the last experiment. The Advisory Committee was again consulted and again adopted a liberal position broadly sympathetic to advertisers and to the concept of providing information to those women who might appreciate it, although an attempt to persuade it that advertising should be accepted merely on the grounds that a market existed for the product which was not being reached was unsuccessful. The Chairman reminded those present that "the underlying starting point for all AAC discussions was that the Authority accepted advertising without judging whether it was necessary or unnecessary. Safety and good taste were the criteria"[17].

On this occasion, while one female Committee member felt that every woman knew about sanitary protection and that advertisements for such products would offend their intelligence, another believed that advertising would promote competition between makes and provide information about *the differences between sanitary towels and tampons. On balance, the Committee was in favour of extending consumer choice, which is not quite the same thing as assessing whether a particular* market needs to be reached from an advertiser's point of view. It recommended that the advertising of different brands of sanitary towels and tampons be accepted in two or three ITV regions for six month test campaigns and that viewer reactions be assessed by research. The same copy requirements currently governing ILR should be applied with the following additional paragraph: "all visual treatments should be tasteful and restrained. No advertisement may feature an unwrapped towel or tampon. Pack shots are acceptable". They also advised an initial post 9 p.m timing restriction[18].

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[15] *Note :* Following advice by the AAC, the IBA had authorised trials on radio in 1976-77. The ads were transmitted at times when women were likely to be alone and "controls ensured that no advertising could undermine an individual's confidence in her own personal standards nor was any inference of sexual or social insecurity permitted." (IBA Annual Report 1976-77, p 42).

[16] IBA Annual Report and Accounts 1977 -78, p. 48

[17] The Advertising of Sanitary Towels and Tampons on Independent Television - AAC Paper 5 (78)

[18] The Advertising of Sanitary Towels and Tampons on Independent Television - AAC Paper 5 (78)

The IBA accepted the recommendations and test campaigns were scheduled to commence in February 1979 in seven ITV areas: an advertisement for panty shields would be shown in London and one for sanitary towels in the ATV, HTV, Scottish, Westward, Tyne Tees and Yorkshire areas.

If regulators and commercial decision-makers had hoped that any negative response to San-pro on television would be more muted this time round, they were to be disappointed. Although this time more viewers waited to see the commercials before expressing their disapproval[19], there was soon evidence of even greater opposition than before, partly because of the wider scope of the campaign.

The test campaign was therefore halted in April 1979, after only three months, in order for all those involved to consider whether it was advisable to continue it given the scale of adverse reaction in some quarters. There had been 205 additional letters of complaint during the actual period of transmission. 97 of these were from the Yorkshire area, which appeared to the Advisory Committee to suggest an orchestrated campaign from that area, but the number of "genuine" complaints was also exceptionally high[20]. Once again, the complainants were almost entirely women, the majority of whom were either older women in the over 55 age bracket, or women watching with young children who resented having to face questions about menstruation when they were not yet ready to explain the facts. A number of teenage girls wrote to Yvonne Millwood to say that they were embarrassed to see the advertisements in the presence of their boyfriends.

The Advertising Advisory Committee discussed the matter at its July 1979 meeting, concentrating on the problem of how to interpret the research presented to them by the IBA. The ITCA argued that opposition would decrease as people became acclimatised to the advertisements. The research results, however, did not make it possible to draw clear inferences from pre- and post-test data, as it was not possible to quantify the numbers of those who had and those who had not seen the advertisement, but who had been asked for their views before and after the advertisements were screened. The Committee could interpret the evidence either as a change of opinion, or as unconvincing either way. When a Committee member asked what degree of embarrassment in terms of a percentage of viewers had to be proved for a product to be considered offensive to public taste

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[19] *Note:* Prior to the first showing the Yorkshire Post reported an IBA spokesman as saying: "we have had a handful of letters objecting to the principle, but I gather they are only a small amount." (Yorkshire Post Reporter, *TV debut for sanitary product commercial,* Yorkshire Post, 14/ 02 / 79)

[20] Advertising of Sanitary Towels and Tampons - AAC Paper 5 (79)

and decency, the Chairman pointed out that the Committee never set numbers: they were influenced by attitudes.

This discussion underlines how difficult it is to gauge audience attitudes accurately, or to assess how significant overtly expressed dissatisfaction is in relation to the number of viewers - the vast majority - who do not express an opinion. Given that the experiment had run for only three months instead of the planned six, the AAC decided to recommend that a further six month trial be conducted in conformity with current guidelines, and that "tightly structured research be conducted into pre- and post-test attitudes by the ITCA, the research organisation chosen liaising with the IBA Research Departments about techniques"[21].

The IBA accepted the recommendation and three new campaigns were prepared for transmission in January 1980. By April, the Authority had received 400 letters of complaint, mainly from women who objected to this class of advertising being screened at all rather than the content of any particular commercial. Two viewers expressed approval[22]. After the experiment had finished a report was prepared for the AAC collating the results of the research. 30% of those questioned still found the advertising of sanitary protection not at all acceptable and 40% not very acceptable, and over 1,000 letters of complaint had been received both by the Authority and 272 by the programme companies involved. This was a high figure as it equalled the average yearly total of complaints for all categories of advertising[23].

In spite of the fact that individual Committee members once more found the commercials "discreet" and were not personally offended, and even though San-pro advertising was now acceptable in Canada and the United States and radio advertising had attracted few complaints, the Committee still adopted a cautious line. It recommended in October 1980 that "as advertisements for sanitary protection appeared to offend a significant minority, the category should not be accepted on television"[24]. The IBA followed this advice and San-pro was once more relegated to the list of banned classes of advertising[25].

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[21] ibid. AAC Paper 5 (79)
[22] Advertising of Sanitary Towels and Tampons - AAC Paper 14 (80)
[23] ibid.
[24] ibid.
[25] *IBA throws in the sanitary towel,* Broadcast 1/ 12 / 1980

By the beginning of 1983, however, advertisers were becoming increasingly frustrated with their continued inability to use the medium of television to promote their products. Further representations were made to the Authority to reconsider its decision. Manufacturers Johnson and Johnson claimed that their own more recent research justified another test campaign as it demonstrated a fall in resistance to San-pro advertising since the IBA surveys of 1980 - 81[26]. They were invited to put their case to the April meeting of the AAC, at which they proposed test showings in the afternoon between the hours of 2.00 p.m. and 3.30 or 4.00 p.m., with a test duration of a year accompanied by a research programme. The Committee was then obliged to sit through a reel of international TV films advertising sanitary protection.

Members of the Committee were nevertheless unconvinced by Johnson and Johnson's research that attitudes had changed sufficiently to warrant another experiment so soon. Female members stated that their own private research revealed that a surprising depth of feeling against this kind of advertising still existed among women of all age groups. Male members were generally supportive of their colleagues' assessment. In fact, on the San-pro question at least, the regulators cannot be accused of bowing to industry pressure. The ITCA argued forcefully on behalf of advertisers that disqualification from using television considerably restricted their marketing strategy, particularly in view of the fact that the category was banned in no other countries apart from the Republic of Ireland and South Africa. It also warned that the IBA might soon be forced to accept San-pro advertising otherwise large sums of money could be lost to Cable channels. The Committee remained unmoved, recommending that San-pro should not be considered for acceptance for another two years. But if advertisers wished to initiate new research projects in the interim they would be looked at[27]. This effectively buried the matter until 1985.

The problem did not go away, however, and in 1985 the manufacturing giant Procter and Gamble entered the fray with its own research figures, which it presented to the AAC at its April meeting. This research showed that 60 per cent of women respondents claimed they would not be uneasy if they saw the French advertisement for the product, and, of the remaining 40%, 20% found it acceptable within strict time limitations and only 18% said they would never find it acceptable. Procter and Gamble suggested that an experiment on Channel 4 might be more acceptable,

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[26] Advertising of Sanitary Protection - AAC Paper 4 (83)
[27] Advertising of Sanitary Protection - AAC Paper 5 (83)

particularly since the relevant legislation required the Authority to encourage innovation and experiment in programming on Channel 4 and there was no reason why this should not be extended to advertising[28].

Although some members of the Committee felt that 40% of respondents admitting unease was still significant, and that the manufacturer's research did not reflect the reality of women viewing in mixed company with males or with children which caused the greatest embarrassment, the point about Channel 4 was accepted. This channel had a different audience profile; people tended to view more as individuals because programming was not geared to mainstream family audiences. Channel 4 audiences were also more "sophisticated", according to Yvonne Millwood. In support of this view, the Committee was reminded by one member that the Home Secretary had emphasised at the time of the 1980 Broadcasting Bill debates that advertising on Channel 4 and the Cable channels could be different from that shown on ITV.

It was decided, therefore, to recommend that a two year experiment be conducted on Channel 4 and on Cable, with revision after one year or earlier if there was marked evidence of public offence. There would be no specific timing restrictions because, as Harry Theobalds later explained to Marketing Week, "Channel 4 tends to attract the sort of mature audiences that won't be shocked or embarrassed by this sort of commercial"[29]. But advertisements had to be slotted in and around suitable programmes, leaving this to the common sense of the ITV companies. More audience research also had to be carried out[30].

The test campaign started in 1986, subject to the following set of guidelines:

(i) The commercials cannot contain anything that could undermine a person's confidence in her personal hygiene

(ii) Visual treatment should be tasteful and restrained. The advertisements may not feature unwrapped towels or tampons but packs are acceptable.

(iii) Marketing techniques such as pack offers or samples are acceptable. Personal endorsements will not be permissible[31]

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[28] Advertising of Sanitary Protection - AAC Paper 8 (85)
[29] *IBA gives backing to sanpro ad,* Marketing , 13/ 06 / 1985, p 10
[30] Advertising of Sanitary Protection Products - AAC Paper 8 (85)
[31] *Note :* This rule was rescinded later in the year.

(iv) There must be no suggestion of sex or intimation of social insecurity

(v) Use of potentially offensive words such as odour, (or period, leakage, blood or bulky) are not acceptable[32].

In spite of strict adherence by advertisers to these very constricting set of rules the complaints once again flowed in. This time, however, the AAC took a more robust view. After carrying out the scheduled review in April 1987, despite more than 1000 complaints, the AAC agreed to recommend to the Authority that no firm case had been made out for the cessation of the experiment or for an immediate restriction on timing. It appeared from research that there was a distinct trend towards people accepting the advertisements after actually seeing them. Specific consideration should be given to timing if the general acceptability of San-pro advertising were to be recommended at the end of the trial in a year's time[33].

The research on public attitudes to sanitary protection advertising which had influenced the Advisory Committee's decision was part of an ongoing programme commissioned by the IBA between 1984 and 1988. This consisted of four surveys among representative quota samples of 1,000 - 1,200 adults contacted throughout mainland Great Britain (and Northern Ireland in 1988); qualitative research conducted by the Harris Research Centre in January 1984; surveys conducted in July 1984, December 1986, and March 1987 by the Harris Research Centre and in March 1988 by the Schlackman Group. In 1984 and 1988 questions about San-pro advertising were contained in surveys which dealt with the much broader issue of taste and decency on television in general. In 1986 and 1987 these questions were also carried on standard omnibus surveys[34].

Three questions were asked: (i) should various products or services be advertised on TV?; (ii) how comfortable or uncomfortable would people feel if various products or services were advertised on TV?; (iii) with whom would people feel most uncomfortable if they ever watched various products or services advertised on TV?.

The main findings showed that since 1984 there had been a steady increase in the numbers of respondents, both male and female, willing to accept San-pro advertising on TV. In 1988, 66% said

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[32] *IBA gives backing to sanpro ads* Marketing ,13/ 06/1985, p 10; *A Curse on the telly,* Ms London, 18/ 04 / 1988, p. 10
[33] The Advertising of Sanitary Protection Products - AAC Paper 8 (87)
[34] *Advertising of Female Sanitary Protection,* Research on Public Attitudes Commissioned by the IBA , p 2

it should be allowed compared to 55% in 1984. Increased acceptance was particularly marked among female respondents; in 1984, 51% approved but by 1988 this figure had risen to 64%. On timing restrictions, 60% did not feel there needed to be any and 34% wanted a post 9.00 p.m. limit. There was also a growth in the percentage of respondents who said they would not be made uncomfortable if they saw sanitary protection products advertisements on TV from 67% in 1984 to 78% in 1988. Respondents were most likely to feel uncomfortable seeing them in the presence of members of the opposite sex or with children under 16, with females more likely than males to be embarrassed in this situation[35].

Table 12. 1

Should TV advertisements for SanPro be allowed?

	Should	*Should Not*	*Don't Know*
July 1984	*55%*	*38%*	*6%*
December 1986	*62%*	*35%*	*4%*
March 1987	*63%*	*32%*	*4%*
March 1988	*66%*	*30%*	*4%*

Source: Advertising of Female Sanitary Protection, Research on Public Attitudes Commissioned by the IBA

Table 12. 2

How comfortable or uncomfortable would you find it if SanPro was advertised on TV ?

	Very Comfortable	*Fairly Comfortable*	*Neither Don't Know*	*Fairly Uncomfortable*	*Very Uncomfortable*
July 1984	*16%*	*24%*	*27%*	*22%*	*10%*
December 1986	*16%*	*30%*	*22%*	*19%*	*12%*
March 1987	*20%*	*28%*	*22%*	*19%*	*10%*
March 1988	*19%*	*35%*	*24%*	*15%*	*6%*

Source: Advertising of Female Sanitary Protection, Research on Public Attitudes Commissioned by the IBA

[35] ibid. p. 4

Table 12.3

Should TV advertisements for SanPro be allowed ?

Sex Differences

	Should	*Should Not*	*Don't Know*
Males			
July 1984	*61%*	*30%*	*9%*
December 1986	*70%*	*24%*	*6%*
March 1987	*70%*	*24%*	*6%*
March 1988	*68%*	*27%*	*5%*
Females			
July 1984	*51%*	*46%*	*4%*
December 1986	*54%*	*44%*	*2%*
March 1987	*57%*	*40%*	*3%*
March 1988	*64%*	*33%*	

Source: Advertising of Female Sanitary Protection, Research on Public Attitudes Commissioned by the IBA

The statistics for male respondents are also interesting. While very few men bothered to complain in writing or to telephone expressing concern about San-pro advertising, and none of the male members of the Committee admitted to the slightest reservations about the category on their own or on other men's behalf, a surprisingly large percentage of men surveyed, 30% in 1984, felt that it should not be shown on television. But unlike for the female respondents, the figure for males remained virtually unchanged between 1984 and 1988, when it was 27%, a slight increase in disapproval over the previous year. The relative intransigence of a significant minority of men's attitudes towards sanitary protection advertising on television is hard to account for.

Table 12. 4

Should TV advertisements for SanPro be allowed ?

Age Differences

	Age			
	16-24	*25-44*	*45-64*	*65+*
July 1984[1]	—	—	—	—
December 1986	*66%*	*78%*	*50%*	*43%*
March 1987	*76%*	*75%*	*55%*	*42%*
March 1988	*77%*	*73%*	*63%*	*39%*

[1] *Different age categories were used in 1984 rendering age-group comparisons difficult*

Percentage are of those saying SanPro advertising should be allowed.

Source: *Advertising of Female Sanitary Protection,* Research on Public Attitudes Commissioned by the IBA

Positive opinions measured according to age differences are fairly predictable, with the 16 - 24 age group being most in favour - 77% in 1988 - and the over 65s least - 39% in the same year.

Table 12. 5

Should TV advertisements for SanPro be allowed ?

Class Differences

	Class			
	AB	*C1*	*C2*	*DE*
July 1984	*58%*	*59%*	*56%*	*51%*
December 1986	*66%*	*62%*	*67%*	*58%*
March 1987	*67%*	*67%*	*67%*	*55%*
March 1988	*73%*	*72%*	*68%*	*56%*

Percentage are of those saying SanPro advertising should be allowed

Source: *Advertising of Female Sanitary Protection,* Research on Public Attitudes Commissioned by the IBA

Measurement according to socio-economic class differences produced some startling figures. Classes AB and C1 went from an acceptance level of 58% and 59% respectively in 1984, to 73% and 72% in 1988, a very significant shift of opinion. Figures for class DE, on the other hand, remained almost unchanged at just over half accepting San-pro advertising on TV, with an increase of only 5% in respondents saying they approved in the four years during which the surveys were conducted. This statistical evidence shows up a much greater conservatism among working class people in their attitude to the subject. The IBA's 1988 research document, "The Public's Views About Advertising on Television", confirms these statistics, recording that "older people and those from the C2/DE social classes were especially likely to cite advertisements for sanitary protection, AIDS and contraceptives/condoms as classes of offence"[36].

The IBA's very comprehensive research was influential in persuading the Advertising Advisory Committee to recommend that the advertising of female sanitary protection should be a generally accepted category and permitted on ITV as well as on Channel 4, when the test period ended in April 1988. Although both the level of complaints and the results of research consistently demonstrated the existence of a hard core of people who still found such advertising offensive in principle, regardless of how bland and innocuous individual commercials might be[37], this minority feeling had to be offset against an increasingly large percentage of viewers, particularly women, who found it acceptable. And if they found it acceptable, their rights as consumers to make an informed choice on the different products available needed to be taken into account. In an attempt to avoid causing offence to the persistent objectors the Committee advised the IBA that time restrictions should apply to ITV. Advertising could not be screened between 6 a.m. and 9 a.m., and 4 p.m. and 9 p.m. on weekdays when children were likely to be watching and could only be shown post 9 p.m. at weekends and on public holidays. Channel 4 would have no specific restrictions but the companies would have to follow a policy of sensitive scheduling[38].

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[36] Mallory Wober and Barrie Gunter, *The Public's Views about Advertising on Television,* IBA Research Document, April 1988, p 41

[37] *Note:* The most recent (1994) Broadcasting Standards Council research into taste and decency on television even now, after six years of widespread TV advertising, records a persistently high level of distaste for San-pro as a category. It evidently still touches a nerve with many women. (Interview with Yvonne Millwood)

[38] Advertising of Female Sanitary Products - AAC Paper 12 (88)

There was, however, another major factor which affected the AAC's and the IBA's decision to allow general acceptance of San-pro advertising on television when they did: the arrival of AIDS. The seriousness of the AIDS threat to public health had prompted the government to launch an unprecedently frank series of information campaigns on television in the mid-1980s, which shattered the taboo (and the IBA guidelines) on contraceptive advertising. As Yvonne Millwood, who was part of the decision-making process at the time, pointed out to me, it would not have made sense to adopt a puritanical approach to sanitary towels when television was being saturated with programming containing much more explicit material on the use of condoms and the mechanics of safe sex. If the surrounding programmes were using language and visuals which would have been impossible only a few years earlier, and "over which the IBA had agonised", discreet sanitary protection commercials began to look tame by comparison[39].

San-pro advertising still continued to attract criticism but the level fell steeply. Only 108 complaints were recorded between May 1988 and December 1991, bearing out the ITCA's claim that viewers would in time become accustomed to seeing the products on television[40]. The regulator, by this time the ITC, felt able, therefore, to lift the limit of a maximum of ten advertisements per day in 1989, and to remove the rule prohibiting the showing of unwrapped products in 1990[41]. In December 1991, taking advantage of an apparently more tolerant climate, Johnson and Johnson launched an unprecedentedly explicit commercial for its Vespre Silhouette sanitary towels on Channel 4 and ITV, featuring agony aunt and broadcaster Claire Rayner.

The campaign broke new ground because it was the first actually to brave public disapproval and show an unwrapped product, and to demonstrate its use in a direct manner. Ms. Rayner performed a (blue) "ink test" to prove the towel's absorbency and held it up in front of a studio audience of women to display its innovative shape "with wings", a clinical demonstration format based on nappy marketing. The campaign also pushed out boundaries by screening the commercial more frequently on Channel 4 across a much wider range of programmes, including early evening programmes popular with children.

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[39] Interview with Yvonne Millwood , Advertising Control Officer
[40] Janis Grinyer, *Time for Sensitivity,* Spectrum, Summer 1992, p. 8
[41] Louella Miles, *Protection Packet,* Marketing Business, June 1993, p. 19

It was greeted with a storm of protest. The ITC received over 500 complaints about sanitary protection advertising in the first four months of 1992 alone, most of it directed at Vespre. This compared with 2,500 about all advertisements in the whole of 1991[42]. Again, complainants were mostly women who were embarrassed at having to discuss the matter with their children. "I want to explain periods to my children when I feel they are ready to know - and I don't need TV adverts to force it on me", ran a typical letter to the ITC[43]. Others complained at the commercial popping up in the middle of Poirot or Little House on the Prairie, both programmes with family audiences; disliked the way the towels were "handled"; or found the ad's appearance during mealtimes distasteful[44].

An article in the Independent which repeated the last three common complaints, described such attitudes as "peculiarly British". Comparing Britain with more enlightened countries on the continent, the writer claimed that "in European commercials, actresses can handle towels and tampons and talk about leakage and odour"[45]. A similar point was made by Christine Ebeling Long, Account Director at Saatchi and Saatchi, makers of the advertisement, when she remarked that "the same kind of product demonstration shown in other European Countries such as Italy, Greece and Germany has never caused any problem"[46]. Claire Rayner herself was reported to be "dumbfounded" by the reaction, and particularly saddened that it came from women rather than men, and that they felt it would harm their children. She believed that a lack of discussion would be much more harmful[47].

The ITC stood firm and sided with the advertisement's supporters. It did not uphold the complaints, giving the reasons for its judgement in the January 1992 Complaints Report. The Commission found "nothing anti-social, immoral, hurtful or, by most conventional standards indecent about the commercial". It believed that "the issue was not whether the piece of film was reprehensible or irresponsible, which it manifestly was not, but the degree of consideration or courtesy which broadcasters could reasonably be expected to display to the section of the audience concerned". The television companies had a duty to satisfy both audiences and advertisers, and "a responsible policy must necessarily, therefore, be something of a compromise".

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[42] Janis Grinyer op. cit. pp 8-9
[43] Clare Longrigg, *Honest but Indecent?*, The Times: Life and Times, 11/ 03 / 1992, p. 4
[44] Liz Hunt, *Women object to Sanitary towel adverts,* The Independent, 14 / 03 / 1992, p. 6
[45] ibid. p. 6
[46] Christine Ebeling Long puts the case for Vespre's campaign, *Honest, Miss,* Spectrum Summer 1992, p. 10
[47] The Independent op. cit. p 6

It is significant that the word "offensive" was not used in the judgement. Although the commercial had definitely offended a large number of people, and the potential to offend had previously been a consideration in banning San-pro as a category, offensiveness had proved to be a fairly subjective criterion and one which was difficult to quantify. By adopting "harder" criteria such as "anti-socialness", "immorality" and "hurtfulness", i.e. qualities which are much less easy to demonstrate as belonging to a television advertisement, and by placing the emphasis on "most conventional standards" of indecency, it was able this time to dismiss the claims of the outraged minority.

Although the ITC did not pull the advertisement off the air, it did admit the need to review timing restrictions for San-pro on Channel 4. As a result, from May 1st 1992 Channel 4 could only screen this class of advertising from 9. 00 p.m. onwards, a move backed by Saatchi and Saatchi and its client. Christine Ebeling Long said that with hindsight the agency understood why "the appearance of the commercial at inappropriate times has upset parents with young children", and it preferred to be constrained by timing than on what it could say[48].

The content of San-pro advertising was nonetheless on the agenda of the Advertising Advisory Committee when it debated the Vespre Silhouette issue. Both the ITC and the Committee felt that although the development of this class of advertising had been slow and careful, and had been consistently researched, something had clearly gone wrong and public opinion had been misjudged. The general feeling among viewers who found it distasteful was that this was not a product that should be sold like soap powder. The problem, however, lay in the content and presentation of the advertising, not in the product itself, except for the hard core of objectors which this time included Muslims from the Asian community. A letter to a member of the Committee from an Asian family described their fear of watching commercial television at all, particularly in the presence of the older generation[49]. Timing was therefore not the main issue, though the restrictions did help prevent some potential difficulties. The main priority for regulators was to look again at ways of making the content less controversial[50].

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[48] Christine Ebeling Long puts the case for Vespre's campaign op. cit. p.10

[49] *Note:* When I interviewed Geoffrey Stephenson, he said that the opposition to the Claire Rayner advertisement voiced by Muslim groups had caused the ITC considerable concern.

[50] AAC Paper 6 (92)

While the ITV Association (formerly the ITCA and now the ITV Network Centre) warned of the dangers of over-reacting, this view was endorsed by the Institute of Practitioners in Advertising, whose representative on the AAC felt that detailed guidance was needed on what could appear on television. He claimed that, overall, he would rather see advertising in the sector operate under greater restraint for the good of the advertising industry. The Committee gave cautious support to the status quo, agreeing with the ITC to continue monitoring the situation closely[51]. In the end, it was the ITV Network Centre itself which "over-reacted" by withdrawing the advertisement in January 1993. Complaints had remained at a high level even after the removal of the advertisement to a post 9.00 p.m. slot, and extensive research by the Copy Clearance Committee revealed that people objected to the format of the advertisement. In particular, as the journal Marketing reported, "it was felt that the 'group discussion' staging of the ad was unsuitable for such an intimate subject matter"[52].

12. 3 Conclusion.

The 20-year history of San-pro advertising regulation in Britain represents a microcosm of advertising regulation in general. It illustrates how the formal mechanisms by which the regulating authority decides and implements policy - the statutorily appointed (until 1993) Advisory Committee, the complaints procedures, the Authority's Research Department and the ITV companies' copy clearance system - operate in the real world. It also shows how attitudes both within the regulatory network and outside in society determine the decision-making process. Great importance is placed on analysing feedback from the viewing public in a variety of ways, and it is clear from their discussions that regulators bend over backwards not to allow their own often relatively liberal opinions to override what they believe to be the wishes of a significant proportion of the television audience[53]. The search for consensus and compromise and the desire to placate certain sections of society has sometimes led to a rather unadventurous approach.

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[51] AAC Paper 6 (92)

[52] Mat Toor, *Vespré ads finally taken off the air,* Marketing, 17 / 12 / 1992, p. 4

[53] *Note:* In the Summer 1992 issue of Spectrum, Geoffrey Stephenson described the general attitude of the AAC as "singularly unprudish", which is why it remained "unmoved by the recent spate of complaints about a particular San-pro campaign." (Professor Geoffrey Stephenson, *Sound Advice,* Spectrum, Summer 1992, p. 11). Evidently, by this time, the proportion of the public who had complained was no longer considered significant.

The crucial question that has to be answered was succinctly put by Winston Fletcher, Chairman of a major advertising agency and a past President of the IPA, in an article in the London Evening Standard: "should advertisements that are generally acceptable but deeply offensive to minorities be banned?"[54] As the series of experiments and debates show there is no easy one-word answer to this question for regulators. A great deal depends on who the minorities are and the perceived strength of their opposition to certain classes of advertising or particular instances of it, compared with the level of active support shown for these classes or instances, and with the general climate of opinion in society at the time.

For instance, IBA research into taste and decency issues in television advertising noted that "there were marked differences in extent of perceived offence as caused by some...items as a function of the sex, age and class of respondents"[55]. People's religious views were also sought as part of the research and a link found between the degree of religiousness of respondents and their distaste for certain classes of advertising which they felt invaded their sense of privacy, such as sanitary protection and birth control. The views of religious believers as an objecting minority, exposed by research and through the complaints procedures, have always been given considerable weight by the AAC and the regulating Authority. Religious opposition to San-pro advertising, especially from Catholics, but more recently from Muslims too, was an influential factor in preserving the ban on San-pro and in reviewing the guidelines after it had been accepted, but no emphasis was placed on the persistent distaste for this category in social class DE. The opinions of women across age and class boundaries have, of course, been of overriding importance in deciding San-pro regulation.

The feelings of offended minorities have nevertheless to be balanced against other considerations in forming regulation policy. The early experiments in 1972 and 1979/80 had generated a lot of hostility and relatively little support, but by the late 1980s and the beginning of the 1990s the climate had changed. Apart from the AIDS coverage on television, the advertising industry was lobbying much harder for a relaxation of the regulations on San-pro, with considerable backing from feminists and personalities such as Claire Rayner, who claimed to speak for the majority of women. The pro-San-pro lobby even received support from a Commons motion, signed by 22 Labour MPs, many of them women, calling for the Vespre campaign to be re-instated. The motion rather unfairly blamed the

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[54] Evening Standard, 12 / 12 / 88, p. 7

[55] Mallory Wober and Barrie Gunter, *The Public's Views about Advertising on Television* IBA Research Document, April 1988, p. 41

ITC for the ban, condemning its "coy administration in banning this advertisement as contributing to an outdated and ignorant approach to menstruation, which forms a natural part of womens' lives"[56].

Criticism of regulation policy was also appearing in the national press from the opposite perspective to that of the objectors. An article in The Times, for example, complained that the Authority's guidelines "read like a cross between the Official Secrets Act, the rules for charades, and a Victorian Lady's Advice to Her Daughter", and accused it of creating "a genre of commercials that is mostly patronising to women and puritanically archaic compared with standards abroad"[57]. The Women's Environmental Network objected in the Guardian that "the ads reinforce every single taboo about menstruation". Its spokeswoman said: "we want periods to come out of the closet because there serious concerns about the safety of tampons and the pollution caused by non-biodegradable products"[58]. This highlights an informational aspect of sanitary protection advertising which goes well beyond the right to more commercial information for women about the kinds of products available .

The advertisements that had been shown on television had received a very positive response in commercial terms, even the notorious Vespre one. And while regulators do not base their decisions on the commercial success or otherwise of particular campaigns, the fact that large numbers of women had responded positively to the campaigns indicated that they appreciated the extra information provided about the product[59]. The regulating Authority would be entitled to consider this fact under its general duty to facilitate the extension of consumer rights such as access to information and expansion of choice, even at the cost of offending a minority of people. In recognition of this aspect of its responsibility the IBA admitted 1986 that "San-pro advertising is socially and commercially useful"[60]. But banning an entire category of advertising, or having rules for the presentation of commercials that are so restrictive that little explicit information can be given, which was the case with the earlier San-pro adverts, conflicts with the access to information duty. Finding the right formula for informing and yet not offending was a continuing problem for both the regulating Authority and the AAC.

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[56] Louella Miles, op. cit. p. 18
[57] Richard Lander, *A Sanitised View of Women on Television,* The Times 31/ 01 / 1988 , p C9
[58] Judy Sadgrove, *High and Dry,* Guardian, 17/ 03/ 1992
[59] *Honest but Indecent?* The Times: Life and Times, 11/ 03/ 1992, p. 4.
[60] Virginia Matthew, *Gentle Approach to Lifting a Curse,* Guardian, The Media Page, p. 13

The answer to Winston Fletcher's question, therefore, would probably be "no", if a sufficiently strong case can be made for the majority view, particularly with respect to advertising for a whole category of products rather an individual commercial. With sanitary protection, a positive case for allowing it to be advertised on television was lacking at the beginning, but as a number of different factors came together over the years to provide a strong argument in favour, the claims of minority interests became relatively less powerful.

This is not to say that in sensitive areas, where strong social taboos are still in place, it may not be advisable on occasion for the regulator to order withdrawal of an individual advertisement solely on taste and decency grounds, if it can be demonstrated that a minority of viewers are for some good reason deeply offended by it. The fact that, in an unexpected reversal of roles, in the Vespre case such action was not taken by the regulator but by the commercial sector itself, may be of some comfort to those who fear that self-policing in the new era of light regulation and tough competition means a policy of anything goes.

Chapter 13

EC Regulation of Television Advertising; Consumer Protection vs. Freedom of Commercial Speech.

13. 1 Introduction.

Although the role of consumer bodies in the drawing up and implementing of television advertising control in Britain has already been described, the development of EC regulation in this area, which was to a significant extent consumer inspired, has not been dealt with in detail. The primary aim of advertising regulation is, of course, to protect the consumer but consumer claims have to be weighed against the interests of the advertising industry. The two sets of interests should not, in any case, be fundamentally different. Advertisers are always quick to point out that both they and the buying public are moving in the same direction. Most consumers also recognise that in providing information, advertising is on the whole a good thing, and that it cannot do its job properly if it is burdened with so many restrictions that the message does not come across. But they are also aware that in having access to a uniquely powerful medium to carry their messages, television advertisers may be tempted to make the relationship exploitative rather than mutually beneficial.

Regulation policy-makers have always struggled to find and maintain the ideal balance between making sure that consumers are treated fairly and with respect, and leaving advertisers with the legitimate freedom to communicate effectively with their markets. The ongoing endeavour to reconcile these two potentially conflicting aims has raised a number of interesting questions. In Britain, with its tradition of developing regulation policy incrementally over a long period of time, regulators addressed these issues step by step, in a spirit of co-operation with the advertising industry and consumer groups. During the 1970s and 80s, however, in the highly politicised context of European Community and Council of Europe law-making, and with very little in the way of existing

Community wide-consumer protection policy, the two sides became much more polarised[1]. Since EC legislation affects television advertising control in this country, though much less than originally anticipated, this chapter examines the issues arising from the consumers vs. advertisers debate by tracing the development of legislation from the 1970s to the present day and looking at its impact on the UK.

The debate centres on the potential clash between the fundamental political principle of freedom of speech and the social objective of consumer protection, both of which have been important considerations in framing European legislation. While the international advertising industry claimed that EC regulation of television advertising posed a threat to the all-important right for an advertiser to communicate with his market, the consumer movement argued that advertisers were abusing this right and needed to be restrained. Laws are not drawn up overnight, and the present rules on television advertising have been in the making for two decades. The process of their development reveals the positions taken by the two sides, and their relative effectiveness in getting their aims translated into action by the European Commission.

13. 2 Battle Commences: The Rise of the Consumer Movement in the 1970s.

The early discussion documents issued by the Commission, and the first efforts at general legislation to control advertising make very little explicit mention of television, as opposed to general, advertising but concern about the power of the broadcast media, especially television, was one of the driving forces behind the consumer movement's campaign to increase the scope of advertising regulation. As two prominent members of the advertising world have noted, "the introduction of television made people more conscious of advertising than they have ever been before. Consumer organisations exerted pressure on governments to introduce or sharpen existing legislation to control advertising in all its forms, particularly as it appeared on television"[2].

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[1] *Note :* Armand Mattelart and Michael Palmer state that "during the 1980s, the European Community and the Council of Europe became the main battlegrounds as the various parties concerned by the future of advertising in Europe jostled for position...Both the (EC) Directive and the (CoE) Convention have become exercises in the politics of confrontation and lobbying." (Armand Mattelart and Michael Palmer, *Advertising in Europe: promises, pressures and pitfalls*, Media Culture and Society, Vol. 13 (1991) p. 543)

[2] Rein Rijkens and Gordon Miracle, *European Regulation of Advertising* Amsterdam, Elsevier Science, 1986, p. 92

The first serious confrontation began in the early and middle 1970s. Increased economic prosperity within the European Community had by this time resulted in a big rise in consumer spending power and a growing awareness that consumer interests were not being adequately addressed within the EEC legislative framework. There was, however, no specific reference to the need for a consumer protection policy in the *Treaty of Rome* which could provide a definitive legal basis for a Community sponsored consumer program. In fact, until the *Maastricht Treaty (Article 129A)* there has been no proper legal basis for promoting consumer interests[3]. However, in the opinion of Emile Noel, Secretary General of the European Commission in 1972, the Treaty sketches out "the policy lines to be pursued in the main areas of economic activity, leaving it to the Communities institutions....to work out the actual arrangements to be applied"[4]. This interpretation enabled the Community to become involved in the field of consumer affairs and, by extension, with the controversial area of advertising control.

In 1973, the Commission produced a preliminary Consumer Protection Program which was formally adopted by the Council of Ministers in 1975. The Program was founded on five basic rights already set out in the Council of Europe Consumer Protection Charter: (i) the right to protection of health and safety; (ii) the right to protection of economic interests; (iii) the right of redress; (iv) the right to information and education; (v) the right of representation (i.e. the right to be heard). The Commission also set up the Consumer Consultative Committee to replace a previous ineffective body.

The Consumer Program dealt with a wide spectrum of issues of which advertising was only one, but one which has always been especially contentious and difficult for regulators. The problem was addressed more specifically in 1975 with the publication of the *Draft Directive on Misleading and Unfair Advertising*. It is a measure of the difficulties in getting this pioneering piece of regulation approved by all twelve (by that time) Member States that it took them until 1984 to reach agreement, with a further two years allowed for the introduction of legislation implementing it in their respective countries.

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[3] Monique Goyens, *Where There's a Will, There's a Way! A Practitioner's View* Journal of Consumer Policy, Vol. 16, No 3-4, 1993, pp. 377 - 378

[4] Emil Noël (1981) *Working Together*, Luxembourg: Official Publications of European Communities, 1982, p. 15

The UK took until 1988 to give effect to the 1984 *Directive* by issuing the *Control of Misleading Advertisements Regulations*. This gives added statutory backing to the part statutory, part self-regulatory framework for regulation of commercial television in the UK, now administered by the Independent Television Commission. This delay had to do not only with the controversial content of the document but with the complicated organisational structures of the EC. The decision-making processes are extremely slow and one commentator has described the business of getting amendments agreed as "horrendously convoluted"[5]. For example, at least four different Directorates General have been involved in advertising policy - DGs III, XI, XII and XV. The advertising industry has recently requested that the Commission come up with a more co-ordinated and coherent approach to advertising, a move that consumer groups are in sympathy with.[6]

The Memorandum put out by the Commission to accompany the first draft of the *Directive* recognised the important part played by advertising in "the development of the modern industrial economy in its role as intermediary between producers and consumers. By directing consumers' attention to the relative merits of the various products the market has to offer it has promoted efficiency of distribution and consumer choice"[7]. It followed this positive view of advertising with the qualification that, nevertheless, "there is a temptation for a producer of goods to base his advertising less on the inherent qualities, price, usefulness or differences of his product but on false or misleading information."[8] The Memorandum goes on to explain that this not only prevents the consumer from making the right choices but distorts competition by giving the producer who misleads an unfair advantage over his competitor. It concludes that " the essential needs of society are not well served by such distortions of the truth of competition and it is therefore essential to regulate such abuses"[9].

The *Draft Directive* itself backed up these strong statements with a comprehensive series of proposals to "protect consumers, persons carrying out a trade, business or profession, and the

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[5] Jim Gibbons, *The EC Way Out*, Spectrum, Autumn 1994, p. 20

[6] Consumers in the European Community Group, "Advertising and Consumers", CECG document, 1993, and Stephen Crampton (CECG Secretary) interview; 21/04/1994

[7] Memorandum on approximation of the laws of Members States on fair competition : *Misleading and Unfair advertising*, Directorate-General for Internal Market of the Commission of the European Communities, Working No. 2 XI/C/93/75 - E, Brussels: November, 1975 (introduction)

[8] ibid. (introduction)

[9] ibid. (introduction)

interests of the public in general against unfair and misleading advertising." *(Article 1)*. Advertising is defined fairly widely[10] and misleading advertising is defined as that which is "entirely or partially false....(which) misleads or is likely to mislead persons addressed or reached thereby"; *(Article 2)* unfair advertising refers extremely broadly to "any advertising which casts discredit on another person by improper reference to his nationality, origin, private life or good name", or injures his commercial reputation by defamatory comments, or appeals to sentiments of fear, or promotes social or religious discrimination, or infringes the cultural equality of the sexes, or exploits the trust, credulity or lack of experience of a consumer. *(Article 2)* It proposed that Member States should "adopt adequate and effective laws against misleading and unfair advertising." *(Article 5)*

The very comprehensive set of proposals contained in the preliminary version of the *Directive* provoked an outcry in the advertising world. The International Union of Advertising Associations (IUAA) and the European Association of Advertising Agencies (EAAA) compiled a Memorandum of their own in response. In it, they criticised the impression given by the Commission that abuses in the advertising media were widespread, and indignantly denied that distortions of the truth were having important repercussions on the competitive character of the market. On the contrary, they argued, "a major interference with the capacity of the producer to communicate with the consumer about his products could be very damaging to a free enterprise economy...By framing the proposed law to deal with occasional abuses of the freedom of communications, the precise terms of the *Directive* are such as would make it difficult for the advertiser to communicate with his market"[11].

The position of the advertising industry here is based on the concept of freedom of communication and it clearly felt that the EC proposals represented a significant threat to its right to exercise this freedom. Although it is not mentioned in the joint Memorandum, later publications by the advertising lobby explicitly refer to the guarantee of freedom of expression set out in the *European Convention on Human Rights*, and to similar formulations contained in subsequent European Conventions and Directives. In this document, however, the industry concentrated on attempting to water down the provisions of the *Draft Directive*, arguing against detailed harmonising legislation,

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[10] *Note :* The full definition given in *Article 2* is *"Advertising means the making of any pronouncement in the course of a trade, business or profession for the purpose of promoting the supply of goods or services"*

[11] Memorandum on approximation of the laws of Members States on fair competition : *Misleading and Unfair advertising*, op. cit. (introduction)

since the occasions when identical advertising campaigns would cover all countries were few;[12] against corrective advertising and the ban on comparative advertising; and in favour of minimum rules, greater reliance on self-regulation and leaving legal measures of enforcement to individual Member States.

13. 3 The Debate Continues.

Advertisers and agencies had perhaps over-reacted to *Draft Directive*, which was very far from being established policy, let alone law. It was intended as a discussion document the contents of which were up for negotiation. Negotiations in fact went on for the next nine years, during which the advertising industry mobilised its forces to lobby both the EC and the governments of Member States for changes to the proposed legislation. It considered this unwelcome instrument of the Consumer Protection Program to be "heavily biased against business and advertising, especially regarding the exaggerated and unsubstantiated assertions about the negative influence of advertising on consumers"[13]. Advertisers and agencies acted to seize back the initiative taken by organised "consumerism" in the early part of the decade, when consumer pressure groups encouraged the Commission down the regulatory path.

The advertising industry's position during this period is summed up by Rein Rijkens, former president of the European Association of Advertising Agencies and Gordon Miracle, Professor of Advertising at Michigan State University, in their definitive book, *European Regulation of Advertising*. In it they take a somewhat cynical view of people they refer to as "consumerists". Rijkens and Miracle maintain that most consumers are complacent about advertising and do not choose to be represented by activists, with whom they often disagree, and whom they feel to be politically inspired or too extreme.[14] For their part, the authors themselves accuse consumer advocates of political or selfish motivation, and of receiving so little backing from those they seek to protect that they cannot claim any mandate to represent them.

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[12] *Note:* The Commission was ahead of its time with this notion - the issue of harmonisation would only become pressing when global advertising, along with Satellite and Cable technology, became a fact of life in the 1980s.
[13] Rein Rijkens and Gordon Miracle op. cit. p xxii
[14] ibid. p. xx

Similar views were expressed by Daniel Oliver, Chairman of America's Federal Trade Commission. In a lecture to the Advertising Association given in London in 1987, he claimed that "the great danger in government regulation of any market (be it for ideas or goods) is that power invites abuse. This is nowhere more evident than in the politics of consumer protection. The temptation to abuse power is often abetted by the efforts of consumer advocacy groups that refuse to believe (or accept) that consumers' values and tastes may differ from their own"[15]. The accusation of abuse of power habitually levelled at the advertising industry by the organised consumer movement is here thrown back at them.

But according to Rijkens and Miracle, such organisations often have only modest financial and human resources and are not well equipped to "deal with well informed and experienced operators in the field of consumer advertising. They often seem to shy away from direct confrontation with opponents who have greater knowledge and resources to enter into dialogue and to debate the issue"[16]. This assertion was put forward as an explanation of the lack of communication and discussion between the advertising world and the consumer movement in the period following the establishment of the *Consumer Protection Program* and the *Draft Directive*.

There are a number of inconsistencies in this position, at least as it is represented by Rijkens and Miracle. With all their references to freedom of communication, the "free flow of accurate information in the marketplace" and so forth, the advertising industry seems to have forgotten that consumers also have the right to freedom of speech. Perhaps what really upset advertisers and agencies, however, was that consumers were actively exercising their "right to be heard" enshrined in the Consumer Program. For large, powerful and wealthy industrial pressure groups in a modern democracy do not usually worry when opponents weaker and less well organised than themselves express their views; what they *do* find objectionable is that others in power should listen. And that is what happened in the European Community, in the early 1970's, when consumers were able to get the ear of the politicians and bureaucrats of the Commission.

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[15] Daniel Oliver, *Who Should Regulate Advertising and Why?* The Advertising Association President's Lecture, 1987, International Journal of Advertising, 1988, 7, 1 - 9

[16] Rein Rijkens and Gordon Miracle, op. cit. p. 92

Consumer groups would be only too willing to agree with Rijkens and Miracle's rather disparaging analysis of their abilities. The European Consumer Law Group complained in 1983 that the bargaining power of consumer organisations is not usually strong enough to conduct negotiations successfully when confronted with highly specialised sectors of trade and industry. They lack money, manpower, resources and research facilities. This situation is exacerbated by "the small degree of organisation of the individual consumer who likes to be protected but does not like to be an active member of a consumer organisation"[17]. This is the consumer movement's problem seen from the inside. The situation it describes has been confirmed both by the scholarly literature on regulation of business in general[18] and by the experience of individual consumer representatives who have been involved in negotiations over regulation with the advertising industry[19].

Again, the advertising industry appears to be inconsistent in its approach to this problem. On the one hand, it protests that its freedom of expression was being seriously threatened by consumer pressure groups with a disproportionate amount of influence; and on the other, it complains that these groups were too timid and ill equipped to stand up to it after it launched its counter-offensive against the draft proposals. When Rijkens and Miracle declare in their book that the advertising world would be only too happy to deal with sophisticated, informed and educated consumers (as opposed to naive and politically motivated activists) they seem to be implying that such people, when presented with the advertisers point of view, would immediately abandon any remaining prejudices, publicly embrace the blessings of advertising and leave the industry in peace. Free speech is often only a valued right for others if they are intelligent enough to agree with you.

The criticism that those who campaign against the established order are interested in personal power rather than obtaining a better deal for the disempowered is a common one. Rijkens and Miracle may be partly right in their analysis of the consumer movements of some EEC countries in the more radical 1970s, but recent opinion polls conducted by the Commission show that an astonishing 89%

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[17] ECLG, (1983a), *Non-Legislative Means of Consumer Protection*, Journal of Consumer Policy, p 217

[18] Robert Britt Horwitz, *The Irony of Regulation Reform: The Deregulation of American Telecommunication*, New York, Oxford University Press, 1989, p. 37

[19] *Note:* The Consumer Council representative on the Advertising Advisory Committee told me that when she first joined the AAC she found herself treated to some extent as an outsider. And although she herself became accepted in time, and as a professional consumer expert was able to stand up to the industry and commercial television representatives, she felt that the ladies chosen intentionally to represent consumers on a lay basis simply did not have the experience and communicational skills to put the consumer case effectively. Their views tended to be easily overridden.

of consumers believe that the standard of consumer protection should be the same in all Member States, i.e. harmonised up to the levels of the most developed countries - the Netherlands, Denmark, the UK and Germany.[20] This is surely evidence that consumer leaders in the 70s were simply doing what was necessary to raise the profile of consumer issues and get the EC to take positive steps to address some very genuine concerns among the buying public. Perhaps it was the advertising industry and rather than consumers who were guilty of complacency, which is why the *Draft Directive on Misleading and Unfair Advertising* came as such a shock.

The relative weakness of consumers in the 1970s, with which the European Commission sympathised, was summarised by Sidney Freedman, Head of Division, EC Promotion of Economic and Legal Interests, at a conference on *Advertising Control Under UK and EC Law and Practice* organised by the City University Business School in September 1978. He stated that "taking these factors into account: (i) the control over the supply of goods and services to the consumer exercised by large enterprises; (ii) the range and complexity of those goods and services; (iii) mass production and the methods of commercialisation to which it has given rise, it is clear that the individual consumer has very little power. He or she is often no more than a unit in a mass market. The balance is tipped against the consumer and there is a need to readjust the balance. That need has been recognised by the European Community".

Freedman went on to explain, for the benefit of "those.... who have been wondering why the Commission has made a proposal on misleading advertising", that "we were invited to do so by the governments of the Nine in order to satisfy a recognised need"[21]. He added that the Consumer Protection Program had been debated in the House of Commons and had the backing of the British Government.

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[20] Lothar Maier, *Institutional Consumer Representation in the European Community*, Journal of Consumer policy, Vol. 16, No. 3-4 1993, p. 358

[21] Sidney Freedman, *The EEC Commission's Draft Proposal* for a Directive on Misleading Advertising in *Advertising Control under the U.K and the European Community Law and Practice* The City University Business School , 28th - 29 September 1978, p. 48

The impression given by advertising spokesmen that the *Draft Directive* was the result of a handful of consumer activists conspiring with out of touch EC bureaucrats is therefore not entirely accurate. There was widespread support at all political levels for some sort of initiative on behalf of consumers.

13. 4 The Advertisers' Success and the Formation of EAT

Advertisers and agencies remained hostile, however. Their two main trade associations in Europe and world-wide, the European Association of Advertising Agencies (EAAA) and the International Union of Advertisers Associations (IUAA), later renamed the World Federation of Advertisers (WFA), formed a coalition to press for a dilution of the *Draft Directive*. In reality, of course, the industry possessed considerable clout and was ultimately successful in persuading legislators to remove some of the more contentious restrictions[22]. When the *Draft Directive* was formally adopted as a *Proposal for a Council Directive on Misleading and Unfair Advertising* in 1978, comparative advertising was to be allowed in principle and a much greater role assigned to self-regulation. But the inclusion of "unfair" advertising and the controversial Article 5 requiring Member States to adopt "adequate and effective laws" against it and against misleading advertising still remained.

The *Proposal* was accompanied this time by an Explanatory Memorandum whose introduction was far more favourable towards advertising than the previous one had been. Rijkens and Miracle relate approvingly that the opening paragraphs were in fact written by John Hobson, a leading member of the UK advertising world and a participant in an EAAA delegation to the EC in 1977.[23] However, problems with the concepts of "comparative" and "unfair" in relation to advertising, which Member States still could not agree on, caused further delays, and the requirement for Member States to pass laws on advertising control rather relying on existing self-regulatory procedures did not meet with universal agreement. By 1982, both consumer organisations and the advertising trade associations were becoming impatient. EAT and BEUC *(Bureau Europeen des Unions de Consommateurs)* overcame their differences sufficiently to write jointly to the Council of Ministers urging a speedy decision. They confirmed their agreement on the basic principles of the *Draft Directive* and acknowledged that "their application is necessary both to protect consumers' purchasing power

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[22] *Note :* The European Advertising Tripartite (EAT) was formed as a pressure group in 1980 in order to build on this success.
[23] Rein Rijkens and Gordon Miracle , op. cit. p 118

against misleading or unfair claims and to avoid distorting of competition. The advent of satellite and increasing transnational advertising will make the directive particularly relevant as a basis for agreeing on practices in Member States"[24].

The *Directive on Misleading Advertising* was finally adopted in September 1984 but concerted lobbying by the advertising industry, both of the EC and the individual governments of Member States, had effectively neutralised it. Even Rijkens and Miracle are forced to admit that "virtually all controversial elements have been deleted or made optional, leaving a somewhat truncated version of the previous document"[25]. *Article 5* now merely called for adequate and effective "means" to be adopted, not laws. The concept of "unfair" advertising had been dropped altogether.

13. 5 The Position of the UK on the Draft Directive.

The UK government had persistently argued for a form of wording that preserved the self-regulatory system and did not undermine it[26]. In 1978, Sidney Freedman had emphasised to British broadcasters, regulators and advertising industry representatives that "the draft directive recognises the value of self-regulation and contemplates its continued existence"[27]. He explained that the Commission did not believe that there was "an inherent contradiction between statutes and codes", pointing to the fact that in the region of 60 statutes governing advertising were already in existence without diminishing the role of self-regulation[28]. But those responsible for implementing any future Directive were not convinced that extending legal rights to consumers was either necessary or desirable.

It was argued, first of all, that courts in England and Wales, from magistrates courts to the higher civil courts of the High Courts of Justice, were already empowered to hear actions alleging misrepresentation or to enforce any of the other statutory rules and regulations made in the interests

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[24] BEUC/EAT (1982/1983), joint letter from the EBUC and the EAT of June 30, 1982 and February 15, 1983, to the President of the Council of Ministers of the EEC, on the proposed Directive on Misleading and Unfair Advertising

[25] Rein Rijkens and Gordon Miracle, op. cit. p. 121

[26] Philip Circus, *Industry Self-Regulation*, International Journal of Advertising, 1988, 7, pp. 311-312

[27] *Note : Article 7* of the *Draft Directive* states, "Where a Member State permits the operation of controls by self- regulation bodies for the purpose of counter-acting misleading or unfair advertising, or recognises such controls, persons or associations having a right to take legal proceedings under *Article 5* shall have both that right and the right to refer the matter to such self-regulatory bodies". (Sidney Freedman op. cit. p. 56)

[28] Sidney Freedman ibid. pp. 55 - 56

of the general public. While there was no overall legal concept of "unfair competition" (and hence of "unfair advertising") in the UK, there were " private rights and remedies for the purpose of protecting personal and business reputation and goodwill"[29] which covered many of the aspects that came within the definition of "unfair" advertising given in the *Draft Directive*. These included actions for personal libel, slander of title, slander of goods and passing off, which were felt to give sufficient opportunities for redress if self-regulation proved inadequate in any particular case.

The Director-General of Fair Trading at the time, Gordon Borrie, expressed strong doubts "as to the criteria provided for determining whether an advertisement is "unfair", and doubts as to whether a directive seeking to prescribe uniform procedures for the EEC as a whole is either legal under the Treaty of Rome or sensible". His greatest doubt was "whether it is necessary or practicable to extend the law into the many areas of advertising control which at present in the UK are the sole preserve of the self-regulatory system. Not only would such an extension face the courts with considerable difficulties of interpretation but it might face the self-regulatory system with extinction, for what would be the point of financing it in a situation where it would simply duplicate the law"[30].

Advertising Standards Authority Chairman, Lord Thomson of Monifieth, also expressed concern on behalf of those directly responsible for self-regulation in the UK including the "hybrid" commercial television Authority, the IBA. He believed that the impact of a community-wide system of legal enforcement, based on the German national system with its reliance on litigation, existing in parallel to the UK's domestic self-regulatory system, would result in the destruction of the latter. "A system of redress which is swift, flexible and free to the consumer" would be replaced by "a slow, rigid and no doubt expensive legal process"[31]. He hoped that the *Draft Directive* could be amended to avoid the basic mistake of applying the German national system to the Community as a whole - a mistake as senseless as trying to apply the pragmatic British system to other countries whose history of regulation was quite different.

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[29] Peter Ford :The Courts and Advertising Control, op. cit. p. 3

[30] Gordon Borrie: *The Work of the Office of Fair Trading in Advertising Control*, in *Advertising Control under the UK and European Community Law and Practice* , City University, Business school, p. 21. These doubts were shared by the government and articulated in the House of Lords Select Committee Report on the implications of the proposed legislation. (*Select Committee on European Communities. Misleading advertising. Draft Directive concerning unfair and misleading advertising, with minutes of evidence.* (Session 1977-78: HL 230) London: HMSO, 1978.)

[31] Lord Thomson of Monifieth, PC : *The United Kingdom Voluntary Control System* in *Advertising Control under the UK and European Community Law and Practice* , City University, Business School, pp. 29 - 35

The views of British broadcasters, regulators and advertisers on the *Draft Directive's* proposals are understandable given the country's strong tradition of effective self-regulation, built up over many years, which appeared to be under threat. The commercial television Authority, in particular, already had powerful statutory backing for its rules governing broadcast advertising. The Consumers Association, however, had a slightly different perspective on the matter at that time. In its written evidence to the Scrutiny Committee of the House of Lords in preparation for the Committee's Report on misleading advertising, the Association said: "we favour the use of codes of practice but think, in many trades, to be effective, these need in the background general legislation if they are to bite. We think this true of advertising"[32]. CA evidently did not think that some minimum legal guarantee of consumers' rights would bring down the whole edifice of self-regulation. It would simply give it more teeth.

13. 6 Regulation of Transfrontier Television: The Appeal to the International Convention on Human Rights, Article 10.

The fact that the advertising pressure groups had been so successful over this period in exercising their rights of communication, in terms of practical results, hardly supports their view of the consumer movement, even with EC backing, as a powerful force for censorship of the business voice. In reality, it turned out to be somewhat of a paper tiger. The main body representing consumer interests in the European Community, the Consumer Consultative Council, consisted of 25 delegates - four from each of the four European consumer organisations plus various independent experts in consumer affairs. National consumer organisations were only represented indirectly. Its status as a Committee meant a relatively low ranking in the EC hierarchy, one of two hundred such committees representing more than five hundred special interest groups[33]. Critics of the Consultative Council's effectiveness have based their judgements not only on the low status of the Committee, but also on the fact that it was not active enough in defending its members' interests, and its opinions were not published by the Commission[34]. So, in contrast to the advertising industry, who was invited to

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[32] Sindney Freedman The ECC Commission's Draft Proposal for a Directive on Misleading Advertising op. cit. p. 57

[33] Lothar Maier, *Institutional Consumer Representation in the European Community*, Journal of Consumer policy, Vol. 16, No 3-4 1993, p. 363

[34] L. Krämer, *EWG-Verbraucherrecht*, Baden-Baden: Nomos, 1985, p. 50

publish its own opinion of itself in the official explanatory document accompanying the *Draft Directive on Misleading and Unfair Advertising*, the opinions of the Consumer Committee were not publicly heard at all.

Nevertheless, the advertising lobby seized on the concept of freedom of speech as a negotiating weapon in the next round of battles over the EC's proposals for the regulation of transfrontier television, particularly its attempts to offer consumer protection in the field of advertising. As Mattelart and Palmer have pointed out, in debate the EAAA makes copious use of texts, conventions, declarations etc. upholding the freedom of commercial speech - in other words advertising. Free enterprise, free speech and free choice are constantly being invoked to justify its pursuit of new target audiences, new customers, new social uses of the media and new communication technologies[35]. The source most often cited in support of freedom of speech arguments throughout the 1980s is *Article 10 (1)* of the *European Convention on Human Rights.*

The Convention was drawn up in 1951 as a defence against fascism and the potential threat to civil rights posed by communist Eastern Europe. It is not EC law but an international agreement applying to many countries in Europe, most of whom have incorporated it into their provisions for basic rights at national level.[36] The UK ratified it in 1951 but did not accept its enforcement machinery until 1966. *Article 10 (1)* states:

> *"Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".*

This important general principle received added confirmation from the Council of Europe's 1982 *"Declaration of Freedom of Expression and Information"*, where it is stated that in the domain of mass media the following objective should be obtained:

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[35] Armand Mattelart and Michael Palmer, op. cit. p 541

[36] Wolfgang Hoffmann-Riem, *Trends in Development of Broadcasting Law in Western Europe*, European Journal of Communication, Vol. 7, (1992) p. 157

"The protection of the right of everyone, regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source, as well as to impart them under the conditions set out in Article 10 of the ECHR." *(Committee of Ministers, 1982)*

Article 10 (1) concludes, however with the proviso that:

> *"This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".*

Licensing has accordingly remained national policy in all European countries.[37]

The clash between the defenders of freedom of commercial speech[38] and those who sought to protect consumers from abuses of this freedom took on a much broader scope than over the *Directive on Misleading Advertising* with the development in the 1980s of the new broadcast media - Direct Broadcast Satellite (DBS) and Cable television and the attempts by the EC to put together an updated Community audiovisual policy which would take these new developments into account.

13. 7 EC Broadcasting Policy: The Green Paper and the Broadcasting Directive on Transfrontier Television.

In the 1980s, the possibility of an increasingly internationalised broadcast media brought with it enormous opportunities for advertising to transform itself into a truly global force. The stakes were high as the numerous additional private television channels expected to follow as a result of the new media would be dependent on advertising for revenue, greatly enhancing the prospects of the advertising industry. Consumers, however, were concerned about uncontrolled exposure to

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[37] *Note:* For a while during the 1980s and the early part of the 1990s a number of unlicensed private commercial radio and television stations started operating illegally in Greece. The Greek government is in the process of trying to remedy the situation.

[38] *Note :* Defenders of freedom of commercial speech under ECHR Article 10 are not on very firm legal ground. Professor Dirk Voorhoof of Ghent University, Belgium, has recently come to the conclusion that, while case-law of the European Court of Human Rights has made clear that "information of a commercial nature" falls under the protection of Article 10, when it comes to challenging the legitimacy of restrictions imposed on television advertising " freedom of commercial speech is not given very much additional protection within the framework of *Article 10.*" (Dirk Voorhoof, *Restrictions on Television Advertising and Article 10 of the European Convention on Human Rights*, International Journal of Advertising, 1993, 12, p. 189.)

commercials broadcast from abroad, given that very different standards of consumer protection in the field of television advertising operated in different Member States.

The situation as regards transfrontier advertising had been complicated by the European Court of Justice's judgement in the *"Debauve"* case in 1980. Although in an earlier judgement (*"Sacchi"*, 1973) the Court had ruled that it was in violation of the Treaty of Rome for countries to restrict the right to receive broadcasts from other Member States and re-transmit them, in *"Debauve"*, it held that restrictive national rules governing the broadcasting (including by DBS) of television advertising in the national territory - including its prohibition - were justified by the general interest, and, by extension, the same applied to restrictions on the re-transmission of advertisements by Cable television. It ruled that "in the absence of any harmonisation of the relevant rules, a prohibition of this type[39] falls within the residual power of each Member State to regulate, restrict or even totally prohibit advertising on television in its territory on grounds of general interest"[40]. The existence of widely divergent national systems of broadcast, as opposed to general, advertising control was therefore a powerful impetus for legislation to harmonise the rules Community-wide.

EC thinking on the whole question of audiovisual policy in the new media era was profoundly influenced by the German MEP Wilhelm Hahn's *Report on Radio and Television Broadcasting in the European Community*, adopted as a *Resolution* by the European parliament in 1982. In the *Report*, Hahn argued that "Information is a decisive, perhaps the most decisive, factor in European integration....The instruments which serve to shape public opinion today are the media. Of these, television, as an audio-visual means of communication is the most important"[41]. Hahn stressed that Satellite technology would alter irrevocably the character of the broadcast media, breaking down the boundaries of national networks and replacing them with "wide-ranging transmission areas"[42].

The European Commission responded by issuing two policy documents: *Realities and Tendencies in European Television: Perspectives and Options* (Commission of the European Communities

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[39] *Note :* The case arose from a challenge to the Belgian Government's prohibition on re-transmission of advertising on foreign-originated Cable channels to conform with a domestic policy which outlawed television advertising

[40] Green Paper op. cit. p. 150

[41] European Parliament (1982) *Report on Radio and Television Broadcasting in the European Community on behalf of the Committee on Youth, Culture, Education, Information and Sport* [The Hahn Report], PE Document 1-10013/81, p. 8

[42] ibid. p. 8

1983) and *Towards a European Television Policy* (Commission of the European Community 1984). These papers explored the ways in which the new technology could be used to further the goal of political, cultural and social integration, already implicit in the concept of a Single European Market, without the national identities of Member States being submerged by excessive Pan-Europeanism or, worse, by an increasingly American dominated Anglophone broadcasting culture.

The most significant initiative, however, was the preliminary draft for the creation of a legislative framework for establishing a single broadcasting market. This took the form of a Green Paper entitled *Television Without Frontiers*, which was issued in May 1984. The Paper acknowledged the need for substantial revision and harmonisation of national laws in specific areas. "Harmonisation was needed for: advertising regulations, in particular the total bans on broadcast advertising in some member states and varying prohibitions on advertising specific items in different member states; national laws concerning the distribution or redistribution of foreign broadcasting signals; national laws on right of reply; and copyright."[43]

In proposing an agenda of expansionist trade measures, the authors of the Green Paper, as Richard Collins has pointed out, had also to try to 'sell' its liberal doctrine of an integrated Community broadcasting market to interventionists who were concerned that national cultures would be undermined. They did this by claiming that the Single Market would both assist the growth of European culture as a whole and strengthen the economic foundations of the European audio-visual industry[44], although the concept of European culture "as a whole" is not a particular clear one.

A number of interested parties contributed to the debate. The European Broadcasting Union issued a *Declaration of Principles Regarding Commercial Television Advertising by DBS*, in which it advocated a self-regulatory approach following the International Chamber of Commerce Code of Advertising Practice[45], adapted for the operation of DBS broadcasts. It advised that its members should comply with domestic laws, which should be strengthened where necessary to outlaw advertising for cigarettes and alcoholic beverages, and recommended a review of rules on advertising

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[43] Richard Collins, European Dossier No 23: *Audiovisual and Broadcasting Policy in the European Community*, North London University Press 1993, p. 11

[44] ibid. p. 11

[45] *Note :* The ICC Code, drawn up in 1937, is the basis for both self-regulatory and statutory codes in force in many countries worldwide

for pharmaceutical products, medicines and children's advertising[46]. Purely commercial, as opposed to public service, broadcasters have, on the whole, supported the advertisers' plea for minimum regulation. The Association of Commercial Television in Europe (ACT), for example, complained fairly recently that television advertising is regarded with mistrust by some Commission members and is subject to "detailed and pointless restrictions"[47].

On the political front, the Council of Europe's Committee of Ministers adopted a recommendation on *The Use of Satellite Capacity for Television and Sound Radio* as a prelude to drawing up a convention of its own to deal with audiovisual policy for European countries able to receive transmissions from EC Member States but not necessarily themselves members of the EC. It deals mostly with programme standards but includes toy advertising as an area where broadcasters should protect "the sensitivity and the physical, mental and moral personality of children and young persons". The purpose of regulation was "to avoid the filth and violence which a few makers of television programs pour out unhindered - under the mask of their right to freedom of expression"[48]. This is strong language. There is no suggestion that television commercials are significant sources of filth and violence, but the Council of Ministers were clearly aware that freedom of expression arguments should be subject to scrutiny and not just accepted at face value. They may be used cynically or other considerations may outweigh them.

BEUC issued a report entitled *the Impact of Satellite and Cable Television on Advertising* in which it criticises the EBU and CoE documents as weak and too general. The report acknowledges that self-regulation and codes of practice "have a useful part to play" and are "a marginally helpful aid to raising advertising standards", but called for an international framework to remedy the inadequacies of self-regulation[49].

The European Commission was faced with the awkward task of trying to reconcile consumer demands for stronger Community-wide legislation to standardise regulation of television advertising

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[46] EBU, *Declaration of Principles Regarding Commercial TV Advertising Broadcast by DBS*, a statement from the European Broadcasting Union, EBU Review, Programmes, Administration, Law, (XXXIV) No. 5, 7-8, 1983, Geneva : September 5.

[47] Matteo Maggiore , *Audiovisual production in the single market*, Commission of the European Communities, p. 203

[48] Council of Europe (1984b) *European Standards for Television Advertising*, Recommendation No. R(84) 3, Strasbourg: Committee of Ministers of the Council of Europe, , February 23

[49] BEUC (1983), *The Impact of Satellite and Cable Television on Advertising*, a Report prepared by the BEUC for the Commission of the EC, Brussels: August 1983.

with advertisers' insistence on the absolute minimum of interference with their right of expression. However, in weighing up the consumers' case, policy-makers were able to take into account not only *Article 10 (1)* of the Convention on Human Rights so popular with the advertising industry, but *Article 10 (2)* which qualifies *(1)*. This states that the exercise of the freedoms guaranteed in *(1)*,

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

The belief that the broadcast media possess exceptional power for good or ill as vehicles of communication has long been a consideration in placing the kind of restrictions on them permitted under *Article 10 (2)*.

The consumer movement's position is based on the fact, recognised in the *Convention*, that freedom of speech, however liberally defined, carries with it "duties and responsibilities" and that advertisers are as bound by these as anyone else. The advertising industry would not, of course, dispute this. In invoking the principle of free speech in the context of television regulation policy it is arguing essentially about the degree to which the qualifications in *ECHR 10 (2)* justify restrictions on advertising. And should restrictions be necessary, the argument is extended to the methods of implementing them which should be compatible with the maximum freedom of expression. Self-regulation has always been the preferred method with legislation, at either domestic or Community level, as a last resort .

The Green Paper had a great deal to say about advertising. It considered it in connection with the economic aspects of television; with the legal aspects - the range of the applicable laws, i.e. the international scope of public advertising law, and the applicability of national law on television advertising to commercial advertising from abroad; and with harmonisation of regulation. Part 6, Harmonisation of Legislation, has a whole section on advertising rules. But it also acknowledged the

positive contributions that broadcast advertising had made in facilitating the free movement of goods, persons and services within the Community, and referred to the necessity for the free flow of information across frontiers *(ECHR 10 (1))*.

On this point, the Commission gave the fact that two Member States - Belgium and Denmark - permitted no commercial television at all as its main reason for having a directive. Legislation would have the liberalising effect of bringing about a genuinely common market in television. The Green Paper stressed that the national rules on broadcast advertising created "major obstacles" to the free flow of advertising across frontiers. So long as domestic supervision systems were applied only to the first hand transmission of advertisements this would not constitute a barrier to the free movement of services. But it could be considered a barrier if a domestic supervisory body should seek to restrict advertising broadcast from abroad, or a distortion of competition if one national system was so much stricter than another that advertising was actively discouraged by that system. At the same time, the Paper acknowledged that "the specific supervisory systems....also merit attention in that they provide a suitable tool for aligning broadcast advertising in the common market on common standards"[50] so as to ensure that liberalisation did not damage the interests of business, consumers, or society as a whole.

The Commission was aware that some kind of trade off would be necessary if it was to get the support of both Member States with restrictive policies on television advertising and the consumer movement for its objective of structural liberalisation. This would most likely take the form of harmonising the different national rules on timing, distribution, classes and content of advertising according to the toughest standards operating in the Community. It therefore proposed a number of limitations, including a total ban on advertising of tobacco products; restrictions on alcohol advertising; severe limits on the timing and distribution of commercial breaks; clear rules on sponsorship; and strict standards for advertising directed at children and young people.

In public debate, consumer groups did indeed concentrate on limiting the amount of time devoted to advertising and the "upwards" harmonisation of rules and regulations. Not unexpectedly, those

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[50] Commission of European Communities (1984a) *Television Without frontiers*. Green Paper on the establishment of the Common Market for broadcasting especially by satellite and cable. COM (84) 300 final. Office for Official Publications of the European Communities. Luxembourg. p. 258

representing advertising interests argued for the opposite - a liberalising policy which avoided making the most restrictive existing rules the benchmark. They particularly opposed the idea that "national legislatures would remain free to impose stricter rules for broadcasts originating within the national territory"[51]. Active lobbying over the next five years continued on this basis. Many in business and advertising questioned the need for a directive at all since it appeared that they stood to lose more than they would gain.

The UK's Confederation of British Industry and Advertising Association, for example, issued an anti-Directive joint statement in 1985, citing *Article 10 (1),* and pointing out that a common market in advertising services already existed in many countries (the addition of the Danish and Belgian markets was clearly not worth much); that no real damage was being done that required legislation; and that there had been no call for legislation from any significant number of consumers.[52] In the same year the International Advertising Association called for "the lifting of arbitrary, artificial and unnecessary restrictions and their replacement by responsible freedom in the use of radio and television, both terrestrial and satellite, and related distribution systems, (and) the amount of advertising time permitted in all electronic media"[53].

British broadcasters also lobbied hard against those proposals which would standardise according to the "strictest common denominator" and which therefore represented a step backwards for UK regulation. The severe restrictions on alcohol advertising, the tobacco ban, a timing limit of a maximum 10%, i.e. six minutes, per hour on advertising and the prohibition of commercials in natural breaks, when the UK had a flexible policy permitting a seven minute maximum and the showing of commercials in natural breaks, particularly worried the IBA and the television companies.

Of these, the tightening up of process regulation was potentially the most damaging measure. The Green Paper (and later the draft for the CoE Convention) favoured the "block" system operated in Germany and elsewhere, where advertising is presented in lengthy blocks rather than distributed more evenly throughout the schedule, a method very unpopular with advertisers and consistently

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[51] ibid. para 38

[52] CBI, (1985), *Consumer Protection in the European Community*, a joint statement from the Confederation of British Industry and The Advertising Association, London : January, pp. 13 - 14

[53] IAA, (1985b), *Global Media Commission Resolution*, the International Advertising Association, New York : July 2

rejected in the UK. IBA Controller of Advertising Harry Theobalds declared: "this is unacceptable to us. We will put maximum pressure on the British Government not to accept this. And I intend to contact the European Commission and certain MPs"[54]. He was joined by the British advertising lobby who tried to persuade the Home Office that any European regulation must not endanger the UK's existing arrangements for commercial television[55].

The Green Paper dealt with a great deal more than advertising, however. It considered the technical, legal, political, economic and cultural issues arising from a common broadcasting policy. The governments of individual Member States had numerous objections and reservations as well as the advertising industry. The difficulties notwithstanding, a draft directive was hammered out and published in 1986. The *Directive on Television Broadcasting,* was finally promulgated in 1989, once again allowing a breathing space for Member States to ratify it and incorporate it into their national legislation. And as with the *Directive on Misleading Advertising* the final document is considerably less far-reaching and ambitious than the discussion paper. Rules on alcohol advertising were more relaxed, maximum advertising minutage was doubled to up to 20% of airtime (twelve minutes) and natural breaks were allowed.

The *Broadcasting Directive* reflects the compromises made along the way between what Richard Collins has called the "liberals" and the "dirigistes"[56]. In Collins' view ,the original Green Paper was a liberal manifesto which placed broadcasting at the forefront of the move towards economic and cultural integration of Europe. It emphasised "the promotion of television as a medium of Community unity"[57]. The dirigistes, on the other hand, were more committed to "the protection of an anterior diversity and cultural pluralism"[58] and the eventual text of the *Directive* represents a partially successful defence of national industries and broadcasting systems against a more centralised pan-European policy.

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[54] Marta Wohrle , *UK anger at EC ad restrictions,* Media Week, 25/ 10/ 1985 p. 14

[55] *Note :* The British government did give valuable support to the anti-European regulation lobby in the UK. During the run-up to the adoption of the CoE Convention in 1989, the British ambassador to the Council was briefed, and Foreign Secretary Douglas Hurd and Home Office Minister Timothy Renton travelled throughout Europe to put the British case. They succeeded in imposing their views which "to all intents and purposes were the views of the British advertising community, agencies, advertisers and the commercial television operators." (A. Mattelart and M. Palmer, op. cit. pp. 545 - 546)

[56] Richard Collins, European Dossier Series No 23: *Audiovisual and Broadcasting Policy in the European Community,* North London University Press 1993, p. 13

[57] ibid. p. 12

[58] ibid. p. 12

As Collins points out, while "interventionist" provisions are numerically more numerous, they are rather weak and none are of such fundamental importance as Article 2, furthering the liberal goal of a single market, which prevents Member States from restricting "retransmission on their territory of television broadcasts from other Member States". These conflicting agendas are primarily concerned with the supply of programming as a cultural product and not with advertising, although the need to deregulate in this field was the initial excuse for the *Directive*. The advertising industry, which is not interested in national cultures except as sources for the most effective means of getting commercial messages across, supported the liberal objective of the single market and the removal of barriers to trade, but took a dirigiste position on regulation of advertising content and timing. The less harmonisation there was in this area and the more anterior diversity the better. This is, of course, the classic Euro-sceptic stance - support for a free trade area but no centralised law-making - which makes sense to advertisers because harmonisation of content usually threatens more bureaucratic restrictions. They therefore actively intervened to protect domestic self-regulatory systems of control.

The *European Community Directive on Broadcasting, Television Without Frontiers,* adopted in October 1989, came into effect on 3rd. October 1991. It declared that "the broadcasting and distribution of television services is also a specific manifestation in Community law of a more general principle, namely the freedom of expression as enshrined in *Article 10 (1)* of the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by all Member States....subject only to the limits set by paragraph 2, of that Article"[59]. With respect to paragraph 2, the *Directive* also stated that "in order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction."[60]

So, although the advertising lobby had won the battle on harmonisation - minimum standards were harmonised downwards not upwards - it had failed to make this compulsory. The UK's commercial

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[59] *EC Directive on Broadcasting :* 89/552/EEC Council Directive of 3 October 1989, p. 2
[60] ibid. pp. 3-4

television regulator, while fighting hard against some aspects of the new legislation, has in fact since taken advantage of the ability to impose stricter rules than those contained in the Directive - The UK still has a 7.5 minute maximum of advertising per hour on ITV instead of 12 minutes, for example. It is also supports the tough restrictions on sponsorship and the prohibition on surreptitious advertising

Article 10 of the *Directive* contains the crucial provision that "television advertising should be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic methods"[61]. This is buttressed by provisions prohibiting subliminal advertising and surreptitious advertising (product placement), and tough rules on sponsorship designed ensure that sponsored programmes are clearly identifiable as such, and to prevent sponsors from exercising influence on the content and scheduling of sponsored programmes "in such a way as to affect the responsibility and editorial independence of the broadcaster"[62](*Article 17)*. News and current affairs programmes cannot be sponsored.

The ban on advertising of all prescription drugs remained, as does the one on tobacco products (leading to the disappearance from British television screens of cigar and pipe tobacco commercials) and rules on alcohol and childens' advertising are still strict, representing a victory for consumers. But with timing and distribution the advertisers had prevailed - the concept of natural breaks was accepted and a maximum hourly average of 15% and a maximum of 20% in any one hour were permitted - a significant increase on the original suggestions.

The Council of Europe *Convention on Transfrontier Television* was adopted a little earlier than the *Directive*, in May 1989, but did not come into effect until 1st May 1993. The *Convention* also refers in its preamble to *ECHR Article 10* and affirms the Council commitment to the free flow of information. The two documents have very similar rules on advertising and sponsorship. The amount of spot advertising is limited to 15% of daily transmission time and 20% per hour, and the distribution of commercial breaks is regulated, with natural breaks permitted. There are requirements regarding advertising of alcohol and commercials directed at children, and complete bans on tobacco products and prescription medicines. Editorial independence in programming and proper separation

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[61] ibid. p. 8
[62] ibid. p. 9

of programme content and promotional message must be ensured and to this end there are bans on surreptitious advertising and restrictions on sponsorship.

13. 8 Summary of the Current Legal Position of the EC on Freedom of Commercial Speech Under Article 10 (1)

A brief look at the concrete circumstances of the EC's pursuit of two potentially contradictory aims reveals a considerable conflict of interest between the consumer and advertising industry agendas. Much consumer legislation does not present any challenge to the right to free speech, but when it imposes limits on what may be said in the course of a commercial transaction there are, arguably, grounds for claiming that such limits are an unacceptable curtailment of this right. In so arguing, the advertising industry has sought to give its case substance by referring to the right to impart information guaranteed in the *European Convention on Human Rights*. Whether it is justified in doing so in law very much depends on the interpretation of the concept of "information" in this context, i.e. whether or not it covers commercial information, and, if it does, on the weight given to this type of information in comparison with others. Also of importance is to what extent the qualifications in *Article 10 (2)* may be used by supporters of consumers' rights to justify restrictions.

On the former point, while case law of the European Commission on Human Rights and the European Court of Human Rights has clearly and explicitly interpreted commercial information or commercial speech as falling under the protection of *Article 10 (1)*, it does not accord it a high priority. The Commission has explained that although it "is not of the opinion that commercial 'speech' as such is outside the protection conferred by *Article 10*, it considers that the level of protection must be less than that accorded to the expression of 'political' ideas, in the broadest sense, with which the values underpinning the concept of freedom to expression in the Convention are chiefly concerned"[63]. This firmly places political speech at the heart of *Article 10's* protection; commercial speech is regarded as more peripheral.

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[63] Church of Scientology (1979) E. Com. H.R., 5 May 1979, Appl. 7805/77 B Jansen and Church of Scientology vs. Sweden, Dec. and Rep. (16), 68.

With respect to the evaluation of restrictions referred to in *Article 10 (2)* the European Court does not view them as constituting a conflicting principle. There is one principle of freedom of expression that is subject to a number of narrowly interpreted exceptions. Any restriction on communication must pursue a legitimate aim and fulfil a "pressing social need"[64]. The protection of the general public as consumers from the more harmful aspects of advertising (assessed differently in different Member States) has evidently been accepted by the European Commission both as a legitimate aim and as socially necessary. The prohibition on advertising of tobacco products and prescription drugs, for example, could be justified as "protection of health", as could restrictions on alcohol, and rules on children and young people would fall under "protection of morals".

A complete ban on broadcast advertising such as that which existed in Belgium and Denmark might be stronger grounds for claiming a violation of *Article 10 (1)* than restrictions on categories or content. As Nicholas Garnham reports: "The Commission and Court of Human Rights have never ruled directly on the question of whether a complete ban.....violates *Article 10*, but have occasionally indicated their attitude. In one case the Commission rejected a complaint that the British prohibition on paid political advertising violated *Article 10* arguing that:

The notion of licensing implies that, in granting a licence, the State may subject radio and television broadcasting to certain regulations. In this context the practice in different member states of the Council of Europe should be taken into consideration. It is clear that a number of these States do not admit any advertising at all on radio or television, whereas other Member States allow such advertising but have, at the same time, laid down rules concerning the types of advertisements admitted. In these circumstances, the Commission finds that the provisions of Article 10 (1) should be interpreted as permitting the state, in granting a licence, to exclude...certain specified categories of advertisements"[65].

The Commission of Human Rights seems to have taken a similar line to the European Court of Justice in the *Debauve* case, using existing widely divergent national laws and the absence of common legal standards to justify a particular nation's policy on advertising. Under this

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[64] Dirk Voorhoof, op. cit. pp. 192-193

[65] James Michael, *The Regulation of Broadcasting by European Institutions*, Economic and Social Research Council, 1988, (PICT Policy Research Papers: no. 5) pp. 10 -11

interpretation, the judgement in favour of the British government's prohibition on paid political advertising does not conflict with an Austrian Constitutional Court ruling in 1986 that the refusal of domestic broadcasting Authorities allow radio commercials for a magazine did violate the right to receive and impart information[66]. Each government is entitled to make its own policy on advertising control. So although in countries where it has been made a part of domestic law, the *European Convention on Human Rights* provides a guide to the relationship between freedom of expression and restrictions on advertising , it is not one that has been particularly useful to the advertising lobby.

In their book, Rijkens and Miracle express the hopes of the advertising world that if *Article 10* does cover commercial speech some of the restrictions on communicating with consumers will be lifted[67]. This hope has yet to be realised; until now, no report of the European Commission and no judgement of the European Court has ever established a breach of *ECHR Article 10* with regard to an implementation of advertising regulation[68].

13. 9 Conclusion.

In many of the books, articles and papers which claim to represent their point of view, advertisers and agencies seem to be somewhat ambivalent about the claim that advertising is such an important mode of imparting information that it merits consideration under *Article 10.* Their use of it can sometimes appear to be self-serving. Although there were prima facie grounds for claiming that freedom of commercial speech was being inhibited by the inability of the Belgian and Danish national advertising industries to use television as a medium at all, the powerful UK advertising lobby actually opposed the *EC Directive,* which was designed to promote such freedom in these countries, because it did not suit its own particular interests. And although the EAAA protested vociferously to the EC that consumer protection measures infringed its members' right to impart information to the public, when it came to refuting the frequent charge that advertising is a manipulator of culture and of people[69], the organisation took a rather different line. It accused consumers of being confused about

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[66] James Michael ibid. p. 12
[67] Dirk Voorhoof, op. cit. p. 187
[68] ibid. p. 207
[69] See: Vance Packard *The Hidden Persuaders.* New York: Simon and Schuster ,1957 and William Leiss, Stephen Kline, Sut Jhally., *Social Communication Advertising,* London : Routledge, 1990.

the nature of advertising, emphasising that it was a mistake to think of it as an information service, as a part of consumer education, or as a significant cultural influence. The EAAA's 1984 Information Bulletin complained that there are "thousands of influential people out there.....(who) muddle advertising with other forms of communication: information, entertainment and instruction. Curiously enough, though they recognise that entertainment does not have to be packed with information....they fail to see that advertising is salesmanship not journalism"[70]. This is surely the industry trying to have its cake and eat it. If advertising is really no more than an entertaining form of salesmanship, the EC cannot be blamed for not affording it protection on a level with the right to speak freely on political, social and religious issues which lies at the heart of a democratic society, and which is the real substance of *Article 10*.

Consumers, on the other hand, do have the right to be represented effectively and to express their views, even if these clash with those of the advertising industry, and even if the result is a curb on its freedom of action. The European Commission and Court of Human Rights have found national regulation to control television advertising to be in the "general interest", a concept virtually synonymous with the "public interest". The regulation eventually adopted, if it can be enforced, represents a reasonable compromise between protecting consumer interests and satisfying the commercial objectives of advertisers and their agencies. And by its own admission, things have not turned out too badly for the advertising industry. The March-April 1989 issue of the IAA's magazine *International Advertiser* contained a message of congratulation for the different organisations whose efforts lay behind the success of the lobby - with special mention of the UK's AA and ITVA - which concluded: "this has shown the economic importance of advertising. Success was achieved because the end-result was a compromise favourable to the industry"[71].

While the UK's commercial television regulator had joined forces with the advertisers and television companies in fighting some of the *Directive's* proposals, it was by no means opposed to its general intention and actively supported the setting down of clearly defined rules on sponsorship and product placement as a back-up to domestic regulation. Only recently, at a workshop on the ITC Code on Sponsorship and related topics at the 1994 Television Show in London, the ITC's Frank Willis was

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[70] *EAAA Information Bulletin 1984* in Armand Mattelart and Michael Palmer *Advertising in Europe: promises, pressures and pitfalls*, Media, Culture and Society, Vol. 13 (1991), p. 542

[71] Armand Mattelart and Michael Palmer, op. cit. p. 546

able to cite the EC ruling as the ground for the regulator's continued rejection of product placement in the face of strong demands for the policy to be scrapped.

And finally, just in case anyone still believes that advertising is under serious threat from proliferating EC regulation, Mattelart and Palmer have a story to tell which appears to give some more empirical confirmation of capture theory. In 1979 and 1983, the IAA organised two highly successful international conferences on public service advertising. The EC was so impressed that it engaged the IAA as a consultant to advise it on its own advertising and public relations, a job it still does. As the authors wryly comment: "to be taken on as a communications consultant by an organisation which seeks to regulate advertising is no mean feat"[72].

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[72] ibid. p. 538

Chapter 14

General Conclusion.

14. 1 Overview.

This thesis has explored a number of related issues that have informed the debate on broadcast advertising regulation in the UK throughout its history, including the "negative" period when, except for limited sponsorship, advertising was regulated out of broadcasting altogether. The most fundamental consideration in policy-making has always been the relationship between broadcasting and society, and the central role of regulation in that relationship. Generally speaking, it has been the function of regulation to mediate between broadcasting, as a medium of social communication, and the audience as receivers of the message it communicates. The history of broadcasting shows that regulation as an institution both reflects the society that created it, and is constitutive of it; the choice of a particular set of regulatory arrangements at any one time has depended on pre-existing British social and political beliefs, and has also played a part in determining future beliefs.

The general theme of the relationship of broadcasting to society includes the more specific issue of what kind of broadcasting, and consequently what kind of regulation, is appropriate for British society. Policy-makers consciously addressed themselves to the question of appropriateness from the very start. At first, there was a very clear idea of what was not wanted in British broadcasting - no disorder and no commercialism - but a slightly less clear idea of how these things could be prevented while at the same time developing an entirely new industry. It took several years of experimental operation for the principle of unity of control to become established as the best means of ensuring order in the system, and for it to be embodied in a particular regulatory institution.

Unity of control, however, did not in itself rule out any commercial input to the system. The regulatory decisions, first to exclude direct advertising from the BBC, and later on to allow it on part of the system only, were reached after examining another crucial issue for broadcasting policy: the relationship between advertising and broadcasting. This relationship has been the subject of continuous debate and controversy, especially with respect to television; beliefs about how advertising affects both the television service itself, and consumers who receive televised advertising messages, have been almost as influential in British regulation policy as attitudes towards broadcasting and society in general.

Hostility to commercialism among the opinion-forming classes who directed broadcasting policy in Britain, especially where it connected with culture, was an extremely influential factor in the choice to reject broadcast advertising in the initial stages and to regulate it heavily later on. Advertising is the most visible symbol of the commercial spirit, it was seen by the pioneer makers of broadcasting regulation as trivialising and debasing. There was no place for "advertising chatter" in the Reithian vision of broadcasting as a medium for bringing high culture to the masses. The public interest argument against advertising in the pre-war Committees was partly an aesthetic one. It was considered silly and intrusive rather than positively harmful in any of the more serious ways that worried policy-makers responsible for drawing up commercial television regulation in the 1950s. This is why "discreet" sponsorship was felt to be more acceptable than the more obvious spot advertising. The Hankey Committee was the first to acknowledge that sponsorship in fact raised more worrying questions than direct advertising but it did not elaborate on them.

The fact that the earliest regulation allowed broadcasting to take the form of a private company, and that commercial television and radio were subsequently introduced, indicate that it was not so much business as a framework for broadcasting that was seen as the problem, but business influence on the content of broadcasting, or, more precisely, advertising influence. Advertising was regarded from the very beginning as incompatible with a quality service, i.e. with a high standard of programmes and the freedom for audiences to enjoy them without interruptions. It was also expensive, and advertisers were likely to concentrate their spending on entertainment programmes with mass appeal, squeezing out broadcasts with a serious educational or informative content. The original British Broadcasting Company was therefore allowed to operate as a

private enterprise, but was not allowed to become involved with the only thing which might have made it viable as a business - advertising. And when a choice had to be made between broadcasting constituted as a fully commercial operation supported by advertising revenue, or as a wholly non-commercial public service, the decision was not difficult to make.

Anti-Americanism is also a recurring theme in the official reports on broadcasting policy, and in the evidence submitted to them. The American model was always being held up as one that was completely unsuitable for the UK. Originally, this belief was not so much based on dislike of American popular culture, although this might have been a part it, but grew out of the feeling that cultural products should not be contaminated by commerce. American radio, and then American television, were disliked not so much because they were American, but because they were commercial and therefore dominated by advertisers. This was thought to be a bad thing not only because it meant saturating the airwaves with advertising, but because advertisers and programme sponsors were not interested in broadcasting for its own sake, only as a vehicle for promoting their goods and services. There is no incentive in an advertising-driven system for broadcasters to produce quality programming; the priority is popular programming. Whether this assessment was entirely fair or not, the belief that the American brand of broadcasting, funded by commercial interests and catering to mass audiences, was inappropriate for Britain was an almost universally held one. Even supporters of commercial television in the 1940s and 50s, including, significantly, the UK advertising industry itself, did not want it to be too American in style.

While the cultural tendencies of anti-commercialism and anti-Americanism were not by themselves reasons for regulating broadcasting in the first place - technical and political considerations were primary - they were extremely influential in giving the regulatory/broadcasting system its particular form. The exclusion of advertising and the operating of broadcasting as a public service monopoly for the vital first decades of its existence were by far the most important factors in determining the course of regulation of commercial television when it finally arrived. And a good deal of regulation directed at the private sector was, and still is, devoted to controlling the participation of the advertising industry in the broadcasting system.

Another fundamental issue in the story of television advertising regulation is that of the public interest. This study examined the concept and concluded that, despite the difficulties surrounding

it, it has been so frequently used in connection with regulation that it cannot just be dismissed. The three successive paradigms of broadcasting regulation, i.e. non-commercial monopoly with advertising regulated out; duopoly of two services, one non-commercial and one advertising-funded but heavily regulated; and a plurality of services with varying degrees of regulation were all given explicit public interest justifications by those responsible for their creation.

Broadcasting is an especially difficult area in which to define the public interest for a number of reasons. It affects so many different sections of society in so many different ways, unlike other regulated industries, so the public, in the context of broadcasting, is a far from homogeneous notion. In the early days, the public referred primarily to potential audiences for broadcasting, and it was their interests which were felt to be at risk by allowing advertising on the air. Among listeners, and later viewers, the sub-sections of children and, to a lesser extent, religious believers, were singled out for special consideration. As broadcasting developed, and analysis of broadcasting and its relationship with advertising grew more sophisticated and informed, the interests of other sections of society were included in the definition of the public who would be affected by regulation - performers, such as actors and musicians, and those employed in the radio and television industries, for example.

If the idea of the public is not altogether unproblematic, correctly identifying a single interest, or set of interests, and setting up regulatory structures to safeguard them, is even more difficult. This is why the concept of competing claims, each prima facie justifiable, has proved so much more useful in the study of broadcasting than the traditional notion of the public interest found in much theory of regulation, which is based on a straightforward division of society into consumers and producers with necessarily conflicting interests. As this study showed, policy-makers responsible for regulating radio in the 1920s and television in the 1930s faced a relatively simple situation. The public as a collection of listeners and viewers was at first not very large for either medium, and, as John Reith pointed out in defence of the BBC's programming policy, no-one, including audiences themselves, really knew what they wanted, or what their interests were. Regulatory decisions that certain things, including advertising, were against the public interest were not hard to make, could be settled without huge debate, and provoked little opposition when they were implemented. Given the newness of broadcasting, its potential cultural significance, and the need for it to be protected from commercial pressures in order to fulfil the

extremely high expectations it had aroused, the claim that unity of control was in the public interest, and the claim that broadcast advertising was against it, were not merely prima facie justifiable, they were the only ones to be seriously advanced at the time.

In the late 1940's early 1950's, at the time of the Beveridge Report, broadcasting had widened in scope enormously and the situation had become more complex. Regulatory decision-making became correspondingly more difficult; not only were there many more possible ways of viewing the interests of the public, but the public as viewers and listeners had become much more aware of what their own interests were. The claim that broadcast advertising was not in the public interest was no longer the only prima facie justifiable one. The opposite claim was also justifiable, and within a few years the political system had validated it; advertising on television was regulated into existence in the public interest. The second broadcasting paradigm which was introduced following this decision still retained something of the previous one. The relationship between advertising and television was still adversarial. Consumers were perceived as vulnerable and advertisers powerful; strict controls were thought to be necessary to protect the public from advertiser influence. The television companies, although they were commercial enterprises, i.e. producers, were producers of a cultural product which was also vulnerable. Consequently, regulation was designed to protect them as well by granting them regional monopoly rights to advertising airtime and restricting market entry.

It was only when broadcasting had been in existence for more than half a century that the conception of the public interest in broadcasting, and the role of regulation in promoting it, changed. Thatcherite ideology favoured competition over co-operation; the market was no longer seen as failing in important ways to serve consumer interests and in need of controls, but as a better means of benefiting consumers than regulation. In broadcasting, the resulting deregulating legislation was mainly concerned with transforming process regulation, allowing much greater scope for market forces to direct events. But although competition is now the main priority, the need for control over advertisements on the air is still recognised as vital for the protection of consumers and an extensive apparatus for product regulation of advertising has been retained..

14. 2 Theories and Approaches: An Assessment.

As already mentioned, this thesis has concluded that public interest theory in various forms is still the most useful in explaining how the structures for regulation of television advertising in the UK were set up and altered at different stages. Although it was developed in America to account for the rise of government regulation of private business, it is able to explain why broadcasting in the UK was structured as a regulated non-commercial public service monopoly for the first thirty years; as a public service duopoly with a unified and tightly regulated commercial sector for the next thirty five; and, finally, as a more competitive multi-media system, with different degrees of regulation. Viewing the public interest as a collection of competing claims with a normative component makes the concept relevant to the duopoly phase of broadcasting, and to the deregulation phase when the "competition" model of regulation replaced the old command and control system.

To say that public interest theory is the most successful in explaining the genesis of broadcast advertising regulation, although it is by no means a complete explanation, is to make a judgement about the success of the regulatory system itself. For if this theory is accepted as for the most part correct, it must also be accepted that not only do regulation policy-makers claim to be acting in the public interest - a claim that ought not to be taken at face value because it is such an obvious one to make - but that the historical evidence supports their claim.

Public interest theory not only sheds light on the genesis of regulatory arrangements, but provides the starting point for regulatory failure theories dealing with the flaws that become apparent as regulation progressed. These theories hold that, while regulatory agencies are created in the public interest, this interest is betrayed by the eventual failure of agencies to fulfil their intended purposes. Influence models of perverted public interest theory, and especially the notion of capture, have been helpful in analysing what happens during the actual operation of broadcast advertising regulation in Britain.

As a critique, the instrumental approach stresses the negative effects on regulation of individuals with similar backgrounds and outlooks occupying opposite sides of the fence as regulators and regulated parties. If the employees of agency and industry have too much in common their separate roles become blurred. It is harder for regulators to distance themselves and take an

objective view of what needs to be done. In the pre-commercial era of BBC monopoly, the regulatory structure was unified and not adversarial, but the extent to which the BBC was dominated by the particular social and intellectual ethos of its Board and top management, and the weakness of the advisory bodies, came in for sharp criticism in the late 1940s.

The regulation of commercial television was set up on more adversarial lines but, nevertheless, the fact that the regulator was also the broadcaster entailed a close connection between it and the television industry. This structural feature, combined with the television companies' financial dependence on advertising, made it difficult for the regulator to maintain sufficient distance between it and the two regulated industries. Their closeness and its detrimental effect on regulation was heavily criticised by the Pilkington Committee and, later on, by consumer organisations. So even though individuals have made their mark on regulation, they cannot do more than take advantage of the structures available to them. Most of the operational weaknesses of UK broadcasting regulation resulted from design faults. Monopolies, however justifiable at the beginning, tend in time to become complacent and unresponsive to public needs. With commercial television, the inherent structural bias towards industry made capture more likely than in a completely detached system, and adjustments had to be made from time to compensate for the systematic favouring of television and advertising interests.

Capture has proved a valuable notion in analysing the failures of UK television advertising regulation. The concept has been generalised in this historical survey from the original narrow reference to the excessive influence of regulated private business on a detached regulatory agency, to the tendency for individuals, or groups of individuals, responsible for making the regulatory system work to become too sympathetic to the needs of the regulated industry

This tendency was noted in the earliest days of the BBC under Reith, when the Corporation successfully imposed its own agenda on a series of compliant advisory committees; in the Advertising Advisory Committee's tendency to be dominated by advertising and television interests; in the influence of large advertisers over the network companies' copy clearance staff; and in the success of the advertising industry in imposing its views on the EC as a regulation-making body. The possibility of becoming over eager to agree with the dominant interests has even been noticed by consumer representatives, whose relationship with the regulated industry

ought to be the most adversarial and on whose behalf advertising regulation is primarily intended.

Organisation theory, which focuses on the autonomous life of institutions, has also had explanatory value in looking at the way in which regulation as an institution actually operates. The first two commercial television regulatory Authorities exhibited to a varying extent the faults identified by organisation theory. They developed a certain degree of "regulation-mindedness"; rules and regulations proliferated and they became excessively involved in relatively trivial cases of interpretation of the rules. They were driven partly by organisational imperatives such as self-preservation[1], and the impulse to retain and expand their own power as institutions. Criticism of regulation from this perspective, especially from the political right who focused on the negative impact on private business government sponsored bureaucratic organisations with wide-ranging discretionary powers, was a strong influence on the deregulation movement in the UK from which regulation of broadcasting and broadcast advertising was not excepted.

In contrast to the public interest group of theories, the "private interest" or conspiracy models of regulatory failure have not proved particularly relevant to UK to broadcasting regulation. Until the 1980s, successive British governments, without needing any persuasion, put forward policies which resulted either in no competition in broadcasting at all or strict control of market entry. Even after the period of monopoly ended, the structuring of commercial television as a cartel with monopoly powers was wholly state initiated. Before they came into existence, it was decided that the new commercial companies should be given a regulatory framework which guaranteed security of income by protection from competition. Without this security the conditions for producing a public service of a comparable standard to the BBC's was not thought possible. The effects of regulatory controls on market entry and competition were, as it turned out, extremely beneficial to the television industry, but the system continued to be justified as the best means of combining public service television with finance through advertising. By the time deregulation was being planned, television had matured into a considerable industrial power and lobbied very hard to retain its privileged position in the face of Thatcherite pro-competition policies. But, apart from some small modifications to the 1990 Broadcasting Act, these efforts were not successful.

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[1] *Note:* the IBA's refusal to give detailed reasons for its decisions on franchise awards for fear of legal action is a classic example of an agency taking evasive action to protect itself from external challenge which could undermine its authority.

Capitalist state theory and other political perspectives on regulation have widened the context in which broadcasting and broadcast advertising regulation can be analysed. One of the aims of this thesis was to show how advertising regulation fitted in to an overall broadcasting regulation policy, and how this was, in its turn, shaped by broader political and social considerations. Major innovations and changes in broadcasting have been politically inspired, but the political system depends for its survival on support from society. The state must legitimate its activities before the electorate and in terms of the legal system and regulation is one of the mechanisms by which it achieves this end.

For the first three decades of its existence, the social purpose of broadcasting was given a higher priority than the accumulation of capital, although in its formative years the BBC's monopoly actually worked in favour of the development of a highly successful and prestigious industry, giving Britain a leading share of the world broadcasting market. When monopoly became an obstacle to the development of a new industry, television, a different regulatory institution was introduced to encourage the increase of capital without neglecting broadcasting's social dimension. And when regulation began to be perceived as a burden in principle to economic prosperity, the state drastically reduced its scope on the grounds that the market, in accumulating capital, would also contribute towards fulfilling the social purpose of television and radio. The role of advertising in television, and the particular form that advertising regulation took, have always been partly dependent on moves within the political system to balance the two fundamental imperatives of a capitalist democracy: the need for business to accumulate capital and the need to compensate those sections of society who do not immediately benefit from this accumulation.

The theories classified by Horwitz offer explanations and critiques of regulation from a number of different perspectives. They are means of assessing the success or failure of the regulation as a principle and in practice. The approaches identified by Dyson are simply some complementary ways of looking at regulation without implying any particular judgements about it, negative or positive. The theories have all been developed primarily from economic or political perspectives, or have considered some general features of organisational behaviour. This study has, in addition, adopted a cultural approach, looking at the contribution made by cultural features specific to

Britain in determining the form and manner of broadcasting and broadcast advertising regulation. A particular style of doing regulation has developed over the years which is clearly reflected in the whole decision-making process of television advertising control. An institutional approach has also been adopted in so far as the workings of the commercial television regulator as an organisation have been examined, and the part played by coalitions of interests in advertising regulation policy has also been considered. The international dimension has not been so important as this is not a comparative study, but the impact of EC legislation on advertising control on the UK regulatory system means that it can no longer be viewed only in relation to the domestic situation.

14. 3 Television Advertising Regulation in the UK: Success or Failure?

Apart from public interest theory, the theoretical perspectives used here are highly critical of regulation and concentrate on its flaws. They have been useful in analysing broadcasting and advertising regulation and this is evidence that there have been problems. But the fact that public interest theory still most accurately describes the genesis and the operation of regulation represents a positive verdict on its effectiveness . If state regulation of broadcasting, including broadcast advertising, has actually been initiated and operated in the public interest, rather than for the benefit of political or business elites, and is still in force after seven decades, it must have been on the whole a success.

Perhaps the most convincing argument for the success of broadcasting regulation, both in principle and practice, is the extent to which it has survived the recent period, when ideological opposition to all forms of state intervention in the economy was strong. The other public utilities - gas, electricity, water and telecommunications - have been privatised, but there is still no real competition in any of their markets and new regulatory agencies have had to be set up to mitigate the effects of private monopoly. Broadcasting, by contrast, since the arrival of Cable and Satellite, is already much closer to being a genuinely competitive market, and in purely market terms regulation of commercial television could have been much further relaxed along the lines recommended by the Peacock Committee.

Although broadcasting was not intended to be an exception from the Conservative government's general deregulation policy, and very considerable changes were made to the structure of commercial television, the 1990 Broadcasting Act actually retained a much greater role for regulation, particularly for control of programming and advertising content, than was consistent with Thatcherite pro-market economic policy. The creation of the Broadcasting Standards Council and the inclusion of the "quality hurdle" in the criteria for the awarding of ITV franchises are classic pieces of regulatory compensation for the probable failure of the market to provide for social needs. And, ironically, the widely held view that, even with this qualification, the competitive tender system of awarding franchises would be extremely damaging to the television service was confirmed by Mrs. Thatcher herself. In her now famous letter to Bruce Gyngell, head of TV AM, on the loss of the company's franchise to a higher bidder, she acknowledged that the system had had unintended and regrettable results.

The general principle that the broadcasting service is not the same as other commercial services, and its providers should therefore not be forced to conduct their operations according to purely commercial criteria is still valid nearly seventy years after its first formulation. The degree to which this principle has been implemented has, of course, altered over the years, but that its adoption was a major factor in the success of British broadcasting is almost universally recognised. During the first phase of broadcasting history, the "brute force" of monopoly[2] provided the right conditions for building the service into one whose reputation for excellence led the world. During the second, regulation of competition ensured that the existence of an alternative commercial television service did not undermine this reputation.

According to Reith, "without monopoly many things would not have been so easily done....The BBC might have had to play for safety; prosecute the obviously popular lines; count its clients; study and meet their reactions; curry favour"[3]. A possibly more objective observer, the American academic Burton Paulu, came to a similarly favourable conclusion about the effects of the British system of broadcasting regulation: "both BBC and ITA operate under constraints which limit both the amount and nature of their competition. That is one of the main reasons why, in my opinion,

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[2] J. C. W Reith, *Into the Wind*, Hodder and Stoughton, 1949, p. 99
[3] ibid. p. 100

that Britain is better served by its broadcasters than the Americans are by theirs"[4]. And even Sir Alan Peacock, a convinced anti-regulationist, admitted in his Report that "the BBC and the regulated ITV system have done far better in mimicking the effects of a true consumer market, than any purely *laisser-faire* system financed by advertising could have done under conditions of spectrum shortage"[5].

Advertising has always been central to the competition debate. From the start, economic realities dictated that if there were to be serious competition to the BBC, it would have to be funded by advertising, direct or indirect. The BBC's financial resources have always been stretched and the license fee method was unable to provide a single nationwide television service in a reasonable time frame, let alone support several other non-commercial corporations. The political will to make money available for such alternatives from taxation was lacking within the party of government when the monopoly was dismantled. So when advertising was introduced, it was introduced as something necessary for the removal of monopoly, which had outlived its usefulness, but also as potentially harmful to the broadcasting product itself. Advertising and quality programming were not seen as a natural combination.

Non-commercial monopoly, which could afford to set extremely high standards for public service broadcasting, created an environment in which the broadcast medium might become "a part of the permanent and essential machinery of civilisation (and) an instrument of social good which could instruct and mould public opinion, banishing ignorance and misery"[6]. These ideals were inherited to a great extent by the commercial television companies. Without the ethos already built up by the BBC monopoly, it is hard to imagine that wholly advertising funded television channels would have felt the need to claim, as a number of them did to the Pilkington Committee, that they should "lead" or be "in front of" public taste, or had a duty "to familiarise people with something they have not had before"[7]. These are all anti-populist aims and represent a risky course to take from an advertiser's point of view.

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[4] Burton Paulu, *Television and Radio in the United Kingdom*, London: Macmillan, 1981, p. 45.
[5] *Report of the Committee on Financing the BBC* (the Peacock Report), Cmnd. 9824, London: HMSO, 1986, p. 131
[6] ibid. p. 103
[7] Report of the Committee on Broadcasting 1960 (Chairman: Sir Harry Pilkington) (Cmnd 1753) London : HMSO, 1962,
p. 18 - 19

With regard to the old problem of whether broadcasters should give the public what it wants or what they think it should have, so well analysed in the Pilkington Report[8], it is a measure of the success of regulation that commercial enterprises, dependent solely on advertisers for their survival, should nevertheless have been encouraged to look further than the first requirement of advertisers - to give the public what it wants - and set themselves the goal of a "broadening and deepening of public taste"[9]. It is also hard to envisage a specialist channel like Channel 4 existing in a fully competitive unregulated commercial broadcasting system. Regulation made this innovative alternative service possible and, after a shaky start, it has won over its target audience and gained the support of advertisers. The general regulatory structures governing the role of advertising in the broadcasting system, in terms of shaping the aims and purposes of broadcasting, have therefore served the public interest by enabling television, in particular, to become considerably more than just another medium for the promotion of goods and services by commercial firms.

If broadcasting regulation in the UK, as an overall design, can be judged successful, what of the more specific arrangements for advertising regulation since commercials were first permitted on the air in 1955? Some of its flaws have already been described in assessing the value of the different theoretical approaches. But at least one thing that has been identified as a general symptom of regulatory failure - the attempts by agencies to reduce conflict and build consensus networks - has always been regarded as one of the particular strengths of advertising regulation in the UK. The concept of the public interest as a series of competing claims puts a positive value on the complex environment in which agencies operate and on the variety of conflicting demands they face. Since the public interest is heterogeneous, it is the duty of the agency to find ways of adjudicating between claims and reconciling different interests. The preference for consensus decision-making, relying on negotiation and compromise rather than command and decree, is a feature of the British way of doing things. This particular "UK style" has been summed up by

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[8] *Note:* It is hard to understand how Pilkington's conclusions can have been so misrepresented by the Standing Conference on Broadcasting. The SCOB Papers state on page 17 that, with reference to broadcasting, the Committee debated "the constant and sensitive relationship with the moral condition of society" as consisting essentially of a choice between "giving the public what it wants" and "giving the public what is good for it", which is condemned by SCOB as "a superficial either-or classification." In fact, Pilkington, paras 49 and 50, make it absolutely clear that "the antithesis: "broadcasting should give the public what it wants, and not what someone thinks is good for the public" is...a gross oversimplification of a complex and continuing problem." The Report goes on to say that neither of the two extremes were accepted by the programme companies, who considered a wide range of possibilities lying in between.

[9] ibid. p. 19

Vogel in the context of regulation as "informal, discretionary, co-operative and closed", as compared with the "US style", which is "rigid, rule-bound, adversarial and open"[10] .

This approach may have its problems but it has been especially useful in television advertising regulation because of the degree of self-regulation involved, even prior to deregulation. The television regulator has always had a general legal framework within which to operate, and has statutory powers to back its Codes of Practice, but it is still completely impractical in advertising regulation, given the potentially infinite possibilities for advertising content, for the regulator to do more than give general guidelines for what is or is not acceptable. Constraints on time and resources, even in the days when close supervision was a statutory obligation, meant that the bulk of the control work was carried out by one of the regulated industries. As this thesis has already emphasised, self-regulatory systems cannot function at all effectively without the commitment and co-operation of the industries concerned. So there is a greater need for consensus and conflict reduction in television advertising control than, for example, in the more adversarially structured regulatory bodies responsible for overseeing the other public utilities in the UK. Another benefit of the discretionary consensus-building approach is that it is cheap, quick and flexible. All the participants in television advertising regulation have stressed that flexibility and speed are essential elements in the successful operation of the system and that, by and large, the regulatory arrangements in Britain have encouraged these elements.

The most serious drawback to this style of regulation is its lack of openness and accountability, or, as Veljanovsky puts it, "one of the less appealing features of UK regulation is its secretiveness"[11] . The television regulatory authorities were constituted in a way that enabled them be less than open. As a matter of general regulation policy, with respect to the ITA's method of awarding franchises, Sendall records that "the arbitrary and secret nature of the selection process and the apparent concentration of power in a body not itself directly answerable to the electorate" caused some disquiet[12]. The IBA's similar unwillingness to reveal the criteria and the reasoning behind its decisions after the last franchise round it conducted has already been noted.

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[10] D. Vogel, *National Styles of Regulation*, Ithaca, New York: Cornell University Press, 1986,
[11] Cento Veljanovsky, *Regulators and the Market*, Institution of Economic Affairs, 1991, p. 9
[12] Bernard Sendall, *Independent Television in Britain*, Vol. 2, London : Macmillan ITV, 1983, p. .367

Specifically in advertising control, both advertisers and consumer groups have called for greater openness in the ITC's decision-making. Consumer representatives on the Advertising Advisory Committee, in particular, are frustrated at the tendency of the ITC's Advertising Control Department to accept an advertiser's arguments in support of his campaign without giving access to the material on which the arguments are based to people who may wish to challenge them. In the regulator's defence, Director of Advertising and Sponsorship, Frank Willis, pointed to the need for confidentiality in trying to accomplish decision-making by voluntary negotiation, and the obligation to respect the wishes of advertisers that commercially sensitive information should not be made generally available. If efficient regulation depends on a system where the regulator has considerable powers of discretion, they must be used responsibly and with care. It is not clear that the balance between respecting the legitimate rights to confidentiality of industry and of those involved in regulatory decision-making process, and allowing the maximum of information into the public domain in the interests of accountability, has always been the right one.

Another question that needs to be answered is whether or not, given the structures invented for it and the attitudes which affect its actual practice, regulation of television advertising has succeeded in its primary aim of consumer protection. Viewers should be protected both from being irritated by the intrusiveness of commercials and from being misled into buying things which do not fit the description given on television. The numerically low level of complaints made, and the even lower level of complaints upheld, tend to suggest that these goals have been achieved. The supervisory procedures are rigorous enough to ensure that very few serious breaches of the Codes have got through, and the capability for a speedy response means that mistakes have been rectified almost as soon as they were spotted. The whole system has tended to err on the side of caution, and while the step-by-step approach and the reliance on case law and precedent may have frustrated the advertising industry, it has benefited consumers. From their point of view, the regulator is more likely to fulfil its consumer protection obligations by playing it safe. Perhaps the Authorities might have taken a more innovative approach to taste and decency issues and paid less attention to the views of vocal minorities, but the commercial television regulators never saw it as their duty to be in front of public taste when it came to advertising control.

Surveys of public opinion nowadays consistently show a reasonable level of satisfaction with advertising on television, and there is the old cliché, recently repeated in an article by Mark Jones

in The Evening Standard, that "the ads are so much better than the programmes"[13]. Jones goes on to compare British commercials favourably with the "deeply boring" American hard sell style of promotion. While regulation has never had the specific regulatory objective of enabling "quality" advertising to be made in the same way that it must ensure quality programming, the restrictions have, as some in the business have admitted, had the effect of forcing the makers of commercials to find a more subtle and intelligent means of getting the message across.

14. 4 Advertising and Television: A Look to the Future.

"Broadcasting today is so inextricably woven into the fabric of our society that it is difficult to imagine what life would be like without it"[14]. Exactly the same thing can be said about advertising. But it is the combination of the two that has had most impact on people's lives. Commercial television commands huge audiences and with careful regulation the advertisements broadcast into the home have not only not detracted from viewers enjoyment, they have often added to it. There is no doubt that ITV provided the BBC with the right kind of competition in the years following its inauguration, and the tightly regulated duopoly managed to combine advertising and public service ideals successfully.

In the last few years, however, the broadcasting landscape in the UK, as elsewhere, has been irrevocably changed. The power of broadcasters is declining as the new technology and deregulation of the system provides more competition. But this has not yet meant that, in practice, the power of advertisers has correspondingly increased. The broadcasting process has been opened up to allow more opportunities for advertisers to shop around in the airtime market. Nevertheless, the inroads made by Cable and Satellite are so far insignificant and ITV still retains much the largest share of the commercial television audience. This is chiefly because, as Blumler points out, "a great strength of public service broadcasting, as practised in Britain, has been how it has carried the mass audience along with it; often catering for popular tastes with high quality production standards and offering diversity to stretch interests and horizons without creating an

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[13] Mark Jones, *How We'll Miss The Satchi Magic*, Evening Standard, 16/12/1994, p. 12

[14] *The SCOB Papers : Broadcasting in the United Kingdom*, Evidence to the Committee on the Future of Broadcasting, The Standing Conference on Broadcasting: London: January 1976, p. 15

impression that uplift was being imposed"[15]. The popularity of public service television, the result of the extremely effective regulatory marriage of public service ideals and advertising early on in broadcasting history, gives it a strong foundation for resisting the challenge of the new media.

The role of regulation in making or breaking the broadcasting system is still a vital one. The 1990 Broadcasting Act, which tried to introduce a more objective and accountable method of awarding television franchises, went too far in the direction of the market with the auction system. This has already had the effect of destroying two broadcasters with a proven record in programming and replacing them with others whose standards have since been widely criticised - GMTV and Carlton; GMTV, in particular, has had several warnings from the ITC about the poor quality of its service. The regulatory framework must provide the right overall conditions for quality, range and diversity in broadcasting to survive. There is no evidence that the market alone can provide these things; more competition and more channels do not necessarily mean more real choice. On the contrary, most evidence points to the fact that a lightly regulated, highly competitive broadcasting market fails to cater for the communication needs of the whole of society.

The de jure removal of the broadcasting function from the television regulator, removing at the same time its obligation to carry out pre-transmission, has not yet resulted in a significant de facto change in advertising regulation. The machinery for copy clearance remains structurally more or less the same, apart from the inclusion of non-terrestrial stations & the exclusion of pre-transmission involvement of the ITC. The intention on the part of the ITV companies is that standards of programming and advertising control should remain as rigorous under a regime having a greater role for self-regulation as under the previous one. As the Network Centre's 1994 Review states: "ITV cannot afford to slip downmarket, despite occasional reports to the contrary. If anything, the reverse is true in an age when advertising has moved beyond the confines of ketchup and baked beans." The increasingly competitive environment may make this aim difficult to achieve, however.

The network companies dilemma was summed up by Trevor Barton, formerly Secretary of the ITV Association: "on the one hand, the ITV companies, as businesses, resent the fact that they

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[15]Jay. G. Blumler, Malcolm Brynin and T. J. Nossiter *Broadcasting Finance and Programme Quality: An International Review*, European Journal of Communication, 1986, 1 (3): pp. 343 - 64

have a more restrictive regulatory regime than Cable and Satellite and cannot operate with a level playing field. But, as broadcasters, they are acutely aware that an "anything goes" commercial approach would accelerate the downward trend of standards both in programming and advertising control.." He claimed that from that perspective, the companies are happy that they still have relatively strict regulation governing amount, distribution and content of advertising which removes the pressure to compete on purely commercial terms with their rivals. So the principle that regulation should protect public service broadcasting from commercial pressures must remain a central part of future policy. Too much has already been surrendered to the "brute force" of the market.

Sponsorship is another area where problems may occur for regulation in the future. At the moment it represents only a small part of total television advertising revenue but it is set to grow as advertisers become more familiar with its use. The temptation for companies to push out the current narrow regulatory boundaries on sponsorship will undoubtedly increase as opportunities to obtain money from this source become more generally available. The ITC has so far taken an extremely tough line on sponsorship and product placement. Its Director of Advertising and Sponsorship is determined that the rules will remain strict and will be strictly enforced. A recent £500,000 fine imposed on Granada Television for stating that a cookery competition was "in conjunction with" She magazine, thereby breaking the rule in the Sponsorship Code that forbids such expressions, is clear evidence that the ITC means what it says[16]. This was the first time that the regulator had used its powers under the 1990 Broadcasting Act to levy fines for infringement of the codes of conduct. The Commission also cited seven instances in 1993 and 1994 when This Morning programme gave "undue prominence" to brand name goods[17]. So it may be that continuing tight control of the content of spot advertisements will have the unfortunate side effect of companies trying to satisfy advertisers by breaching the rules in areas where such breaches are more difficult to detect, such as sponsor interference in programme editorial or product placement.

The outlook for advertising control in the future is uncertain. The systematic and structural changes to commercial television regulation have not yet filtered through to the copy clearance

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[16] Mark Jones op. cit. p.1
[17] ibid. p. 1

procedures for spot advertising, which are still dealt with in much the same way as before. The new system of sponsorship, with its cluster of problems, will need particular vigilance on the part of the regulator. But so long as the legacy of forty years of ensuring that advertising serves the interests of broadcasting, and not the other way round, is not undermined, and broadcasters, advertisers and regulators continue to work together as they have done in the past, the new competitive environment need not mean that the long partnership between advertising and public service broadcasting is at an end.

List of Interviewees

Trevor Barton, Secretary, Independent Television Association.

Sue Bloomfield, Consumer Policy, Consumers' Association.

Stephen Crampton, Secretary, Consumers in the European Community Group.

Winston Fletcher. Chairman, Delaney, Fletcher, Shaymaker, Delaney and Boozell.

Hugh Little, Competition Policy Media Section, Office of Fair Trading.

Uisdean MacLean, Head of Advertising Clearance at the BACC.

Kenneth Miles, Director General, Incorporated Society of British Advertisers.

Yvonne Millwood, Former Advertising Control Officer, Secretary to the Advertising Advisory Committee.

Nick Phillips, Director General, Institute of Practitioners in Advertising.

Professor Colin Seymour-Ure, Department of Politics and Government, The University of Kent, Chairman, Advertising Advisory Committee.

Colin Shaw, Director , Broadcasting Standards Council.

Professor Geoffrey Stephenson, Director , Institute of Applied Psychology, The University of Kent, Former Chairman, Advertising Advisory Committee.

Harry Theobalds, Former Advertising Controller, IBA.

Diana Whitworth, Head of Public Affairs Group, National Consumer Council.

Frank Willis, Director of Advertising and Sponsorship, Independent Television Commission.

Appendix 1

TELEVISION ACT 1954.

SECOND SCHEDULE
RULES AS TO ADVERTISEMENTS

1. The advertisements must be clearly distinguishable as such and recognisably separate from the rest of the programme.

2. The amount of time given to advertising in the programmes shall not be so great as to detract from the value of the programmes as a medium of entertainment, instruction and information.

3. Advertisements shall not be inserted otherwise than at the beginning or end of the programme or in natural breaks therein, and rules (to be agreed upon from time to time between the Authority and the Postmaster General, or settled by the Postmaster-General in default of such agreement) shall be observed:

(a) as to the interval which must elapse between any two periods given over to advertisements;
(b) as to the classes of broadcasts (which shall in particular include the broadcast of any religious service) in which advertisements may not be inserted, and the interval which must elapse between any such broadcast and any previous or subsequent period given over to advertisements.

4. In the acceptance of advertisements, there must be no unreasonable discrimination either against or in favour of any particular advertiser.

5. The charges made by any programme contractor for advertisements shall be in accordance with tariffs fixed by him from time to time, being tariffs drawn up in such detail and published in such form and manner as the Authority may determine.

Any such tariffs may make provision for different circumstances and, in particular, may provide, in such detail as the Authority may determine, for the making, in special circumstances, of additional special charges

6. No advertisement shall be permitted which is inserted by or on behalf of any body the objects whereof are wholly or mainly of a religious or political nature, and no advertisement shall be permitted which is directed towards any religious or political and or has any relation to any industrial dispute.

7. If in the case of any of the television broadcasting stations used by the Authority, there appears to the Authority to be a sufficient local demand to justify that course, provision shall be made for a reasonable allocation of time for local advertisements, of which a suitable proportion shall be short local advertisements.

Appendix 2

PRINCIPLES FOR TELEVISION ADVERTISING

INDEPENDENT TELEVISION AUTHORITY

JUNE, 1955

FOREWORD

The rules about advertising contained in this booklet are based on the recommendation of the Advertising Advisory Committee appointed by the Authority under Section 8 (2) (b) of the Television Act, 1954. It is the duty of the Authority under the Act " to comply and secure compliance with the recommendations" of the Advisory Committee "subject to such exceptions or modifications, if any, as may appear to the Authority to be necessary or proper having regard to the duties incumbent on the Authority" otherwise then under subsection 8 (2). The Authority has accepted the Committee's recommendations and they therefore govern all advertising on the Authority's service until further notice.

It should be noted that paragraph 2 of the "Principles for Television Advertising" expressly reserves the right of the programme contractors and the Authority to impose stricter standards of advertising conduct than those laid down in the "Principles" and its two Appendices. This right is comparable to the recognised right of owners of other advertising media to reject any advertisements they wish.

The "Principles for Television Advertising" represents a general code of television advertising conduct. Appendix l to the "Principles" contains rules about specific classes of advertisements and methods of advertising.
Appendix 2 is a reprint of the " British Code of Standards in relation to the Advertising of Medicines and Treatments" which, under paragraph 2 (a) of Appendix l, governs the advertising on television of medicines and treatments.

Under Section 4 (5) of the Television Act the Authority is obliged to consult the Postmaster-General about the classes and descriptions of goods or services which must not be advertised and the methods of advertising which must not be employed and to carry out any directions which he may give them on the subject. The Authority has consulted the Postmaster-General about the rules here published and he has accepted those to which Section 4 (5) is applicable.

If an advertiser or advertising agent is in doubt about any advertisement, he should approach the contractor or contractors with whom he proposes to place the advertisement or the Authority. He should not approach the Advertising Advisory Committee or any of its members direct.

PRINCIPLES FOR TELEVISION ADVERTISING

Preamble

1. The general principle which will govern all television advertising is that it should be legal, clean, honest and truthful. It is recognised that this principle is not peculiar to the television medium, but is one which applies to all reputable advertising in other media in this country. Nevertheless, television, because of its greater intimacy within the home, gives rise to problems which do not necessarily occur in other media and it is essential to maintain a consistently high quality of television advertising.

2. The detailed principles set out below are intended to be applied in the spirit as well as the letter and should be taken as laying down the minimum standards to be observed. They should be read in conjunction with the rules about specific classes of advertisements and methods of advertising which are set out in Appendix 1. The programme contractors, and the Authority, may in certain circumstances impose stricter standards than those here laid down and these principles do

not override or supersede the standards of practice laid down by individual or organisations as incumbent upon their own members and applying to their own particular trade or industry.

3. Definition
The word " advertisement" has the meaning implicit in the Television Act, i.e. any item of publicity inserted in the programmes broadcast by the Authority in consideration of payment to a programme contractor or to the Authority.

4. Legal Requirements
Advertisements must comply in every respect with the law, common or statute. In the case of some Acts, notably the Merchandise Marks Acts, rules applicable to other forms of advertising may not, on a strict interpretation of the Acts, cover television advertising. Advertisements must, however, comply in all respects with the spirit of those Acts.

5. False or Misleading Advertisements
No advertisement, taken as a whole or in part, shall contain any spoken or visual presentation of the product or service advertised, or statement of its price, which directly or by implication misleads.

In particular:

(a) SPECIAL CLAIMS - No advertisement shall contain any reference which is likely to lead the public to assume that the product advertised, or an ingredient, has some special property or quality which is in fact unknown, unrecognised or incapable of being established.

(b) SCIENTIFIC AND TECHNICAL TERMS - Statistics, scientific terms, quotations from technical literature and the like must be used with a proper sense of responsibility to the ordinary viewer. The irrelevant use of data and jargon must never be resorted to make claims appear more scientific than they really are. Statistics of limited validity should not be presented in such a way as to make it appear that they are universally true.

(c) IMITATION - Any imitation likely to mislead viewers, even though it is not of such a kind as to give rise to a legal action for infringement of copyright or for "passing off" must be avoided.

6. Disparaging References
No advertisement shall contain any statement intended to promote sales by unfair comparison with or reference to competitive products or services.

7. Testimonials
Documentary evidence or testimonials may be required as a condition of the acceptance of advertisements. The irresponsible use of testimonials must be avoided.

8. Guarantee
The word "guarantee" should be used with caution and sparingly and only in relation to some specific description or quality and the detailed terms of any such guarantee must be available for inspection by programme contractors. Where the guarantee is associated with another to return the purchase price, it must be made quite clear to what it applies and in what way it protects the purchaser.

9. Competitions
Advertisements inviting the public to take part in competitions where allowable under Section 3 (3) or the Television Act, 1954, and the Betting & Lotteries Act, 1934 (which requires the presence of an element of skill), should state clearly how prospective entrants may obtain the printed conditions including the arrangements for the announcement of results and for the distribution of prizes.

10. Advertising in Children's Programmes
No product or service may be advertised and no method of advertising may be used, in association with a programme intended for children or which large numbers of children are likely to see, which might result in harm to them

physically, mentally or morally, and no method of advertising may be employed which takes advantage of the natural credulity and sense of loyalty of children.

In particular:

(a) No advertisement which encourages children to enter strange places or to converse with strangers in an effort to collect coupons, wrappers, labels, etc., is allowed. The programme contractor must investigate the details of any collecting scheme and satisfy himself that it contains no element of danger to children.
(b) No advertisement for a commercial product or service is allowed if it contains any appeal to children which suggests in any way that unless the children themselves buy or encourage other people to buy the product or service they will be failing in some duty or lacking in loyalty towards some person or organisation whether that person or organisation is the one making the appeal or not.
(c) No advertisement is allowed which leads children to believe that if they do not own the product advertised, they will be inferior in some way to other children or that they are liable to be held in contempt or ridicule for not owning it.
(d) No advertisement dealing with the activities of a club is allowed without the specific permission of the programme contractor who must satisfy himself that the club is carefully supervised in the matter of the behaviour of the children and the company they keep and that there is no suggestion of the club being a secret society.
(e) While it is recognised that children are not the direct purchasers of many products over which they are naturally allowed to exercise preference, care should be taken that they are not encouraged to make themselves a nuisance to other people in the interests of any particular product or service.

APPENDIX 1
RULES ABOUT SPECIFIC CLASSES OF ADVERTISEMENTS AND METHODS OF ADVERTISING

1. Unacceptable Products or Services
Advertisements or products or services coming within the recognised character of, or specifically concerned with, the following should not be accepted:
(a) money-lenders
(b) matrimonial agencies and correspondence clubs
(c) fortune tellers and the like
(d) undertakers or others associated with death or burial
(e) organisations/companies/persons seeking to advertise for the purpose of giving betting tips
(f) unlicensed employment services, registers or bureaux
(g) specifics for slimming or bust development so far as they are not dealt with in the British Code of Standards
(h) contraceptives
(i) smoking cures and
(j) products for treatment of alcoholism.

N.B.--An advertiser who markets more than one product may not use advertising copy devoted to an acceptable product for purposes of publicising the brand name or other identification of an unacceptable product.

2 Advertising of Medicines and Treatments
(a) The British Code of Standards
The advertising of medicines and treatments may be accepted on the Authority's service provided it complies with the basic standard of "The British Code of Standards in relation to the Advertising of Medicines and Treatments" which is attached as Appendix 2.
(b) Visual presentation of doctors, dentists, nurses, midwives, &c.
In the advertising of medicines and treatments, statements, gestures or representations that give the impression of professional advice or recommendations should not be allowed.

3. Mail Order Advertisements
Advertisements for the sale of goods by mail order should not be accepted unless the contractor has satisfied himself that adequate stocks of the goods in question are carried and that they correspond with the description given in the advertisement. Such advertisements should not be accepted where an accommodation address is given.

All advertisements should make it clear that the customer is entitled to return the goods within seven days if not satisfied and to obtain full refund of the purchase price.

4. Homework Scheme Advertisements

The fullest possible particulars of any schemes must be supplied and where it is proposed to make a charge for the raw materials or the components and where the advertiser offers to buy back the goods made by the home-worker, the advertisement must not be accepted.

5. Financial Advertisements

In view of the importance of giving full information in connection with any offer to the public of debentures, bonds and shares and in view of the difficulty of ensuring that such information is given in the limited time of the normal television advertisement, invitations to invest should be limited to the following :

(a) invitations to invest in British Government stocks (including National Savings certificates), stocks of public boards and nationalised industries in the United Kingdom and Municipal Government stocks in the United Kingdom;

(b) invitations to place money on deposit or share account with building societies

(c) invitations to place money on deposit with the Post Office or any Trustee Savings Bank.

No advertisement should be allowed which contains any review of or advice about the stock market or investment prospects, or which offers to advise on investments.

6 Hire Purchase

Where a price is mentioned in an advertisement or reference is made to any form of instalment buying, care must be taken to ensure that the amounts quoted indicate to prospective purchasers how much extra money is required for hire purchase and do not mislead them into thinking that the total cost, inclusive of interest and additional charges/and/or Purchase Tax, is less than in fact the case.

7. Instructional Courses

Advertising offering courses of instruction in trades or subjects leading up to professional or technical examinations should not imply the promise of employment exaggerate the opportunities of employment or remuneration alleged to be open to those taking such courses; neither should it offer unrecognised "degrees" or qualifications.

Betting (including Pools) Advertisements

Betting (including Pools) advertisements will not be permitted for six months and the question will then be reviewed.

Appendix 3

TELEVISION ACT 1964

SCHEDULE 2
RULES AS TO ADVERTISEMENTS

1. - (1) The advertisements must be clearly distinguishable as such and recognisably separate from the rest of the program.

(2) Successive advertisements must be recognisably separate.

(3) Advertisements must not be arranged or presented in such a way that any separate advertisement appears to be part of a continuous feature.

(4) Audible matter in advertisements must not be excessively noisy or strident.

2. The standards and practice to be observed in carrying out the requirements of the preceding paragraph shall be such as the Authority may determine either generally or in particular cases

3. The amount of time given to advertising in the programmes shall not be so great as to detract from the value of the programmes as a medium of information, educational entertainment

4. Advertisements shall not be inserted otherwise than at the beginning or the end of the programme or in natural breaks therein.

5.- (l) Rules (to be agreed upon from time to time between the Authority and the Postmaster General, or settled by the Postmaster General in default of such agreement) shall be observed as to the classes of broadcasts (which shall in particular include the broadcast of any religious service) in which advertisements may not be inserted, and the interval which must elapse between any such broadcast and any previous or subsequent period given over to advertisements.

(2) The Postmaster General may, after consultation with the Authority, impose rules as to the minimum interval which must elapse between any two periods given over to advertisements, and the rules may make different provision for different circumstances.

6. In the acceptance of advertisements there must be no unreasonable discrimination either against or in favour of any particular advertiser.

7 - (1) The charges made by any programme contractor for advertisements shall be in accordance with tariffs fixed by him from time to time, being tariffs drawn up in such detail and published in such form and manner as the Authority may determine.

(2) Any such tariffs may make provision for different circumstances, and, in particular, may provide, in such detail as the Authority may determine, for the making, in special circumstances, of additional special charges.

8. No advertisement shall be permitted which is inserted by or on behalf of any body the objects whereof are wholly or mainly of a religious or political nature, and no advertisement shall be permitted which is directed towards any religious or political end or has any relation to any industrial dispute.

9. If, in the case of any of the television broadcasting stations used by the Authority, there appears to the Authority to be a sufficient local demand to justify that course, provision shall be made for a reasonable allocation of time for local advertisements, of which a suitable proportion shall be short local advertisements.

Appendix 4

The Independent Television Code of Advertising and Practice
Independent Television Authority

JULY, 1964

Section 8(1) of the Act, 1964, states that it shall be the duty of the Independent Authority
(a) to draw up, and from time to time review, a code governing standard and practice in advertising and prescribing the advertisements and methods of advertising to be prohibited, or prohibited in particular circumstances; and
(b) to secure that the provisions of the code are complied with as regards the advertisements included in the programmes broadcast by the Authority.

The rules about advertising contained in this booklet govern all advertising on Independent Television until further notice. In drawing up this code the Authority has consulted the Advertising Advisory Committee and the members of the Medical Advisory Panel appointed in accordance with Section (5) of the Television Act, 1964.

Under Section 7(5) of the Television Act, I964, the Authority must consult the Postmaster-General about the classes and descriptions of advertisements which must not be broadcast and the methods of advertising which must not be employed and to carry out any directions he may give them in these respects. The Authority has consulted the Postmaster-General on the rules here published and he has accepted those to which Section 7(5) is applicable.

It should be noted that section 8(2) of the Television Act, 1964, expressly reserves the right of the Authority to impose requirements as to advertisements and methods of advertising which go beyond the requirements imposed by this code. The programme contractors, too, may in certain circumstances impose stricter standards than those here laid down - a right comparable to the recognised right of those responsible for other advertising media to reject any advertisements they wish.

Preamble

The general principle which will govern all television advertising is that it should be legal, clean, honest and truthful. It is recognised that this principle is not peculiar to the television medium, but is one which applies to all reputable advertising in other media in this country. Nevertheless, television, because of its greater intimacy within the home, gives rise to problems which do not necessarily occur in other media and it is essential to maintain a consistently high quality of television advertising.

2 Advertisements must comply in every respect with the law, common or statute. In the case of some Acts, notably the Merchandise Marks Acts, rules applicable to other forms of advertising may not, on a strict interpretation of the Acts cover television advertising. Advertisements must, however, comply in all respects with the spirit of those Acts.

3 The detailed rules set out below are intended to be applied in the spirit as well as the letter and should be taken as laying down the minimum standards to be observed.

4 The word "advertisement" has the meaning implicit in the Television Act, i.e. any item of publicity inserted in the programmes broadcast by the Authority in consideration, of payment to a programme contractor or to the Authority.

5. Programme Independence
No advertisement may include anything that states, suggests or implies, or could reasonably be taken to state, suggest or imply, that any part of any programme broadcast by the Authority has been supplied or suggested by any advertiser - Television Act, I964, Section 7(6).

6. Identification of Advertisements
An advertisement must be clearly distinguishable as such and recognisably separate from the programmes - Television Act, I964, Schedule 2, paragraph I(I).

7. Subliminal Advertising
No advertisement may include any technical device which, by using images of very brief duration or by any other means, exploits the possibility of conveying a message to, or otherwise influencing the minds of, members of an audience without their being aware, or fully aware, of what has been done - Television Act, I964, Section 3(3).

8. Good Taste
No advertisement should offend against good taste or decency or be offensive to public feeling - Television Act, I964, Section 3(I)(a).

9. Gifts or Prizes
No advertisement may include an offer of any prize or gift of significant value, being a prize or gift which is available only to television viewers of the advertisement or in relation to which any advantage is given to viewers - Television Acts, I964, Section 3(4).

10. Stridency
Audible matter in advertisements must not be excessively noisy or strident - Television Act, I964, Schedule 2, paragraph I(4).

11. Charities
No advertisement may give publicity to the needs or objects of any association or organisation conducted for charitable or benevolent purposes. (This does not preclude the advertising of 'flag days' fetes or other events organised by charitable organisations or the advertising of publications of general interest.)

12. Politics
No advertisements may be inserted by or on behalf of any body the objects whereof are wholly or mainly of a religious or political nature, and advertisements must not be directed towards any religious or political end or have any relation to any industrial dispute - Television Act, I964, Schedule 2, paragraph 8.

13. Appeals to fear
Advertisements must not without justifiable reasons play on fear

14. Unacceptable Products or Services
Advertisements for products or services coming within the recognised character of, or specifically concerned with, the following are not acceptable:
(a) money-lenders
(b) matrimonial agencies and correspondence clubs
(c) fortune-tellers and the like
(d) undertakers or others associated with death or burial
(e) unlicensed employment services, registers or bureaux
(f) organisations/companies/persons seeking to advertise for the purpose of giving betting tips
(g) betting (including pools)
N.B. An advertiser who markets more than one product may. not use advertising copy devoted to an acceptable product for purposes of publicising the brand name or other identification of an unacceptable product.

15. Reproduction Techniques
It is accepted that the technical limitations of photography can lead to difficulties in securing a faithful portrayal of a subject, and that the use of special techniques or substitute materials may be necessary to overcome these difficulties. These techniques must not be abused: no advertisement in which they have been used will be acceptable, unless the resultant picture presents fair and reasonable impression of the product or its effects and is

not such as to mislead. Unacceptable devices include, for example, the use of glass or plastic sheeting to simulate the effects of floor or furniture polishes.

16. Description and Claims

No advertisement may contain any descriptions, claims or illustrations which directly or by implication mislead about the product or service advertised or about its suitability for the purpose recommended. In particular:

(a) **Special Claims** - No advertisement shall contain any reference which is likely to lead the public to assume that the product advertised, or an ingredient, has some special property or quality which is incapable of being established

(b) **Scientific Terms and Statistics** - Science terms, statistics, quotation from technical literature and the like must be used with a proper sense of responsibility to the ordinary viewer. Irrelevant data and scientific jargon must not be used to make claims appear to have a scientific b~ they do not possess. Statistics or limited validity should not be presented in such a way as to make it appear that they are universally true.

Advertisers and their agencies must be prepared to produce evidence to substantiate any description, claims of illustrations

17. Comparative Advertising and Disparagement

Substantiated competitive claims inviting fair comparison with a group of products or with other products in the same field may be acceptable. Such claims may not be presented in a way which by distortion or undue emphasis, is likely to mislead. Advertisements may not contain disparaging references to another product or service.

18. Imitation

Any imitation likely to mislead viewers, even though it is not of such a kind as to give rise to a legal action for infringement of copyright or for "passing off", must be avoided.

19. Price and Claims

Visual and verbal presentations of actual and comparative costs must be accurate and incapable of misleading by undue emphasis or distortion

20. Testimonials

Testimonials must be genuine and must not be used in a manner likely to mislead. Advertisers and their agencies must be prepared to produce evidence in *support of any testimonial and any claims* therein.

21. Guarantees

The word "guarantee" should be used with caution and sparingly and only in relation to some specific description or quality and the detailed terms of any such guarantee must be available for inspection by the Authority. Where the guarantee is associated with an offer to return the purchase price, it must be made quite clear to what it applies and in what way it protects the purchaser.

22. Competition

Advertisements inviting the public to take part in competitions where allowable under Section 3(4) of the Television Act, 1963 and the Betting, Gaming and Lotteries Act, 1963 (which requires the presence of an element of skill), should state clearly how prospective entrants may obtain the printed conditions including the arrangements for the announcement of results and for the distribution of prizes.

23. Homework Schemes

Fullest particulars of any schemes must be supplied and where it is proposed to make a charge for the raw materials or components and where the advertiser offers to buy back the goods made by the home-worker, the advertisement is not acceptable.

24. Sale Hire Purchase

Advertisements relating to the sale of goods on hire-purchase or credit must comply with the provisions of the advertisements (Hire-Purchase) Act, 1957, and from 1st January I965, Part IV of the Hire-Purchase Act, 1964.

25. Instructional Courses

Advertisements offering courses of instruction in trades or subjects leading up to professional or technical examinations must not imply the promise of employment or exaggerate the opportunity of employment or

remuneration alleged to be open to those taking such courses; neither should they offer unrecognised "degrees" or qualifications.

26. Mail Order Advertising

Advertisements for the sales of goods by mail order are unacceptable unless adequate stock of the goods in question are carried and they correspond with the description given in the advertisement. Such advertisements are unacceptable where an accommodation address is given.

All advertisements should make it clear that the customer is entitled to return the goods within seven days if not satisfied and to obtain full refund of the purchase price.

27. Direct Sale Advertising

Direct sale advertising is that placed by the advertiser with the invention that the articles or services advertised, or some other articles or services, shall be sold or provided at the home of the person responding to the advertisement. Where it is the intention of the advertiser to send a representative to call on persons responding to the advertisement, such fact must be apparent from the advertisement or from the particulars subsequent supplied and the respondent must be given an adequate opportunity of refusing any call

Direct sale advertisements are not acceptable without adequate assurance from the advertiser and his advertising agency (a) that the articles advertised will be supplied at the price stated in the advertisement within a reasonable time from stocks sufficient to meet potential demand and (b) that sales representatives then calling upon persons responding to the advertisement will demonstrate and make available for sale, the articles advertised.

It will be taken as prima facie evidence of misleading and unacceptable "bait" advertising for the purpose of "switch selling" if an advertiser's salesmen seriously disparage or belittle the cheaper article advertised or report unreasonable delays in obtaining delivery or otherwise put difficulties in the way of its purchase.

28. Financial Advertising

In view of the importance of giving full information in connection with any offer to the public of debentures, bonds and shares and in view of the difficulty of ensuring that such information is given in the limited time of the normal television advertisement, invitations to invest are limited to the following:

(a) invitations to invest in British Government Stocks (including National Savings Certificates), stocks of public boards and nationalised industries in the United Kingdom and Local Government stocks in the United Kingdom.

(b) invitations to place money on deposit or share account with building societies.

(c) invitations to place money on deposit with the Post Office or any Trustee Savings Bank, and, normally, banking companies which are recognised as such for the purposes of the Eighth Schedule to the Companies Act, 1948.

Advertisements by Unit Trusts authorised as such by the Board of Trade may be accepted provided that these are strictly limited to the name and description of the Trust, the address of its manager, and an invitation to viewers to write to the manager for full particulars of the units available. To person may be shown on the screen during the course of the advertisement.

Advertisements announcing the publication in established national and provincial newspapers and journals of prospectuses offering shares or debentures to the public may be accepted provided that these are strictly limited to giving the name of the company whose shares or debentures are being offered, the amount of the offer and the names and dates of publication of the newspapers and journals in which a prospectus may be found. No person may be shown on the screen during the course of the advertisement.

No advertisement is acceptable which contains any review of or advice about the stock market or investment prospects, which offers to advice on investments.

29. Cigarette Advertising

In cigarette advertising, the following are unacceptable:

(a) advertisements that greatly over-emphasise the pleasure to be obtained from smoking

(b) advertisements featuring the conventional heroes of the young.

(c) advertisements appealing to pride or general manliness.

(d) advertisements using a fashionable social setting to support the impression that cigarette smoking is a "go-ahead" habit or an essential part of the pleasure and excitement of modern living.

(e) advertisements that strikingly present romantic situations and young people in love, in such a way as to seem to link the pleasures of such situations with the pleasures of smoking.

(f) advertisements that state, suggest or imply, without valid evidence, that it is safe to smoke one brand or type of cigarette than another.

30. Advertising and Children
Particular care should be taken over advertising that is likely to be seen by large numbers of children and advertisements in which children are to be employed. More detailed guidance is given in Appendix I.

31. Advertising of Medicines and Treatments
Within the generality of the Advertising of Medicines Independent Television Code the advertising medicines and treatments is subject to the detailed rules given in Appendix 2

Appendix I: Advertising and Children

1. The Viewing Child
No product or service be advertised and no method of advertising may be used, in association with a programme intended for children or which large numbers of children are likely to see, which might result in harm to them physically, mentally or morally, and no method of advertising may be employed which takes advantage of the natural credulity and sense of loyalty of children.
In particular:
(a) No advertisement which encourages children to enter strange places or to converse with strangers in an effort to collect coupons, wrappers, labels, etc., is allowed. The details of any collecting scheme must be submitted for investigation to ensure that the scheme contains no element of danger to children.
(b) No advertisement for a commercial product or service is allowed if it contains any appeal to children which suggests in any way that unless the children themselves buy or encourage other people to buy the product or service they will be failing in some duty or lacking in loyalty towards some person or organisation whether that person or organisation is the one making the appeal or not.
(c) No advertisement is allowed which leads children to believe that if they do not own the product advertised they will be inferior in some way to other children or that they are liable to be held in contempt or ridicule for not owning it.
(d) No advertisement dealing with the activities of a club is allowed without the submission of satisfactory evidence that the club is carefully, supervised in the matter of the behaviour of the children and the company they keep and that there is no suggestion of the club being a secret society.
(e) While it is recognised that children are not the direct purchasers of many products over which they are naturally allowed to exercise preference, care should be taken that they are not encouraged to make themselves a nuisance to other people in the interests of any particular product or service. In an advertisement offering a free gift, a premium or a competition for children, the main emphasis of the advertisement must be on the product with which the offer is associated.
(f) If there is to be reference to a competition for children in an advertisement, the published rules must be submitted for approval before the advertisement can be accepted. The value of prizes and the chances of wining one must not be exaggerated.
(g) To help in the fair portrayal of free gifts for children, an advertisement should where necessary, make it easy to see the true size of a gift by showing it in relation to some common object against which its scale can be judged.

2. The Child in Advertising
The appearance of children in advertisements is subject to the following conditions:
(a)Employment
It should be noted that the conditions under which children are employed in the making of advertisements are governed by certain provisions of the Children and Young Persons Act 1933 (Scotland 1937) and the Act of 1963; the Education Acts 1944 to 1948; and the appropriate by-laws made by local Authorities in pursuance of these Acts.
(b) Contributions to Safety
Any situations in which children are to be seen in television advertisements should be carefully considered from the point of view of safety.

In particular:
(i) children should not appear to be unattended in street scenes unless they are obviously old enough to be responsible for their own safety; should not be shown playing in the road, unless it is clearly shown to be a play-street or other safe area; should not be shown stepping carelessly off the pavement or crossing the road without due care; in busy street scenes should be seen to use zebra crossings in crossing the road; and should otherwise be seen in general, as pedestrians or cyclists, to behave in accordance with the Highway Code.

(ii) children should not be seen leaning dangerously out of windows or over bridges, or climbing dangerous cliffs.
(iii) small children should not be shown climbing up to high shelves or reaching up to take things from a table above their heads.
(iv) medicines, disinfectants, antiseptics and caustic substances must not be shown within reach of children without close parental supervision, nor should children be shown using these products in any way.
(v) children must not be shown using matches or any gas, paraffin, petrol mechanical or mains-powered appliance which could lead to their suffering burns, electrical shock or other injury.
(vi) children must not be shown driving or riding on agricultural machines (including tractor-drawn carts or implements). Scenes of this kind could encourage contravention of the Agriculture (Safety, Health and Welfare Provisions) Act, 1956.
(vii) an open fire in a domestic scene an advertisement must always have a fireguard clearly visible if a child is included in the scene.

(c) Good Manners and Behaviour

Children seen in advertisements should be reasonably well-mannered and well-behaved.

Appendix 5

Independent Television Commission

Television Advertising Complaints Report

September 1992

OFFENSIVE

CUSSONS AQUASPA SHOWER GEL

Complaints from: 9 viewers
1 VCC Member

Nature of complaint:
The complainants thought that the advertisement, which showed a couple wearing oilskins in shower and referred to "safer showering", was unsuitable to be shown when children might be watching and that it trivialised the health education message of "safe sex"

Assessment:
The product benefit claimed in the commercial was that the gel was a mild formulation designed to minimise removal of natural skin oils. In accepting this advertisement for transmission the television companies had not felt that this way of alluding to protecting skin would be generally seen as trivialising the use of condoms. The ITC agreed. The commercial did not contain any visual material likely to cause offense and the fact that "safer showering" was an oblique allusion to the expression "safer sex" was not likely to be understood by children. Nevertheless, in the light of viewers' comments the advertiser undertook not to schedule future runs of the advertisement in or adjacent to children's programmes.

Decision: Complaints not upheld

KP FRISPS

Complaints from: 10 viewers

Nature of complaint:
The complainants thought that the advertisement, which featured a crisp before a firing squad, was distasteful in that it trivialised violent death. Some complainants referred to the current conflict in former Yugoslavia.

Assessment:
The advertisement was part of a campaign based on the slogan "The crisp is dead - long live the Frisp". In cases such as this the ITC has to form a judgment on whether the degree and extent of likely offense is sufficient to require an advertisement to be withdrawn. In this case, on balance, the ITC did not feel justified in intervening although, had the theme of the commercial been developed more strongly, this might have been appropriate.

Nevertheless the case does illustrate that, however divorced from reality, humorous references to death in advertising for commercial products do have the capacity to offend some viewers. In order to prevent gratuitious offense the ITC reminds that such references are best avoided.

Decision: Complaints not upheld but guidance given

SLIM FAST

Complaint from: 1 viewer

Nature of compliant:
The complainant objected to the scheduling by Thames Television of advertising for a slimming product immediately after a trailer for ITN which carried film of hunger and maltreatment in Bosnia

Assessment: ITC rules require that television companies exercise responsible judgment, and operate appropriate systems, to avoid inappropriate juxtapositions between advertising and editorial material. Thames explained that, in this case, their schedulers had understood that the trailer focused on news of a strictly military nature rather than personal human suffering and agreed that the juxtaposition was unfortunate. They also explained that they had tightened up the systems designed to prevent such occurrences. The ITC recognised the difficulty of making such systems fully effective but nevertheless concluded that the complaint was justified-

Decision: Complaint upheld.

HARMFUL

COI - CHILDREN AND BOTTLES SAFETY

Complaint from : 1 viewer

Nature of complaint :
A public information film demonstrated a safety message to parents by presenting the ways in which very dangerous chemicals and substances might be attractive to young children. For example, one sequence depicted a little girl pouring anti-freeze from a lemon & lime bottle into a cup from her tea set and then drinking it. For this reason, the commercial had attracted a post 2100 hour timing restriction but the complainant alleged that when watching children's Saturday morning television with her four year old daughter she saw the commercial, and thought it highly irresponsible to schedule it at such a time.

Assessment :
The ITC raised the matter with Granada, the television company concerned, and those responsible apologised for the error in scheduling. The ITC asked for reassurances that measures would be taken to ensure that such an error would not re-occur.

Decision : Complaint upheld.

GLADE PLUG - IN AIR FRESHNER

Complaints from : 26 viewers

Nature of complaint :
Advertising for this product showed it being plugged into and unplugged from an electrical socket without the power first being switched off. The complainants objected that this is contrary to recommended electrical safety advice and, in particular, that it was unwise for children to be set this bad example.

Assessment :
The ITC received from the Department of Trade and Industry's Consumer Safety Unit the advice that, although the actions shown involve only slight danger, it was unhelpful that television advertising should contradict "safe

practice" advice. Independently, S.C. Johnson, the makers of Glade, became aware of the public concern and withdrew the commercial. The advertising will not reappear until appropriate amendments have been made.

Decision : Complaints upheld.

MISCELLANEOUS

DIAL - A - DATE

Complaint from : 1 Competitor

Nature of complaint :
The Association of British Introduction Agencies believed that an advertisement for this company transmitted on European Television network's (ETN) "Lifestyle" channel infringed the ITC Code. Specifically they did not believe that the company did in fact match individual clients and that the requirement for an address or published telephone number for that address to be included in the advertisement was not met.

Assessment :
ETN informed the ITC that they had considered that the relevant Code rule was not applicable to an "interactive service". The ITC did not accept that the specific characteristics of the service justified exemption from the general rules applicable to matrimonial and introduction agencies.

In reviewing the advertisement the ITC also noted that the statement relating to the charges for the premium-rated telephone number was at variance with the ICSTIS Code and further did not comply with the ITC Guidance Notes on the legibility of superimposed text which had been circulated to all licensees.

ETN were reminded that it is a requirement of their license from the ITC that they have adequate procedures for ensuring compliance with the ITC Code.

Decision : Complaint upheld.

SUNDAY MIRROR

Complaint from : 1 viewer

Nature of complaint :
An advertisement featuring a newspaper supplement on the Kama Sutra was shown on Central Television at approximately 8.30 p.m. whereas the viewer believed that a post 9 p.m. watershed restriction was more appropriate in view of the nature of the commercial.

Assessment :
The commercial had been cleared by the ITV Association for transmission only after 9 p.m. This restriction was overlooked in the course of rescheduling other advertisements and the company concerned, Central Television, apologised for the error.

Decision : Complaint upheld.

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