

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 December 1988

relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851 — Magill TV Guide/ITP, BBC and RTE)

(Only the English text is authentic)

(89/205/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the complaint lodged by Magill TV Guide Ltd on 4 April 1986 against Independent Television Publications Ltd, British Broadcasting Corporation and Radio Telefis Eireann,

Having regard to the Commission Decision of 16 December 1987 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 read in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article No 19 (1) of Council Regulation No 17 ⁽²⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas,

I. THE FACTS

- (1) This Decision concerns the practices and policies of Independent Television Publications Ltd, British

Broadcasting Corporation and BBC Enterprises Ltd, and Radio Telefis Eireann, respectively, in relation to their advance programme listings, and the effect of these practices and policies on the market for television (TV) programme guides for programmes which can be received in Ireland and Northern Ireland.

A. The undertakings

(a) ITP

- (2) Independent Television Publications Ltd, London, was established in 1967 in order to publish a national programme journal for independent television in the United Kingdom. The shareholders of ITP are the current television contractors franchised by the Independent Broadcasting Authority (IBA) to supply independent television programmes. The IBA itself is a public corporation established in order to provide (independent) television and radio broadcasting services as a public service in the United Kingdom, the Isle of Man and the Channel Islands additional to that of the BBC. The IBA awards contracts to private undertakings to supply programmes for particular regions of the country or to supply a particular programme service. These contractors together provide the programmes for one TV channel (ITV). In addition Channel 4 Television Company Ltd, a subsidiary of the IBA, also provides a television programme service.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

(b) *BBC*

- (3) The British Broadcasting Corporation is incorporated in the United Kingdom by Royal Charter and operates under a licence granted by the Secretary of State for Home Affairs. The principal object of the BBC is to provide a public broadcasting service for general reception at home and overseas. Another object is to compile, print, publish, issue, circulate and distribute, with or without charge, such printed matter as may be conducive to any of the objects of the corporation.

The BBC's revenue is derived from three sources: television licence income; grants; and the BBC's own commercial trading activities conducted through BBC Enterprises Ltd, the BBC's wholly owned subsidiary, including publications.

The total annual turnover of BBC Enterprises Ltd, for 1986 and 1987 was £ 117 million.

(c) *RTE*

- (4) Radio Telefis Eireann Authority is a statutory corporate body established in Ireland to provide a national television and sound broadcasting service, fulfilling public service conditions. RTE has also been granted authority to publish, with or without charge, such printed matter as may seem conducive or incidental to its objects.

RTE's revenue is derived from three sources: television licence income, advertising revenue and publications.

(d) *Magill*

- (5) Magill TV Guide Ltd, Dublin, was established in order to publish in Ireland and Northern Ireland a weekly magazine containing information on forthcoming television programmes available to television viewers in the area. Publication began initially in May 1985. Following injunctions obtained by ITP, BBC and RTE, restraining Magill from publishing their advance weekly television listings pending full national proceedings on the right to publish this material, Magill has for the present ceased its publishing activities.

Magill TV Guide Ltd is a wholly owned subsidiary of Magill Publications Holdings Ltd, Dublin.

B. The television market ⁽¹⁾

- (6) In December 1985 there were 0,5 million colour and 0,2 million black and white television licences

⁽¹⁾ The market for radio programmes is not considered separately in the present Decision because advance listings for radio programmes services are normally published together with television programme listings.

on issue to households in Ireland (Central Statistical Office's figures). The comparable figures for the United Kingdom in July 1986 were 16,3 million and 2,6 million. In Northern Ireland 0,3 million households possessed television licences in November 1986. The vast majority of the population in both countries have access to a television.

In Ireland RTE enjoys a statutory monopoly for the provision of a national broadcasting service. It currently broadcasts on two channels — RTE 1 and RTE 2.

In the United Kingdom a duopoly exists between the BBC and the IBA for the provision of the two national television services. Each provides two channels — BBC 1 and BBC 2, ITV and Channel 4, respectively, with regional variations. Northern Ireland is one such region ⁽²⁾.

In addition to the programme services which are broadcast to them directly, most television viewers in Ireland and Northern Ireland also receive the neighbouring television programmes. As a result, therefore, these viewers receive at least six television channels: RTE 1, RTE 2, BBC 1 (Northern Ireland), BBC 2, ITV (Ulster) and Channel 4. Alternatively or in addition some viewers receive the BBC and IBA programmes broadcast in Wales.

Furthermore, since January 1987 many viewers in Ireland have also been able to receive a number of satellite channels distributed by the various cable operators in that country ⁽³⁾. Additional television channels are also envisaged in both countries in the course of 1989.

C. The products

- (7) The products involved in this case are the advance listings of forthcoming television and radio programmes.

Advance weekly listings are sent, free of charge, on request, to newspapers, and in some cases, to magazines in the form of programme information sheets or summaries. These sheets or summaries may include additional information on the content of individual programmes. They also include a

⁽²⁾ A limited number of viewers in the United Kingdom may also receive additional channels distributed by local cable operators. As yet however cable services are not widely available in the United Kingdom as a whole. No such service is available in Northern Ireland.

⁽³⁾ These include Sky Channel, Super Channel, Arts Channel, Children's Channel, Cork Multichannel, Lifestyle and Screensport.

copy of, or reference to, the copyright notice or licence defining the limits within which publishers are permitted to reproduce this information which viewers and listeners in Ireland and in the United Kingdom or substantial parts thereof can receive. A listing is defined for present purposes as a list of programmes to be broadcast by or on behalf of a broadcasting organization within a given period of time, the list including the following information: the title of each programme to be broadcast, the channel, the date and time of transmission.

Programme listings are produced in the course of determining the content of the programme service to be broadcast, including the channel and time of transmission of each programme. This may be termed programme scheduling. The planning procedure for the IBA, BBC and RTE programme schedules may start several months before the actual date of broadcast, and may initially relate to periods of more than a week before weekly and daily programme schedules are prepared. In any event the schedules go through a series of drafts, which become increasingly detailed and precise at each stage, until a weekly schedule is finalized (subject to last minute changes) between two and four weeks before transmission, depending on the practice of the broadcasting organization or companies concerned. The listings serve to document the weekly programme schedules. At this stage, however, they also become marketable products.

D. Copyright law and programme listings

United Kingdom

- (8) It has been expressly confirmed that television programme listings, including programme summaries (that is, a factual synopsis of each programme) are entitled to copyright protection as literary works under the 1956 Copyright Act⁽¹⁾. As a result the owners of programme listings are entitled to prevent unauthorized third parties *inter alia* from reproducing, publishing or broadcasting the whole or a substantial part of the protected work. No precise definition of what constitutes a 'substantial part' of a programme listing, however, has yet been established.

Ireland

- (9) The legal position with regard to programme listings under the 1963 Copyright Act has to date not been examined judicially. The matter is currently the subject of legal proceedings between Magill and the BBC, ITP and RTE.

E. Copyright and ITP (ITV and Channel 4), BBC and RTE programme listings

(a) *ITP (ITV and Channel 4)*

- (10) Ownership of the copyright in the programme listings of the ITV television service is vested initially in the programme contractors which produce the programme schedules. However, the terms of their contracts with the IBA require them to assign this copyright to ITP for the duration of their contracts, and forbid them from publishing a programme journal or programme details themselves⁽²⁾. In return ITP agrees to pay contractors an amount equal to a proportion of 70 % of the net profits of ITP attributable to the sale of *TV Times*. This amount is divided amongst the programme contractors in direct proportion to the net advertising revenue of each⁽³⁾. Channel 4 also assigns the copyrights in its programme listings to ITP without charge, in consideration of the latter's agreement to incur costs and expenses in order to publish and publicize Channel 4's information on its programmes. For the purposes of the present Decision these listings are collectively termed ITP listings.

(b) *BBC*

- (11) Ownership of the copyright in the programme listings for BBC 1 and BBC 2 is vested initially in the BBC itself. Since an agreement signed in May 1986, however, this copyright has been assigned to BBC Enterprises Ltd, subject to the right of the BBC to exercise such rights as are necessary for its own publicity.

(c) *RTE*

- (12) Ownership of the copyright in the programme listings for RTE 1 and RTE 2 is vested in RTE.

F. The programme listings and TV guide markets

- (13) Programme listings are the means by which the viewing public may obtain advance information as to the forthcoming programmes services which they can receive. In general these listings are not imparted directly to the public as such, but to the extent that they are made available, they are received by them via intermediary publications (or broadcasting services). To the extent that they contain this information these publications may be termed TV guides⁽⁴⁾. However, a distinction may be drawn between daily (or weekend) and weekly TV guides, and also between comprehensive and other guides.

⁽²⁾ This agreement is not the subject of the present proceedings.

⁽³⁾ The programme contractors also have an interest in the profits of ITP in their capacity as shareholders in the company.

⁽⁴⁾ The term 'TV guide' is considered to include radio programme listings.

⁽¹⁾ BBC and ITP v. Time Out Ltd (1984) FSR 64.

(a) *Daily (or weekend) guides*

- (14) Most, if not all, daily newspapers published in Ireland and Northern Ireland contain the ITP, BBC and RTE television and radio programme listings for that day. United Kingdom newspapers sold in Ireland include the same ITP and BBC television and radio programme listings. Weekly newspapers also contain the listings for the day of publication. On certain days some newspapers may contain up to two days listings. A number of Irish newspapers also publish the listings of the cable and satellite channels available in Ireland or in the Local area at least. As a result, therefore, a number of comprehensive daily TV guides exist on the market in Ireland and the United Kingdom, including Northern Ireland.

In addition the daily (or in some cases two days) listings of the BBC and ITP are available on Ceefax and Oracle, the television teletext information services provided by the BBC and ITV and Channel 4 to households with television sets which receive this service.

The newspapers (daily and weekly) receive advance weekly listings free on request from ITP⁽¹⁾, BBC and RTE, together with programme summaries, that is, additional factual information about some of the programmes concerned. This is accompanied in each case by a copyright notice or licence setting out the terms upon which this information may be reproduced. The practices and policies of ITP, BBC and RTE in this respect, with minor variations in their individual policies, are that newspapers may reproduce daily (or in some circumstances two days) listings, subject to certain conditions as to the format of publication. RTE also permits magazines to publish this information on the same basis as weekly newspapers.

The licensing policies of ITP, BBC and RTE are strict by enforced by each party, if necessary by taking legal action against publications exceeding the terms permitted⁽²⁾.

The cable and satellite companies by contrast do not impose any limitations on the publication of their programme listings, which are also distributed free of charge on request.

(¹) In fact the listings are received from the contractors and Channel Four themselves.
 (²) A certain number of 'highlights', that is, reference to a limited number of programmes to be broadcast over the following week are deemed by each of the parties not to infringe their copyright.

(b) *Weekly guides*

- (15) No comprehensive weekly TV guides currently exist on the market in Ireland or the United Kingdom. For a brief period in May and June 1986 the *Magill TV Guide* did publish such a guide in Ireland, but following injunctions obtained by ITP, BBC and RTE in national legal proceedings, Magill ceased publication of the guide.

Undertakings seeking to publish a comprehensive weekly TV guide in Ireland and the United Kingdom are restrained by the licensing policy of ITP, BBC and RTE, which is limited to that described in paragraph 14. Where undertakings are considered to have exceeded the limits of these licences, legal proceedings have been threatened or initiated against the undertakings concerned for infringement of copyright under United Kingdom and/or Irish law. Proceedings have been initiated against Magill on this basis by ITP, BBC and RTE. By contrast neither ITP nor the BBC have sought to prevent the publication of their programme listings in any weekly TV guides published outside Ireland and the United Kingdom for the declared reason that they have no interest in pursuing foreign language publications, even if it is suspected that these publications may include material, which, depending on local law, may infringe their copyright.

ITP, BBC and RTE each publish weekly TV guides containing only their own individual weekly programme listings.

(i) *ITP*

- (16) The ITP weekly TV guide is *TV Times*, published in 13 regional editions at a price of £ 0,37 or £ Irl 0,52. The Northern Ireland and Wales editions are sold in the United Kingdom and also in Ireland. The average weekly circulation figures for *TV Times* in Northern Ireland and Ireland for 1986 are 72 410 and 15 910 respectively. According to ITP the total average weekly circulation figures for *TV Times* are around 3 million, the guide being purchased by some 16 % of households in the United Kingdom in possession of a television set⁽³⁾.

Together with the BBC TV guide, *TV Times* is the biggest selling weekly journal in the United Kingdom. As a result it is very attractive to advertisers. *TV Times* is purchased by 2% of households in Ireland.

The total trading results for *TV Times* for the five years up to July 1986 are as follows:

(³) No separate figure is maintained for Northern Ireland.

Year to 29 July⁽¹⁾ (£ 1 000)

	1981/82	1982/83	1983/84	1984/85	1985/86
1. Turnover ⁽¹⁾	47 678	49 850	54 079	57 294	59 563
2. Profit before tax	2 599	3 140	3 613	3 884	3 944
3. Profit before tax as a percentage of turnover	5,45 %	6,30 %	6,68 %	6,78 %	6,62 %
4. Copyright fees	6 063	7 327	8 429	9 063	9 203

⁽¹⁾ Source ITP.⁽²⁾ Divided between sales and advertising.(ii) *BBC*

- (17) The BBC weekly TV guide (now published by the BBC's own wholly owned subsidiary) is *Radio Times*, published in 16 regional editions at a price of £ Irl 0,37 or £ Irl 0,52. The Northern Ireland and Wales editions are sold in the United Kingdom and also in Ireland. The average weekly circulation figures for *Radio Times* in Northern Ireland and Ireland are 75 430 and 15 020 respectively. The total average weekly circulation figures exceed 3 million, the guide being purchased by approximately 15 % of households in the United

Kingdom in possession of a television set. Although no precise statistics are available on the point, it would seem that many of the consumers who purchase the *Radio Times* also purchase *TV Times* (see Report of the Monopolies and Mergers Commission: The British Broadcasting Corporation and Independent Television Publications Ltd 1985 Cmnd. 9614). The *Radio Times* is, therefore, also very attractive to advertisers.

The total trading results for *Radio Times* for the five years up to 1986 are as follows:

Year to 31 March (£ million)

	1982	1983	1984	1985	1986
Turnover ⁽¹⁾	41,5	45,2	43,7	52,6	56,3
Net profit before tax	3,6	5,6	2,8	2,2	1,3
Net profit before tax, as a percentage of turnover	8,7 %	12,4 %	6,4 %	4,2 %	2,2 %

⁽¹⁾ Net sales plus advertising revenue.

Source: BBC

(iii) *RTE*

- (18) The RTE weekly guide is *RTE Guide*, published at a price of £ 0,50 or £ Irl 0,40. It is sold in Ireland and also in Northern Ireland. The average weekly circulation of the *RTE Guide* in Ireland and Northern Ireland in 1986 was 130 000 and 6 500 respectively.

The total trading results for the *RTE Guide* for the five years up to September 1985 are as follows:

Year to September (£ Irl 1 000)

	1981	1982	1983	1984	1985
Turnover (Sales and Advertising)	1 706	2 195	2 853	3 099	3 916

II. LEGAL ASSESSMENT

A. Article 86

Undertakings

- (19) In publishing TV guides in return for commercial gain, including the sale of advertising space, ITP, BBC (or since May 1986 BBC Enterprises Ltd) and RTE are each engaged in an economic activity. As such they are undertakings within the meaning of Article 86. The applicability of the competition rules in such circumstances to public broadcasting organizations was confirmed by the court in Case 155/73 *Sacchi*⁽¹⁾.

As regards the BBC, while the TV guide publishing activities of this organization have been transferred to BBC Enterprises Ltd since May 1986, the latter is a wholly owned subsidiary of the organization and hence subject to its control. Moreover the BBC has retained certain rights in relation to copyright in BBC programme listings and still determines overall policy over the licensing of these listings. As such therefore the BBC and BBC Enterprises Ltd are to be considered as a single economic unit for the purposes of Article 86 in the present case.

⁽¹⁾ Case 155/73 *Sacchi* [1984] ECR 409.

Dominance

Relevant product market

- (20) The products to be taken into account are the advance weekly listings of ITP and BBC regional programme services and those of RTE and also the TV guides in which these listings are published (or broadcast).

For a publisher wishing in particular to produce a weekly comprehensive TV guide for distribution in the geographic area where the programmes to which these listings relate can be received, these listings constitute the essential raw materials for any such guide, in addition to other listings which are already available. The individual listings are not interchangeable with one another but instead are complementary to one another, as they concern different programmes. In the case of comprehensive guides therefore each of these listings are elements of a comprehensive whole.

Equally for the consumer wishing to obtain advance weekly information these listings are essential. In practice they are made available to the consumer through the publication (or broadcasting) of the TV guides. The advance weekly listings of the broadcasting organizations contained in the guides are not interchangeable as far as the consumer is concerned, for the same reason as for the publisher stated above.

Moreover weekly listings can be distinguished from daily listings. Daily listings are only to a limited extent substitutable for advance weekly listings in terms of the information they provide to consumers. The fact that many consumers are prepared to purchase one or more of the weekly TV guides published by ITP, BBC and RTE when information on a daily basis is available in newspapers demonstrates the demand for more advance information.

In addition this indicates the demand for this information to be contained in a single periodical, that is, a comprehensive guide. This is the experience of Magill, and other publishers who have sought to publish advance weekly listings. It is also the situation in other Member States where comprehensive weekly TV guides are available.

In this context the importance of comprehensive TV guides for advertisers should also be underlined, particularly in view of the potential demand for these guides.

The TV guide markets referred to above are separate from the market(s) for broadcasting services although the former derive their existence

from and may be considered as ancillary to the latter.

Relevant geographic market

- (21) The geographic market in the present case is determined by the common area within which the programmes to which the weekly listings relate can be received and where TV guides containing these listings are distributed. The RTE programme service is received in most, if not all, of Ireland and Northern Ireland. The BBC, ITV and Channel 4 programme services, or at least regional versions of these services, are also received in this area. Any comprehensive weekly TV guide therefore would contain at least the weekly listings for these regional services.

It follows for the purposes of the present case that the relevant geographical market is most if not all of Ireland and Northern Ireland, which are constitutes a substantial part of the common market for the purposes of Article 86.

Dominance

- (22) Irrespective of any intellectual property rights which they may be, or may at least claim to be, entitled to, broadcasting organizations have a factual monopoly over the production and first publication of their weekly listings. This is because programme listings are a by-product of the programme scheduling process, carried out and known only to the programme planners themselves. Moreover the listings only become marketable products when the schedules themselves are finalised (subject to last minute changes), a short time before transmission. As a result therefore it is not possible for third parties to produce reliable listings themselves for publication in their own TV guides. Instead they must obtain listings from the broadcasting organizations themselves, or from undertakings to which the rights in the listings have been granted, in this case ITP, BBC and RTE. Third parties are therefore in a position of economic dependence which is characteristic of the existence of a dominant position.

In addition, the factual monopoly held by the broadcasting organizations in relation to their individual programme listings is strengthened into a legal monopoly in so far as they claim protection under the copyright laws in the United Kingdom and/or Ireland, or parties to whom they may have transferred their claimed legal rights seek the same

protection. In the present case ITP (to whom independent television companies in the United Kingdom have assigned their rights), BBC and RTE have each sought protection under the copyright laws in question.

As a result no competition from third parties is permitted to exist on these markets.

On the basis of the above it is concluded that ITP, BBC and RTE each hold a dominant position within the meaning of Article 86.

Abuse

- (23) Article 86 expressly provides at (b) that an abuse is committed if an undertaking in a dominant position limits production or markets to the prejudice of consumers.

At present publishers have no means of producing a comprehensive TV guide for consumers in Ireland and Northern Ireland. Instead consumers wishing to obtain advance weekly programme information are required to purchase three separate guides, that is *TV Times*, *Radio Times* and *RTE Guide*, published by ITP, BBC and RTE, respectively, at a total weekly cost of £ Irl 1,54 or around £ Irl 77 annually. Even so the consumer in Ireland is not fully informed of all programme services available in his area as a number of cable and satellite channels are also distributed in various parts of the country. Although publishers are entitled to publish this information free of charge, it is not commercially viable to do this in the form of a weekly publication which does not also include the ITP, BBC and RTE weekly listings.

The impossibility for publishers to produce and publish a comprehensive TV guide results from the refusal of ITP, BBC and RTE to permit the publication of advance weekly listings as well as from the legal proceedings which ITP, BBC and RTE institute against those publishers not respecting the terms of the licences granted and those not granted licences at all. That is confirmed by the experience of Magill and the declared policies and practices of the parties themselves in this regard.

Thus, ITP, BBC and RTE prevent the meeting of a substantial potential demand existing on the market for comprehensive TV guides.

The demand results from the advantages offered by comprehensive TV guides, i.e. marking advance-weekly listings for a great number of programmes available to the consumer in a reasonably practical way and without having to pay a considerable amount of money.

As to the price itself, the situation in other Member States and the experience of Magill indicate that such comprehensive guides may become available at a reasonable price as far as consumers are concerned. In that respect the importance of the commercial potential of comprehensive TV guides for advertisers must be taken into account. This attraction is increased by the fact that, according to BBC estimates, TV guides like *Radio Times* are in fact read by many more than the number of persons who actually purchase them.

The potential of the market as above is also confirmed by the situation in several other Member States where comprehensive weekly TV guides are purchased by a large proportion of the national population, despite the fact that comprehensive daily TV guides also exist in newspapers in the same form as in Ireland and the United Kingdom.

The publication of the *Magill TV Guide*, albeit brief and of a limited print run, also clearly demonstrates the consumer demand for a comprehensive weekly TV guide in the area concerned.

ITP, BBC and RTE (individually or collectively) claim that their current policies and practices with regard to their advance weekly listings are motivated by the need to ensure comprehensive high-quality coverage of all their programmes, including those of minority and/or regional appeal, and those of cultural, historical and/or educational significance. The Commission is of the opinion that these policies and practices are not necessary to achieve these aims, but can instead be achieved by less restrictive means, if necessary by imposing terms to this effect upon publishers to whom they grant licences to publish their programme listings. The Commission does note, however, that none of the parties have considered it necessary to impose any limitations on the publication by third parties of daily (or two days') listings in order to achieve this purpose.

Indeed, having regard to the actual policies and practices of ITP, BBC and RTE, respectively, which are to supply publishers with their advance weekly listings but to limit by means of the terms of licences granted the reproduction of these listings to one or at most two days' listings at a time or to refuse licences altogether, the Commission takes the view that these policies and practices are unduly restrictive.

In the light of the above the Commission concludes that the current policies and practices of ITP, BBC and RTE in relation to their respective advance weekly listings are intended to protect and have the effect of protecting the position of their individual TV guides, which do not compete with one another or with any other guides.

In this connection the Commission considers that the three undertakings are perfectly capable, having regard to their present position and experience on the market, of playing a major role on the market for comprehensive weekly TV guides, if they so wish. Alternatively they may continue to publish individual TV guides on a market where comprehensive TV guides are available if they consider the consumer to be best served by their own guides, as they have stated. By limiting the scope of their licencing policies so as to prevent the production and sale of comprehensive TV guides, however, they restrict competition to the prejudice of consumers.

The Commission takes the view that in the circumstances described above undertakings in a dominant position, that is, in this case ITP, BBC and RTE, respectively, which use that position to prevent the introduction on to the market of a new product, that is, a comprehensive weekly TV guide, abuse that dominant position in a manner which is prohibited under Article 86.

The argument put forward by the parties in relation to copyright do not affect this conclusion. On the contrary the Commission considers that the practices and policies of ITP, BBC and RTE in the present case in fact use copyright as an instrument of the abuse, in a manner which falls outside the scope of the specific subject-matter of that intellectual property right.

A further element of the abuse is that, by virtue of their current policies and practices, ITP, BBC and RTE, which are each dominant on the market for their own listings, retain for themselves also the derivative market for weekly TV guides, a market upon which competition could otherwise take place, particularly in relation to weekly comprehensive guides.

Effect on trade between Member States

- (24) The abovementioned abuse has an effect on trade between Member States because a comprehensive TV guide containing the advance weekly listings of

ITP and BBC regional programmes and those of RTE would clearly be marketed in both Ireland and Northern Ireland, which would include cross-border trade in such a guide or guides. In addition trade in the advance weekly listings themselves would include that of a cross-frontier nature.

Article 90 (2)

- (25) Even if ITP, BBC and/or RTE are under a public or statutory duty to produce and publish their individual programme listings in the form of TV guides, the application of the competition rules in this case in no way obstructs the performance of that particular task within the meaning of Article 90 (2). Therefore that Article is not applicable in the present case.

B. Article 3 of Regulation 17

- (26) Article 3 (1) provides that where the Commission finds that there is infringement of Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.
- (27) The abuse in the present case is the limitation by the parties of the market for weekly TV guides in Ireland and Northern Ireland by limiting the scope of their licencing policies and practices so as to prevent the entry on to the market of a comprehensive TV guide or guides. It follows that the Commission's intervention should remedy the current situation by providing for at least the possibility of the publication of a comprehensive weekly TV guide. To achieve this end it is necessary for the regional ITP and BBC weekly programme listings and those of RTE to be made available to each other or to a third party or parties for publication in a comprehensive guide. To confine an order for the supply of these listings to ITP, BBC and RTE, *inter se*, would discriminate against third parties wishing to produce a comprehensive weekly guide in a manner which would not be compatible with Article 86. Accordingly the only remedy possible in the present case is to require ITP, BBC and RTE to supply each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and to permit reproduction of those listings by such parties. This requirement does not extend to information in addition to the listings themselves, as defined in this Decision. If they choose to supply and permit reproduction of the listings by means of licences, any royalties requested by ITP, BBC and RTE should be reasonable. Moreover, ITP, BBC and RTE may include in any licences granted to third parties such terms as are considered necessary to ensure comprehensive, high-quality coverage of all their programmes, including

those of minority and/or regional appeal, and those of cultural, historical and educational significance. The parties should therefore be required within two months from the date of notification of this Decision to submit proposals for approval by the Commission of the terms upon which they consider third parties should be permitted to publish the advance weekly programme listings which are the subject of this Decision.

high-quality coverage of all their programmes, including those of minority and/or regional appeal, and those of cultural, historical and educational significance. The parties are therefore required, within two months from the date of notification of this Decision, to submit proposals for approval by the Commission of the terms upon which they consider third parties should be permitted to publish the advance weekly programme listings which are the subject of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The policies and practices of ITP, BBC and RTE, respectively, in relation to their individual advance weekly programme listings, on programmes which may be received in Ireland and Northern Ireland, constitute infringements of Article 86 in so far as they prevent the publication and sale of comprehensive weekly TV guides in Ireland and Northern Ireland.

Article 2

ITP, BBC and RTE shall bring the infringements as mentioned in Article 1 to an end forthwith by supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties. This requirement does not extend to information in addition to the listings themselves, as defined in this Decision. If they choose to supply and permit reproduction of the listings by means of licences, any royalties requested by ITP, BBC and RTE should be reasonable. Moreover, ITP, BBC and RTE may include in any licences granted to third parties such terms as are considered necessary to ensure comprehensive

Article 3

This Decision is addressed to

Independent Television Publications Ltd,
247 Tottenham Court Road,
London W1P 0AU,
United Kingdom;

British Broadcasting Corporation,
BBC Broadcasting House,
London W1A 1AA,
United Kingdom;

BBC Enterprises Ltd,
Woodlands,
80 Wood Lane,
London W12 0TF,
United Kingdom;

Radio Telefis Eireann,
Dublin 4,
Ireland.

Done at Brussels, 21 December 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission