REVIEW OF THE TELEVISION WITHOUT FRONTIERS DIRECTIVE

RESPONSES SUBMITTED BY THE EUROPEAN ALLIANCE OF LISTENERS’ AND VIEWERS’ ASSOCIATIONS (EURALVA)

THEME 1: EVENTS OF MAJOR IMPORTANCE FOR SOCIETY

1. Do you think that article 3a of the Directive achieves its objectives and is still an appropriate tool to balance the different interests involved?

EURALVA shares the view of the European Commission, as stated in its Fourth Report on the Application of the TWF Directive, that in general the provision was working satisfactorily. We consider that Article 3a achieves its objectives and still is an appropriate tool to balance the different interests involved.

2. Binding Elements in Relation to the Measures Taken by Member States in View of the Principle of Mutual Recognition resulting from Article 3a(3).

EURALVA considers that the following elements of the measures taken by the listing Member State should be recognised by the other Member States:

- the listed events (i.e. the events which are designated)
- the modalities of the broadcast (e.g. whole or partial live coverage)
- the definition of ‘a substantial part of the public’

EURALVA considers that the implementation of these binding elements will not lead to any practical problems, as they are compatible with the provisions of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, since article 3(2)(d) of that directive only requires Member States to provide broadcasters with the exclusive right to authorise or prohibit the fixations of their broadcasts, by whatever means they are transmitted.

3. Reference Dates for (Member States and Rights Holders) in Relation to the Obligation of Enforcement of Article 3a.

EURALVA considers that the application of this provision will not lead to practical problems.

4. Do you think that the adoption of ‘guiding principles’ or more detailed provisions, providing more specific information for Member States on the choice and implementation of national measures, would increase legal security for all parties concerned?

EURALVA considers that each Member State should be required to consult members of the public - or alternatively television viewers - before it draws up its
list of designated events. Moreover, that consultation process should allow television viewers to nominate specific events for potential inclusion on the list.

EURALVA considers that while the providers of rights to qualifying services should continue to be entitled to equitable remuneration, it is not necessary to define at EU level, specific arbitration or mediation procedures.

5. Do you think it is necessary to change the procedure provided in article 3a? In particular, do you think that it would increase legal certainty if the Directive provided for a Commission decision on the compatibility of the proposed measures with Community law?

On balance, EURALVA considers that it would not increase legal certainty if the Directive provided for a Commission decision, since the final decision would always be taken by the European Court of Justice. However, this would not prevent the Commission from issuing a ‘note of guidance’ to a Member State, when one of its proposals to restrict the commercial exploitation of the broadcast of an event which it deemed to be of major importance for society looked as though it might possibly be incompatible with Community law.

THEME 2: PROMOTION OF CULTURAL DIVERSITY AND COMPETITIVENESS IN THE EUROPEAN PROGRAMME INDUSTRY

I Broadcasting of a majority proportion of European Works (Articles 4 and 6)

I(1) In your opinion, do these provisions seem appropriate with regard to the aims pursued? Is there a problem with the interpretation or application of Article 4 in relation to promoting the distribution and production of European works?

Quite frankly, the provisions of Article 4 are not working as intended. The original wording was a diplomatic compromise which allowed the Governments of different Member States to interpret the same words in a radically different manner. As the fifth communication from the Commission to the Council and the Parliament on the application of articles 4 and 5 of Directive 89/552/EEC clearly shows that in 1999, 31.42 per cent. of EU channels failed to comply with the provisions of article 4, and although the proportion not complying in 2000 fell slightly, 27.5 per cent. of channels were still effectively ignoring the provisions of Article 4. This means that in 2000, only in Finland and Greece did all the channels achieve the minimum European quota.

In contrast, during the same year, 52 channels registered in the United Kingdom, 22 channels registered in Italy, and 10 channels registered in Sweden, all failed to meet the 50 per cent. quota of European programmes.

Moreover, there is a major problem with the interpretation or application of the words ‘where practicable’ in Article 4. The reasons for non-practicability cited by the Member States involved are, quite frankly, pathetic. All the channels which claim to have found it impracticable to meet the 50 per cent. European quota knew the provisions of the TWF Directive when they decided to establish
their television channel in an EU Member State, and a decision to fulfil this requirement should have been part of their original business plan.

The result has been that the diet of European programmes which has been available to European viewers has been smaller than it should have been. Frequently, as the Commission notes in its Communication to the Council and the Parliament, many channels which are subsidiaries of non-EU companies make systematic use of their own catalogue material and rarely show European works.

2. In your opinion, is there a problem with the interpretation or application of Article 6 in relation to the definition of European works for the purposes of Chapter III? In particular is there a need to consider a more harmonised definition at Community level of the concept of European works, or alternatively, coordination or provision for mutual recognition of definitions by the Member States? If so, under what criteria?

In EURALVA’s view, the present definition of a European programme is too broad, in that it is possible to make a programme which is legally European, but which is indistinguishable from a non-European programme. In EURALVA’s opinion the definition should be narrowed to require given proportions of performers, and of key creative personnel (e.g. producer, screen writer, director, art director, composer) to be both nationals of, and resident in, an EU Member State. A suggested proportion would be 80 per cent. Beyond this, we do not consider that there should be a more harmonised definition at Community level.

3. Any other aspects not raised in the preceding questions
EURALVA considers that to adopt a screen quota is the wrong manner in which to promote the distribution and production of European works. In our view, the Community should establish an investment quota, whereby every channel is required to invest a given proportion (say 50 per cent.) of its investment budget for the acquisition and production of programmes into European programmes. This would ensure that the programmes in which it invested would be both European and those that it judged to be potentially commercially successful. Naturally, it would also be necessary to put in place measures that ensured that the internal transfer pricing of programme licensing fees by subsidiaries of non-EU companies did not distort the balance of costs between ‘externally-purchased’ and ‘internally-produced’ programmes.

II European works by independent producers (Article 5)

1. In your opinion, are these provisions appropriate with regard to the aims pursued? Do you consider that there is a problem with the interpretation or application of Article 5 by the Member States in relation to promoting the distribution and production of European works by independent producers (including recent works) by television broadcasters? Do surveillance and monitoring at national level appear to you to be satisfactory?

In the opinion of EURALVA, the concept of an ‘independent producer’ is an outdated one which dates back to 1989 when there was far less inter-channel competition than exists today. Moreover, it has little effect upon the quality,
range or diversity of programmes broadcast to viewers, since ‘independence’ from the broadcaster fails to distinguish between ‘economic independence’ and ‘creative independence’. The former can often means that the television broadcaster can increase the financial risk which the independent producer has to accept, whereas the latter may (but frequently does not) mean that the producer has a greater degree of creative freedom than if s/he were making an in-house production. The balance between the two forms of ‘independence’ is not spelt out in the directive, but is invariably set down in the contract between the television broadcaster and the independent producer.

In the opinion of EURALVA therefore, this provision should be removed from the Directive as it has ceased to have any real effect on the quality, range or diversity of programmes available to viewers in a multi-channel age. Moreover, the current definitions of ‘independent’ (which vary between Member States) all allow a European broadcaster, which is a subsidiary of a non-EU parent company to claim classification as a non-EU production company, and to claim classification as an ‘independent company’.

2. It follows that there is no need to harmonise or co-ordinate at Community level the definition of the concept of independent production or producer.

III. Media Chronology (Article 7)

1. Do the provisions of Article 7 appear adequate to you with regard to the aims pursued?

EURALVA considers that Article 7 of the Directive should be abolished. The phrase ‘unless otherwise agreed between its rights holder and the broadcaster’ in Article 7, effectively nullifies the legislative attempt to regulate the chronology of the release of a programme across different media. Moreover, in most Member States contract law takes precedence over statute law.

THEME 3: PROTECTION OF GENERAL INTERESTS IN TELEVISION ADVERTISING, SPONSORSHIP, T ELESHOPPING AND SELF-PROMOTION

EURALVA considers that Chapter IV of the Directive, which establishes minimum standards for television advertising, surreptitious advertising, sponsorship and teleshopping, highlights the contradiction between television as a medium which is designed to deliver programmes to viewers, and television as a medium which delivers the eyes and ears of the viewers to advertisers, sponsors or televi sual outlets of goods which are available for sale. Moreover, surreptitious advertising is a practice which clandestinely restricts or biases the content of an apparently non-commercial television programme in a manner that is designed to mislead viewers about the relationship between the presenter and/or a character in the programme, and certain identifiable goods or services which are deployed within the narrative of that programme.
There is clearly a balance to be struck between the interest of viewers and those of advertisers, sponsors, surreptitious advertisers and teleshops and those of viewers. In the considered judgment of EURALVA, the balance has swung too far in away from that of the viewer.

Do the provisions of article 1(c)-(f) seem appropriate to the aims pursued? Are there problems with the interpretation of these concepts with regard to recent technological and market developments?

EURALVA considers that: The concepts and definitions of ‘television advertising’, ‘surreptitious advertising’, ‘sponsorship’ and ‘teleshopping’ in Article 1 (c)-(f) should be broadened to take account of new technological and market developments.

Do the provisions of Articles 12 and 16 seem appropriate with regard to the aims pursued? Are there problems with the interpretation of these concepts with regard to recent technological and market developments?

The general standards (Article 12) and those for the attention of minors (Article 16) are broadly correct, although in the latter case, EURALVA believes that all Member States should have a common definition of the age below which a young person is a ‘minor’.

Do the provisions of Article 10 enabling the separation of the editorial content of the programme from the different forms of advertising seem appropriate with regard to the aims pursued? Are there problems with interpretation and/or implementation with regard to recent technological and market developments. If so, what solutions would you propose?

The form and presentation of television advertising and teleshopping (Article 10) need to be more clearly delineated from those for programmes, so that it is always clear to the viewer whether they are watching a programme or an advertisement, a sponsored communication or a (possibly clandestine) advertisement.

Do the provisions relating to advertising and teleshopping spots between (principle) and during programmes (limited derogation) seem appropriate to you with regard to the aims pursued? Are there problems with interpretation and/or implementation with regard to recent technological and market developments (particularly with regard to new advertising techniques)? If so what solutions would you propose?

Article 11 should be amended to require that, in general, advertising and teleshopping spots should be restricted to spots between programmes. Where an advert or a teleshopping spot is inserted during a programme (limited derogation), broadcasters should be required to warn viewers in advance of this fact. This warning should be broadcast (in both sound and vision) before the start of the programme, in all on-screen trailers for the programme, and in any electronic or printed off-screen advertising for the programme.
Do the provisions of Articles 13, 14 and 15 seem appropriate to you with regard to the aims pursued? Are there in your opinion problems with the interpretation of these concepts with regard to new advertising techniques?

EURALVA considers that the current prohibitions on the advertisement of all tobacco products, and on medicines available on prescription (Articles 13-15) should be maintained. Moreover, EURALVA considers that advertisements for alcoholic products directed at minors should be extended to cover all products which contain even a minimum amount of alcohol.

Do the problems of Article 17 seem appropriate to you? Are there in your opinion problems with the interpretation of these concepts with regard to recent technological and market developments?

EURALVA considers that the provisions of Article 17 (requirements linked to sponsored television programmes etc.) should be maintained.

New Advertising Techniques

Is split screen advertising and interactive advertising compatible with the provisions of the Directive, and in particular with Article 10, which lays down that television advertising and teleshopping must be easily identified?

EURALVA considers that the following advertising techniques should be banned in all Member States as they are ruining the culture of advertising-funded television:
separate/split-screen advertising;
interactive advertising; and
virtual advertising.

Do the provisions of Article 20 which allows a derogation from Article 11(2)-(5) and from Articles 18 and 18a for broadcast intended only for the national territory seem appropriate?

EURALVA considers that the possibilities, which are allowed in Article 20 for broadcasts which are intended only for the national territory, for derogation from Article 11(2-5) and from Articles 18 and 18a should be abolished.

THEME 4: PROTECTION OF MINORS AND PUBLIC ORDER - RIGHT OF REPLY

Has there been any problem in applying the distinction in Article 22 between programmes which might seriously impair the physical, mental or moral development
of minors, in particular programmes that involve pornography or gratuitous violence, which should not be broadcast at all; and programmes which are likely to impair the physical moral or mental development of minors, which may be broadcast provided that minors in the area of transmission will not normally see such broadcasts?

EURALVA considers that this distinction should be reviewed, notably in connection with the arrival of digital television. In EURALVA’s opinion there should be an outright ban on programmes that incite or validate violent behaviour against individuals or mammalian animals on all non-encrypted television services which are delivered free to air.

Moreover, co-regulation or self-regulation should only be developed in this area provided that in all cases, at the start of the programme and in any on-screen material trailing the programme, viewers are given due warning of the potential danger of the programme to minors. EURALVA also considers that the Directive should be revised to require all Member States to require any television broadcasters which they license (whether available on a free-to-air or a subscription basis) to provide viewers with a minimum set of warnings along the lines indicated above.

Prohibition of programmes containing incitement to hatred.

EURALVA is not aware of any problems in this area with European Union licensed stations. However, recent developments in the global cultural environment indicate that the European Union should continue to be cautious. EURALVA therefore considers that Member States should not be allowed to introduce co-regulation or self-regulation in this area. Moreover, bearing in mind the Sixth Mission Statement for Public Service Broadcasters included in the 4th Ministerial Resolution of the Council of Ministers of the Council of Europe, which was agreed in Prague in December 1994, EURALVA considers that all Member States should be required to encourage every television station that they license to reflect in its programme policies that reflect “the different philosophical ideas and religious beliefs in society with the aim of strengthening mutual understanding and tolerance, and of promoting community relations in pluri-ethnic and multi-cultural societies.”

Derogation from the obligation to ensure freedom of reception allowed under Articles 22 and 22a.

EURALVA considers that all viewers should be allowed to watch any programme or service which is licensed by any EU Member State, and that the provision allowing derogation from the obligation to ensure freedom of reception should be removed from the directive.

Right of Reply

There are a number of problems for viewers wanting to exercise a right of reply, which were spelt out in 1996 in Tolley’s Communications Law of which the Commission seems unaware. (Vincent Porter and Martin Gabriel, ‘A Right too far: ten obstacles to the exercise of a right to reply to transfrontier television broadcasts’, Tolley’s Communications Law 1(1) (1996), 2-7.)
The authors concluded that the right to fair treatment, as enacted in British law, was the only right that could normally be exercised by an ordinary viewer. In many Member States, jurisdictional or procedural obstacles rendered the exercise of a right of reply all but impossible for an aggrieved viewer who did not have at her/his immediate disposal the resources of a large international law firm.

Obstacles to the exercise of the right of reply by an aggrieved viewer, which the authors identified, included:

- the difficulty in ascertaining in which jurisdiction the right of reply to a transfrontier broadcast must be exercised;
- the different jurisdictional restrictions on who may exercise a right of reply;
- the several jurisdictional provisions on precisely what constitutes an offending broadcast;
- differences as to precisely to whom the aggrieved viewer should address a claim for a right of reply;
- the varying (and often very short) time limits within which the aggrieved viewer has to file a right of reply;
- the precise format of the letter of complaint
- the degree of detail which has to be provided in identifying the allegedly offending broadcast;
- the widely variable justification required for the exercise of a right of reply, the precise format of the reply itself; and
- the legal procedures by which an aggrieved viewer can appeal against a refusal by a broadcaster to allow the exercise of a right of reply.

For all these reasons, EURALVA considers that Article 23 of the Directive should provide for a standard EU-wide procedure, probably analogous to that provided in the United Kingdom.

THEME 5: APPLICATION (RELATED ASPECTS)

Do the provisions in Article 2 for determining the competent Member State seem appropriate to you with regard to recent technological and market developments?

EURALVA has no view as to whether the provisions for determining the appropriate Member State are appropriate. What does concern it however, is the ease with which the viewer can determine the Member State in which the broadcaster is licensed. Broadcasting is becoming increasingly transnational in character. For example, the Quatar-base station Al-Jazeera is licensed in the EU by the CSA in Paris and broadcast by satellite to the UK. The problem is likely to become more complex once the ten new candidate countries are full members of the EU.

EURALVA noted above, the difficulty for an aggrieved viewer in identifying in which jurisdiction s/he had to try to exercise a right of reply. EURALVA therefore considers that every channel should carry a visual or aural signal that identifies in which Member State the channel is registered, the principal address
of the channel in that country, and an e-mail address to which an aggrieved viewer can address any complaints.

*Do you think the Directive defines an appropriate set of tasks for the Contact Committee?*

EURALVA supports the continuation of a Contact Committee and believes it is especially important at a time of digitalisation and of moves towards analogue switch-off and, moreover, when a number of television stations licensed by Member States appear already to be ignoring the provisions of the Directive.

EURALVA also considers it is important that bodies representing the interests of viewers should be represented on the Contact Committee.

**THEME 6: ACCESS TO SHORT EXTRACTS OF EVENTS SUBJECT TO EXCLUSIVE RIGHTS**

*Do you think that there is a lack of consistency and that the absence of a harmonised right to access newsworthy events restricts the free movement of independent news media, and especially news agency services, since gaining access to an event in one Member State does not necessarily mean that news coverage of that event may be included in the service being sold in other Member States?*

EURALVA considers that there is a lack of consistency in the right of access by viewers to events of public interest. Moreover, although Article 5(3)(c) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society allows each Member State to impose exceptions and limitations on the right to communicate to the public of ‘broadcasts works or other subject-matter of the same character ... in connection with the reporting of current events, to the extent justified by the informative purpose and as long as the source, including the author’s name, is indicated, unless this turns out to be impossible’ each Member State has implemented this exception and limitation in a different manner.

Since the fundamental principle of the TWF Directive is for each Member State to ensure the reception of a broadcast licensed in another Member State, the failure of a Member State to recognise in its domestic legislation, any exception or limitation allowed by another Member State in a properly licensed transfrontier broadcast, is a de facto failure to implement the fundamental provision of the TWF Directive.

EURALVA therefore considers that there should either be a harmonised right to access newsworthy events, or that the TWF Directive should specifically require each Member State to exempt from protection in its domestic law any exception of limitation legitimately exercised by a broadcaster in the EU state in which it was originally licensed (regardless of whether or not it specifically referred to the right of access to newsworthy events).
If a harmonised right is deemed to be necessary, then it should be at least 90 seconds per event, for use in any programme, and without further financial compensation.

*Do you think that a right to short reports should be established by legislation or by means of co- and/or self-regulation?*

EURALVA considers that, by definition, a right to receive short reports must be established by legislation. A solution that emerges by means of co-regulation and/or self-regulation affords no legal right to the viewer, and therefore fails to enshrine in law the citizen’s right to receive information and ideas, as guaranteed by article 10 of the European Convention on Human Rights.

*14th July 2003*

*Submitted by Mrs Jocelyn Hay MBE, Chairman, on behalf of:*

The European Alliance of Listeners’ & Viewers’ Associations (EURALVA)

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