EUROPEAN COMMISSION PUBLIC CONSULTATION ON THE REVIEW OF THE "TELEVISION WITHOUT FRONTIERS" DIRECTIVE

ITV RESPONSE

JULY 2003
SECTION 1 - Summary and Recommendations

1. ITV welcomes the opportunity to respond to the European Commission's consultation on the future of the Television Without Frontiers (TWF) Directive. This response reflects the collective view of the fifteen regional ITV companies that make up the ITV Network, the UK's largest commercial broadcasting network.

2. This response sets out ITV's views on the future of the Directive and its inter-relationship with other community instruments. It also comments in detail on each of the Commission's six discussion themes – Listed Events; quotas; advertising; protection of minors; application and short news extracts.

The Future of the Directive

3. The revised Directive will not come into force before 2006 and is likely to stay in place until at least 2010. It will therefore need to be 'future proof'. Digital television calls into question many of the assumptions underpinning media regulation, not least because it creates more 'empowered' consumers. In ITV's view, this necessitates a move away from detailed rules at EU level towards a more principles-based approach.

4. The review process should be conducted against the backdrop of the Commission's five principles for good regulation – namely that regulation must be the minimum necessary to achieve clearly-defined policy goals, guaranteeing legal certainty and technological neutrality and enforced as locally as possible.

5. The Directive should also clearly articulate its core policy objectives in a specific article. Its main objective is clear – to ensure the free movement of television services in the internal market. However, secondary objectives, be they economic or cultural, need to be clarified. In future it also needs to be clear which policy objectives underpin which provisions.

6. The issue of the scope of the Directive needs to be addressed as a priority. However, ITV does not consider that content convergence means that TWF should be extended to the Internet, as existing EU instruments already adequately regulate this medium at present.

7. In the absence of a 'Content Directive', there is still much that can be done to clarify and improve the regulatory framework for audiovisual content at EU level:
   - the co-ordination between the TV Directive and related policy initiatives within the Commission should be improved;
   - the interface between content services and 'information society services' should be clarified;
   - the coherence between content rules and those covering the delivery of content should be improved, e.g. in the case of must carry rules;
   - the Commission should consider the creation of a 'Content Package', made up of the TWF Directive and related dossiers.

Conclusions and Recommendations on the Commission's work themes
8. **Listed Events.** ITV strongly supports the retention of Article 3a. If the 2002 World Cup had not been listed by the UK Government, it is very likely that the world’s most-watched sporting spectacle would not have been available on free TV in the UK. The Commission should consider issuing guidance in two areas; mutual recognition of national lists and what constitutes a ‘fair price’ for a listed event. It should, however, avoid introducing a harmonised definition of what is a ‘substantial proportion of the public’.

9. **Quotas.** The UK regulator imposes stricter European and independent production quotas (65% and 25% respectively) on our main public service channel, ITV1, than are imposed by Articles 4 & 5 of TWF. We remain unconvinced of the case for harmonising quotas at EU level and request the Commission to undertake a thorough review of the rationale for these provisions before proposing their retention. It is commercial imperative, not legal obligation that drives ITV’s investment in UK content – viewers simply prefer to watch home-grown programmes. It is also in ITV’s best interests to commission the best programmes for its channels, regardless of production source.

10. We would be strongly opposed to any tightening of the quotas regime, e.g. by imposing a sub-quota for non-national works or applying the quotas to new services. We also do not think that a harmonised definition of ‘independence’ is desirable or workable. We would, however, like to see the ‘assiette’ for the European production quota widened to include news and sports programmes.

11. **Advertising.** Revision of the Directive’s advertising rules is a key priority for Europe’s commercial broadcasters and ITV welcomes the constructive approach taken thus far by the Commission. The two studies on protection of minors in advertising and the use of new advertising techniques have stood out in terms of quality.

12. ITV thoroughly supports the retention of advertising rules guaranteeing qualitative standards and a high level of consumer protection in the areas of children and alcohol. We believe that these provisions are appropriate and will remain valid in the digital era, as will the principle of ensuring that all viewers can identify advertising content at all times.

13. By contrast, we can see no justification for the retention of rules on insertion of advertising, which we see as unnecessary micro-management and ultimately damaging to the editorial integrity of programming.

14. On new forms of advertising, we believe that the establishment of viable new revenue streams is fundamental to the future sustainability of commercial television in Europe. ITV is investing heavily in the development of new techniques, particularly interactivity, and we would welcome an Interpretative Communication from the Commission that recognised the legality of these new techniques and offered guidance as to which of the Directive’s regulatory principles should be applied to their use.

15. **Protection of minors.** We thoroughly support the retention of TWF’s rules in this area. It is vitally important that broadcasters retain high standards with regard to the protection of minors in programming. Children are a special case and maintaining viewer trust is crucial to our success. The ITC’s Family Viewing Policy and Watershed rule are well known to UK viewers and strictly adhered to by broadcasters.
16. However, ITV does not believe that a harmonised EU approach to rating content is realistic or necessary at this point. Cultural differences remain difficult to overcome and existing rules appear not to be causing cross-border confusion.

17. **Short News Reporting.** ITV does not believe that the TWF Directive should be amended to include a right of access to short extracts subject to exclusive rights. We do not consider that sufficient evidence has been produced by the advocates of this proposal that viewers’ fundamental right to receive information has been compromised by the current arrangements in place across the EU. Where there are no specific news access arrangements in a Member State and access to footage cannot be negotiated privately, the Copyright Directive may offer a solution through its ‘fair dealing’ provisions. If the non-mandatory nature of this provision is considered inadequate, the EU should logically seek to amend the Copyright Directive, not the TWF Directive.
SECTION 2 – Introduction

18. ITV welcomes the opportunity to respond to the European Commission’s consultation on the future of the Television Without Frontiers (TWF) Directive.

19. This response reflects the collective view of the fifteen regional ITV companies that make up the ITV Network. We are the UK’s largest commercial broadcasting network. Our main free to air channel, ITV1, has extensive public service obligations to deliver a wide range of programming and regional broadcasting commitments. ITV1 spends approximately £1 billion (circa 1.45bn) on programming annually, which are made by both ITV companies and independent production companies. This figure constitutes the highest investment in programming made by any single commercially-funded channel in Europe.

20. ITV is committed to digital broadcasting. ITV1 is available on all three major digital platforms in the UK (satellite, cable & DTT), as is ITV2, its digital-only sister channel launched in 1998, and ITV News, a new 24 hour news service.

21. The European Commission’s consultation process has so far been transparent and wide-ranging. The decision to postpone an immediate revision of the Directive last year was, on balance, the correct one given the vital importance of getting the Directive right for the digital age ‘first time around’. The result, however, is that proposals for revision are unlikely to be adopted before 2006 at the earliest. This further emphasises the need for a ‘future-proof’ Directive, as it is likely to stay in place until at least 2010.

22. The revised Directive will therefore need to be one that reflects the state of the European market in 2010. In 2003, we already have over 1500 channels (compared with 47 in 1989 when the Directive was first adopted), significant levels of digital penetration and a wide range of business models, from free to air, to pay TV, to pay per view. In 2010, even if the linear analogue viewer is not quite extinct, he soon will be. This will have far-reaching implications for all members of the broadcasting ecology - broadcasters, advertisers, producers and rightsholders alike.

23. It will also have far-reaching implications for what is likely to be the appropriate level of EU regulation. Digital TV calls into question many of the assumptions underpinning media regulation, not least because it creates more ‘empowered’ consumers. We would argue that this necessitates a move away from prescriptive content rules at EU level towards, where appropriate, greater reliance on high level regulatory principles that can be interpreted and enforced as locally as possible to operators and viewers.

24. This response sets out ITV’s views on the possible future shape of TWF, its core principles and how it should inter-relate with other Community instruments. It then goes on to comment on each of the Commission’s six detailed discussion themes in turn. This response has also been informed by the constructive work of a ‘Policy Focus Group’, which was set up by the UK Government and the Independent Television Commission (ITC) to discuss the review of the Directive with the broadcasting industry, and in which ITV has actively participated.
SECTION 3 - The Future Shape of the Directive

Core Principles

25. The revision of the Directive should proceed on the basis of the Commission’s principles of good regulation for our sector, set out in 1999 in the Commission’s Guidelines on Audiovisual Policy and reaffirmed in the Communications Package of 2001. According to these principles, regulation must be the minimum necessary to achieve a clearly-defined policy goal, guaranteeing legal certainty and technological neutrality and enforced as locally as possible to the operators concerned.

26. These principles should appear on the face of the Directive, just as they do in the case of the Communications Package. This approach would mirror that taken by the UK Government in the new Communications Bill, which places an obligation on the single regulator Ofcom to have regard to similar principles of good regulation.

Clear Policy Objectives

27. In ITV’s view the first priority in the review process should be to clearly define the Directive’s policy objectives. The primary objective is clearly an Internal Market one – to ensure the free flow of television services in the EU. There are also several ‘secondary’ objectives cited in the current recitals of the directive, although it is not clear whether there is any hierarchy attached to them, or sometimes which objectives underpin which provisions. The most obvious example of this is Article 4 & 5, where the European and independent production quotas appear to be underpinned by Internal Market, cultural and economic objectives.

28. We would therefore advocate the inclusion of a specific article in the Directive which clearly sets out its core objectives.

Scope

29. This is a crucial issue. Whilst scope is not explicitly addressed in any of the Commission’s discussion documents, it is hard to assess the appropriate level of content regulation for such areas as advertising or consumer protection in isolation from the question of how far this regulation should extend. This was certainly the evidence of the hearings where there were several unprompted debates about scope.

30. The Commissioner herself has already posed the key question in several earlier speeches: “Does digital technology mean that rather than thinking in terms of freedom to provide television services, we should think in terms of a more liberal regime governing freedom to provide electronic content services?”

31. The answer is yes. We do not yet have an entirely ‘converged’ content industry in Europe. Content delivery is certainly becoming far more integrated (e.g. the TV programme with interactive enhancements and a dedicated website) and there are also examples of the same content flowing through television, Internet and mobile phones, but this is still very much the exception, not the rule. However, by 2006, and certainly by 2010, this is likely to
be very different. With that in mind, it is logical to conclude that consumer expectations of each medium are likely to evolve significantly.

32. This underlines the need for a coherent approach to regulating content, but it does not necessarily make the case for the extension of the TV Directive to cover the Internet. In our view coherence can be delivered by ensuring that similar services are regulated in a similar way – for example, streamed content on the ITV website should not be regulated differently to streamed content on British Telecom's website just because ITV is also a broadcaster. There would be a danger of 'traditional' broadcasters being discriminated against in this way if the Directive's scope was extended.

33. We also do not consider that there is currently a need for an extra layer of regulation for the Internet given that the E-Commerce Directive already imposes minimum standards on providers of information society services in the field of consumer protection. For example, it contains a provision on the 'identification' of commercial communications that largely mirrors Article 10 of TWF. These provisions are also supplemented by self-regulatory mechanisms such as the Internet Watch Foundation which works with national authorities to remove illegal material from the web.

34. The UK Government has taken a similar view during the passage of the Communications Bill and has refrained from statutory regulation of the Internet. However, it has sought to clarify what services are effectively seen as broadcasting for the purposes of regulation by developing the concept of ‘television licensable content services’. This will mean, for example, that whilst all interactive enhancements to a programme will be seen as broadcasting, content related to that same programme made available on a website (whether streamed or not) would not be licensed as broadcasting.

35. We consider this a broadly sensible approach. Importantly, within the general term 'broadcasting' there is scope to apply differing levels of regulation according to consumer expectation. For example, traditional linear television will be more heavily regulated than interactive television where viewers have far more control over the content they access. Ofcom will also have the ability to revisit what is and what is not licensable on this basis in response to developing consumer expectations, as well as feedback from operators on the functioning of the regime.

**Clarifying the Audiovisual Regulatory Framework at EU level**

36. Whilst we therefore do not consider that a 'Content Directive' is necessary at this point, there are certain short term and longer term steps the Commission could take that would do much to clarify and improve the regulatory framework for audiovisual content at EU level.

i. Improve the co-ordination between the TV Directive and related policy initiatives within the Commission.

ITV is concerned at the growing number of horizontal and vertical European Commission initiatives that appear to cast doubt over the autonomy of the sector-specific rules set down in the TWF Directive. For example, despite several months' negotiation, it is still unclear how TWF will relate to both the Unfair Commercial Practices Directive (DG Sanco) and the Sales Promotion Regulation (DG Markt). Most recently, there has been confusion over the
potential implications of a proposed DG Employment Directive on gender equality for the broadcasting and advertising sectors.

Given the scope of the European Commission’s activity, there will always be potential for overlap between policy areas. However, sector specific rules should be clearly delineated from one another whilst their inter-relationship with horizontal measures should at least be clear to all stakeholders.

ii. Clarify the interface between content services and ‘information society services’ at EU level.

Directive 98/34 defines information society services as ‘any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’. Does the Commission understand this definition to cover interactive television services or not?

DG Information Society is responsible for the issue of interoperability in digital television. However, the focus of its work appears to be the extent to which barriers exist in Europe to the provision of information society services. Applications Programming Interfaces (APIS) are used to deliver all types of interactivity, regardless of payment. ITV, for example, provides free-to-view interactive enhancements to programming as well as interactive services that require payment. The definition of information society services would suggest that only the latter service should be considered in the debate about interoperability. There is clearly little logic to this.

iii. Improve the coherence between content rules and those covering the delivery of content

This has parallels with ii. but specifically relates to the blurred line between content and infrastructure regulation drawn by the recently adopted Communications Package. This package of directives dealt with issues that were both content and infrastructure-based, e.g. must carry; access to broadcasting transmission, conditional access services and electronic programme guides; and interoperability. All of these issues are underpinned by broadcasting public policy objectives at the Member State level (such as universal access to public service broadcasting or digital switchover) yet are the (almost) sole domain of DG Information Society, a Commission department that has no competence over content issues.

The example of must carry is particularly instructive. Having been dealt with by DG Information Society through the Universal Service Directive, we understand it is soon to be the subject of a draft Communication from DG Internal Market. It may also be worth recalling at this point that in a Declaration of 12th December 2001, the Commission stated that it would ‘consider, in the forthcoming review of the “Television Without Frontiers” Directive, the availability of public service and other specified broadcasts in an evolving market for electronic communications services.’

1 See DG Information Society’s public consultation on the Commission Staff Working Document on ‘barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications’, January 2003
Such a fragmented approach cannot lead to good law-making. There is an urgent need for more ‘joined-up governance’ from the Commission on issues such as this. From 2004 the UK will have a single regulator for the whole communications industry. Ofcom will have to weigh up competing policy objectives (e.g. the promotion of competition vs the safeguarding of the rights of the citizen) to form a single view on all issues. In our view the Commission must find a way of doing the same. Improved co-ordination between the various Commission services would be a good start. In addition, should the Member States deem it appropriate to set up a European Regulators Group for content, an idea on which the Commission has invited views, it should ensure that this group works in tandem with its equivalent for infrastructure set up under the Communications Package on all matters where there are overlapping competences.

iv. The creation of a ‘Content Package’

We support the idea that has been discussed in some fora of the creation of a ‘Content Package’ that would co-ordinate the TWF Directive with closely-related dossiers, such as the Recommendation on the Protection of Minors and the Media Programme, in order that they be discussed and amended at the same time. This package might also clarify how its audio-visual components relate to other Directives such as E-Commerce or Unfair Commercial Practices (if adopted) in order that both operators and consumers are clear about the regulatory framework for content.
SECTION 4 – Specific Comments on the Commissions Work Themes

Events of Major Importance for Society

37. ITV strongly supports the retention of Article 3a. The UK’s listed events regime has worked well. It aims to uphold the spirit of the directive, namely to ensure that most TV viewers are able to enjoy coverage of events of ‘major importance to society, such as the Olympic Games and the Football World Cup, on free television, whilst maintaining an important balance between the rights of free to air and Pay TV broadcasters.

38. There are those who doubt the need for listed events legislation. However, the controversy surrounding the sale of the TV rights to last year’s Football World Cup in Japan and South Korea proved beyond doubt that listed events rules are needed to protect the public. If the World Cup had not been listed by the UK Government, it is very likely that the world’s most-watched sporting spectacle would not have been available on free TV. The rightsholder, Kirch Media, would simply have sold the tournament to the highest bidder, likely to have been a Pay TV company.

39. The Commission’s discussion paper and the subsequent public hearing raised several important issues with regard to the application and overseeing of listed events rules. They can be summarised under the following headings, i. Commission ‘guidance’; ii. harmonising measures and iii. verification of national lists.

40. Commission guidance. This may be useful for Article 3a(3) which covers the application of one Member State’s list by another Member State (mutual recognition), particularly in light of the TV Danmark case.\footnote{Regina v ITC, 25th July 2001. UKHL 42}

41. The TV Danmark case also gave an important assessment of the pricing of listed events. The House of Lords judgement made it clear that it is not enough simply to offer ‘qualifying’ broadcasters the opportunity to acquire the rights on fair and reasonable terms, rather that they have to be offered the rights on the basis of what that category of broadcaster ‘could reasonably be expected to pay for them’. Without clarity on this issue, the core objective of listed events rules (to ensure that virtually all citizens can view events of major importance on free TV) is easily circumvented. The Commission might consider how this can be avoided by issuing guidance on price. We would suggest that the detailed reasoning given in the TV Danmark case may be a useful starting point for these deliberations. However, any guidance does not require the establishment of formal arbitration or mediation procedures at EU level. Ultimately, the price paid will depend on the prevailing conditions of each national market. It is therefore national authorities that will be best placed to apply any Commission guidance.

42. Harmonising measures. Whilst the Commission’s role in overseeing the functioning of the listed events regime is vital, its competence in terms of the content of national lists is rightly very limited. Only Member States are in a position to decide what constitutes an event of major importance for their own society. Similarly, ITV considers that the decision as to what constitutes a ‘substantial proportion of the public’ should remain a Member State competence. For historical and cultural reasons, ‘Free TV’ means different things in different countries. In the UK, the main free to air broadcasters are required to be
universally available to viewers. The coverage threshold for a ‘qualifying broadcaster’ under listed events rules is therefore correspondingly high at 95%. In other EU countries, e.g. Germany, it is far lower. Any harmonised definition of ‘substantial proportion’ is likely to be at a lower level than 95%. This would result in UK viewers losing out as fewer would be guaranteed access to listed events.

43. **Verification of national lists.** The Commission asks whether legal certainty would be increased if the Directive provided for a formal Commission decision on the compatibility of a Member State’s proposed list with Community law. This is difficult to answer in the absence of a test case and it may therefore be preferable to return to this issue once the European Court has resolved the current proceedings brought by Kirch Media against the Commission. Whatever the outcome, it is important to stress that the Commission’s competence in this area should only ever extend to a judgement on whether the list has been drawn up in accordance with Community law (i.e. in a clear and transparent manner; in due and effective time; immediately notified to the Commission etc.) and not the contents of the list.

Promotion of cultural diversity and competitiveness in the European Programme Industry

44. As discussed at the outset, whilst it is clear that the Directive is underpinned by a plurality of policy objectives, it is not always clear which objectives are being pursued by which provisions. This is certainly the case for Chapter III of TWF and we would therefore suggest that a good starting point for the re-launched study into the efficacy of the quotas regime would be to test Articles 4&5 against the Commission’s five core regulatory principles.³

45. We are familiar with the argument that harmonisation at EU level was necessary for Internal Market reasons in 1989 because most Member States already had some form of quota. However, given that many areas of media law rightly remain unharmonised and that the existence of Article 3(1) ensures that the EU playing field is unlikely ever to be level in this area, we are unconvinced that this argument remains valid.

46. We also note with interest that the promotion of ‘cultural diversity’ is identified as a key aim of TWF in the Commission’s discussion document, despite its absence from the text of the Directive. The main ‘secondary’ objective underpinning the quotas has always been that of promoting the competitiveness of the European programming industry. We view this objective as both economic and cultural. ITV entirely shares the EU’s desire to see a successful content production industry. Where we may differ is the extent to which quotas are a necessary tool to achieve this success.

47. This may seem like a curiously defensive argument from a broadcaster that both comfortably exceeds the EU quotas and has far stricter quotas imposed on its output at national level.⁴ However, there will always be a degree of principled objection to the imposition of a quota due to its potential implications for editorial and scheduling freedom.

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³ Regulation should be the minimum necessary to deliver a clearly defined policy goal, should encourage legal certainty, guarantee technical neutrality and be administered as locally as possible.

⁴ ITV1 currently has an ‘original production’ quota of 65% and an independent quota of 25%
Where quotas are imposed, they must be clearly justified. National governments and regulators impose their own positive programme obligations and quotas on broadcasters, particularly terrestrial channels, in return for benefits such as public funding or access to scarce spectrum. This ‘deal with the state’ will evolve as digital television penetration increases. Whilst programming obligations will not disappear completely, what is clear is that they will need to be more flexible than before and capable of responding to changing market trends. The UK Government has acknowledged this in the remit it has given to the new regulator Ofcom to review programming quotas on a regular basis. Similarly, the EU must be clear about why quotas are justified, and how it will ensure they remain adaptable to changing market and viewer trends in the years to come.

European Production Quota - Article 4

48. As stated above, ITV Network spends approximately £1 billion (Euro 1.45bn) per year on networked and regional programming, the vast majority of it on original European (UK) content. The most recent figures released by the Commission (in its Communication on the Implementation of the European quotas regime for 1999/2000) showed that ITV’s main public service channel broadcast the highest proportion of European works of any UK broadcaster, at 77%. According to recent Eurofiction studies carried out by the European Audiovisual Observatory, ITV is also the largest investor in original drama in Europe, including all public channels.

49. However, it is worth repeating an argument that has consistently been made by both the public and private broadcasters during the course of this debate - namely that it is not legal obligation but business imperative that drives broadcasters to invest in indigenous programming. Today’s average TV viewer simply prefers home-grown programming to imports. For example, ITV’s investment in drama delivers very large audiences to our main channel. In the first 6 months of 2003, ITV produced seven of the top ten most popular dramas on British television.5 Nevertheless, were viewer trends to change in the future and indigenous programming was replaced by US imports in the popularity stakes, should European broadcasters be compelled to provide viewers with programming that they do not want to watch?

50. We would therefore request that the Commission undertake a thorough review of the underlying rationale for the European production quota. Following that, if it still concludes that Article 4 remains necessary, it should:

i. clarify its legal basis;
ii. oppose any strengthening of the quota;
iii. retain the flexibility inherent in the clause “where practicable and by appropriate means”, in order that new channels are not unduly burdened and that national regulators can adapt to market and viewer changes in the case of existing channels;
iv. retain the current definition of a “European work” which poses few problems.

5 According to Barb, the UK’s audience monitoring service
Sub quota for non-national works

51. The Commission should also strongly resist any proposal to introduce a sub-quota for non-national European production. The essence of ITV’s public service remit is the provision of high quality programming that reflects the length and breadth of UK society. Indeed this highlights one of the great strengths of the European television market – the existence of broadcasters who produce programmes tailor-made for their national and regional audiences. National governments do of course have the power to amend the remit of their public service broadcasters. However, it is doubtful that the wording of the Amsterdam Protocol would allow this to be done at European level.

Calculation of the “assiette”

52. ITV considers it anomalous that certain programming genres and thematic channels (news, sport, games) are excluded from the European quota calculation. We would favour a revision of the current “assiette” to allow all European programming to be counted. This would reflect the economic and cultural contribution these channels make to the European TV market and would also put an end to the complex and largely meaningless debate surrounding the definition of “stock” and “flux” programming.

Application of quotas to new services

53. We would also like, for the record, to reiterate our opposition to the application of quotas to ‘new’ non-linear television services such as interactive and on-demand. These services are all characterised by an active consumer decision to engage with the content, be it programming or advertising. As such, whilst one could conceivably make ‘European’ content available, it would be impossible to exercise any control over what content is accessed by consumers. In addition, any unnecessary intervention is likely to have particularly serious consequences for the potential development of these as yet largely unproven markets.

Independent Production quota - Article 5

54. ITV is committed to commissioning the best programmes for its channels, regardless of production source. Many of those programmes come from the UK’s highly talented independent production sector. The Commission’s most recent report indicated that 28% of ITV’s transmission time was accounted for by independent productions, comfortably in excess of the 25% quota imposed at national level.

55. Nevertheless we have similar reservations about the need for an independent quota at EU level to those expressed on the European production quota, and we would again urge the Commission to clarify the objective of and justification for this quota before proposing its retention. With European broadcasters already devoting an average of 40.5% of their transmission time to independent productions in 2000 (again according to Commission figures), coupled with the huge proliferation in channels brought about by the arrival of digital television, it is difficult to argue that a 10% quota remains fundamental to the survival of the independent sector.
56. We are also concerned that during the hearings some of the producer bodies appeared to suggest that the quota should be strengthened in order to address the fact that broadcasters can dictate ‘terms of trade’ to producers. We do not consider that the TWF Directive is the appropriate instrument to deal with this issue. Rather, producers should seek recourse through the relevant competition authority. Nor do we think that it is fair to imply, as producer groups did at the recent hearing, that independent producers suffer from a negotiating imbalance vis-à-vis broadcasters on all European markets.

57. ITV is currently the only UK broadcaster to have independently regulated terms of trade with independent producers. They were approved by both the Independent Television Commission (ITC) and the Office of Fair Trading (OFT) and remain subject to scrutiny from these two bodies. The terms of trade prohibit ITV from acquiring programme rights for more than 5 years and do not allow ITV to own secondary rights for exploitation on different markets. The recent ITC Programme Supply Review\(^6\) concluded that Ofcom should oversee the drawing up of terms of trade by all the main broadcasters in the UK, including BBC and Channel 4. It is our hope that this will create a level playing field between all broadcasters and the independent production sector that will ensure a fair commissioning process whilst enshrining the basic principle that reward should follow risk. This opportunity is denied to ITV and the independent producers we deal with under our current terms of trade.

58. Finally, the Commission invites comments on whether a harmonised definition of an ‘independent producer’ should be included in the Directive. Several participants in the hearing (including ITV) stressed that a European definition is unlikely to be sufficiently flexible to accommodate a rapidly changing independent production market. The UK Government, for example, has recently amended the definition of ‘independence’ through secondary legislation rather than through the new Communications Bill and is also about to entrust its new regulator Ofcom with the task of reviewing the definition of independence as and when appropriate. This essential flexibility risks being undermined by a European definition.

59. We are also not confident that a ‘one size fits all’ European definition would be capable of reflecting the complexity of national production markets. At the hearing, we gave the example of one of ITV’s regional companies currently being defined as both an independent producer (when producing programmes in the Welsh language) and a non-independent producer (when producing in English). The status of other ITV companies may also be reviewed in the near future. It is difficult to envisage a European definition capable of accommodating this level of idiosyncrasy.

Protection of General Interests in Television Advertising, Sponsorship, Teleshopping and Self-promotion

60. The European Commission has so far taken a very constructive approach to reviewing the advertising provisions of the Directive. The studies it has overseen on the protection of

\(^6\) UK Programme Supply Review: A Report by the Independent Television Commission to the Secretary of State for Culture, Media and Sport, November 2002
minors in advertising and new forms of advertising have been comprehensive and of high analytical quality. The views expressed by Commission representatives during the various hearings have also given the industry confidence that the Commission favours updating TWF’s advertising provisions to better reflect the changing needs and expectations of viewers.

61. This consultation process is being conducted against the backdrop of the worst advertising recession in the history of commercial television. According to Zenith Optimedia’s latest forecasts for June 2003, “The eurozone is the slowest-growing economic grouping in the developed world, and its advertising market is shrinking in real terms for the third successive year”. The UK market is also “shrinking fastest of the big five” and there is no little evidence of a sustainable recovery in 2004 and 2005. ITV, for its part, suffered an estimated 15% fall in advertising revenue in 2001 (which equates to 450m) and the market has continued to decline, albeit at a slower rate, in both 2002 and 2003.

62. The prolonged nature of the downturn has led commentators to question whether it is purely cyclical in nature. There is, for example, clear evidence that advertisers are diversifying into other forms of commercial communication or marketing. For example, the UK’s Interactive Advertising Bureau reports that the EU Internet advertising market is currently worth 787m and could reach 5bn by 2005 and account for an estimated 10% of overall advertising spend.

63. Digital television has also created the ‘fully empowered consumer’. People are increasingly active consumers of television, who take decisions to engage and interact with on-screen content, rather than simply absorb it passively. The regulatory framework needs to reflect this behavioural change if it is to move in line with consumer expectation.

64. ITV considers that all these factors should be taken into account as the revision of the directive is progressed.

*General Standards (Article 12); Protection of Minors (Article 16)*

65. ITV supports the retention of Article 12, as drafted. These general principles are supplemented at UK level by detailed provisions contained in the ITC’s Programme Code.

66. We also support the need for special rules for minors in the Directive and consider that Article 16 strikes the right balance. Commercial broadcasters have a clear incentive to ensure that any advertising that appears in or around children’s programming is responsible and appropriate and we accept that it is legitimate for this incentive to be underpinned by regulatory principles. This is because without the advertising revenue that this generates, we would not be in a position to continue investing in children’s programming.

67. ITV is proud of the quality and variety of the children’s programmes it broadcasts. We spend tens of million pounds each year on children’s programming, the majority of it sourced from independent producers, including original children’s drama, entertainment, pre-school and factual programmes. These high quality programmes are freely available to

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7 Zenith Optimedia, *Advertising Expenditure Forecast*, June 30th 2003
all households with access to a television (i.e. 99.4%) on a non-subscription basis. It is also
worth noting at this point that, according to the European Audiovisual Observatory’s 2002
Yearbook, free to air commercial broadcasters in countries where regulated advertising is
permitted devote a greater proportion of their transmission time to children’s programming
than their equivalents in Member States where advertising to children is banned. For
example, the EAO records that ITV devotes 9.7% of its schedule to children’s programmes
whilst in the countries where a ban exists, the average is below 5%.

68. The consequences of any tightening of the restrictions in Article 16 would certainly be
severe from the perspective of programme production. However, we also remain entirely
unconvinced that there is any need to introduce restrictions from a consumer protection
perspective. At this point it seems appropriate to recall the Commission’s publicly stated
view that it would only support further regulation in this area if:

- It is indispensable;
- It is proportionate;
- It does not discriminate against television as opposed to other media;
- It does not contradict other EU policy objectives, such as investment in European
  or independent production.

69. It is impossible to see how a proposal to further restrict advertising to children could meet
these tests. The conclusions of the Commission’s Bird & Bird study from 2001\(^8\) would
seem to support this view. The current TWF provisions were considered “adequate and
flexible” and it took nearly 1000 pages to set out the range of regulatory and self-regulatory
practices in place across EU Member States. Importantly, Bird & Bird also reported that the
number of consumer complaints about advertising to children was “extremely low”.

70. This is certainly an accurate reflection of the UK market. The process that sees an advert
develop from an idea, through production, to transmission is one that encounters a number
of regulatory and self-regulatory safeguards en route. The ITC’s Advertising Code
implements the rules of TWF and also imposes its own more detailed rules (e.g. on viewer
competitions, direct response advertising and the inference of ‘child inferiority’). In addition,
the broadcasters themselves have put certain filter mechanisms in place to ensure
compliance with these rules. For example, the Broadcast Advertising Clearance Centre (a
body set up and funded by the broadcasters) produces Notes of Guidance for broadcasters
to help ensure that ITC rules are interpreted in letter and in spirit. The BACC also provides
an additional layer of scrutiny by ‘pre-clearing’ all adverts prior to their transmission.

71. This multi-layered approach is one that works well in the UK. The ITC’s findings in its
regular complaints reports would also support this view. In 2002, only two complaints were
upheld by the ITC against ITV on matters of children’s advertising. With this in mind, ITV
would support the retention of high level principles for protection of minors in advertising
through Article 16 of TWF, which continue to allow the detailed implementation and
interpretation of these rules to be left to NRAs and the broadcasters themselves.

Separation principle (Article 10)

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\(^8\) ‘Study on the impact of television advertising and teleshopping on minors’, INRA/Bird & Bird, 2001
72. Viewers need to know when they are being sold to and Article 10 rightly seeks to ensure that what is commercial content and what is editorial content is clearly identifiable on screen.

73. It is the principle of being able to identify advertising (advertising ‘transparency’) that ITV believes should underpin this article rather than the idea of ‘separation’. Separation will remain the most important means of delivering the policy objective of identification, but may not be the only one, and in any event should not be used as the basis for resisting the introduction of new techniques such as split screen advertising where commercial content and editorial can co-exist on screen, often to the benefit of the viewer.

74. In an article that already imposes an obligation to identify or separate all advertising, it could be argued that the clauses prohibiting the use of subliminal and surreptitious advertising are redundant. We would also suggest that ‘isolated advertising spots’ are more likely to be welcomed by viewers than seen as a hindrance, as long as the advert is clearly identified. We would therefore suggest that this clause be repealed.

Insertion (Article 11)

75. The evidence of the consultation process so far suggests that there is widespread consensus that this article contains an unnecessary and unworkable level of detail.

76. There is a natural limit to consumer tolerance for advertising and it is clearly not in the interests of broadcasters to exceed that limit. Nevertheless, the question is not whether rules on the insertion of adverts in and around programming are necessary, but whether they should continue to be harmonised at EU level. We believe the answer is an unequivocal ‘no’.

77. Article 11 appears to have been conceived as a way of safeguarding the editorial integrity of programmes and films. However, in reality its inherent inflexibility leads producers to engineer programme part lengths that serve the needs of the directive, but may not serve those of the viewer engaged with the programme’s storyline. In this sense the insertion article can have entirely the opposite effect to what was intended, with broadcasters struggling to fit the content in around the adverts, rather than the adverts around the content, as should be the case.

78. We would therefore advocate the deletion of Article 11(2), (3), (4) and (5). It would, however, seem logical to retain 11(1) governing the insertion of adverts during natural breaks. This would ensure that the spirit of Article 11 was retained whilst leaving the operational detail of how it was implemented to the Member States.

Tobacco; Medicine; Alcohol (Articles 13, 14, 15)

79. We note that the media-neutral directive on tobacco is close to adoption and we leave it to the European Commission to judge whether it would at that point make sense to repeal sector-specific rules such as Article 13 of TWF.
80. On medical products, we are aware that DG Enterprise is currently reviewing pharmaceutical legislation and has raised the prospect of a pilot project on the ‘dissemination of information’ on three areas of disease (AIDS, asthma and diabetes). In principle we would support this initiative.

81. Whilst grouped under the same heading in the Commission discussion paper, it is important that a clear distinction is drawn between tobacco and alcohol in terms of their implications for consumer health. Alcohol is after all enjoyed in moderation by millions of Europeans without causing adverse health effects.

82. ITV considers that Article 15 of the Directive lays down proportionate minimum standards in respect of alcohol advertising on TV. These are supplemented by more detailed rules at Member State level, as deemed appropriate. In the UK the ITC’s Advertising Code sets out detailed obligations that are strictly adhered to by a responsible alcohol advertising sector that now accounts for an estimated 6% of total UK TV advertising spend.

83. Given that the current rules appear to be functioning well, ITV sees little case for the introduction of further EU measures in this area, and we do not believe a proposal to introduce stricter rules would pass the Commission’s ‘burden of proof’ test outlined above (future intervention should be indispensable, proportionate, non-discriminatory etc.). We would, however, refer back to the concern expressed in paragraph 36 that the sector-specific rules of TWF should not be called into question by other horizontal initiatives within the Commission, e.g. DG Sanco’s work on public health.

Duration (Articles 18 and 19a)

84. As in the case of the insertion rules, it is difficult to build a convincing case for the retention of these rules at EU level, particularly given Member States’ ability to impose stricter rules at national level and the negligible adverse consequences for the Internal Market of a broadcaster in one state having a different minutage allocation to a broadcaster in another.

85. Since ITV is one of the UK broadcasters on whom considerably stricter obligations are imposed (our main channel can only show an average of 7 minutes advertising per hour) any liberalisation of these rules at EU level is unlikely to have a major effect on ITV. However, we would urge the Commission to re-examine whether there is a real need to retain harmonised rules at EU level.

Sponsorship (Article 17)

86. This article is largely uncontroversial and we would propose no major amendments.

87. We support the principle that the content and scheduling of programmes should not be influenced by the sponsor in a way that affects editorial integrity. However, we question whether changes are needed to clarify that:

i. the sponsor referred to in this article is the ‘broadcast sponsor’, not the ‘event sponsor’;
ii. the prohibition of the sponsorship of news and current affairs programming could not be construed as extending to sports news programming.

New forms of advertising

88. The establishment of viable new revenue streams is fundamental to the future sustainability of commercial broadcasting in Europe. New forms of advertising will not solve the on-going advertising recession single-handedly, but they do allow broadcasters to offer advertisers increasingly innovative ways of reaching and engaging with their target audience. In that sense whilst the markets for these new techniques remain fledgling in most cases, they are already an important weapon in the battle to convince advertisers that television will continue to be the best place to spend their money in the years to come.

89. ITV ran its first interactive application on the UK’s digital terrestrial platform in March 2001 and is currently in the process of rolling out both interactive programming (e.g. interactive UEFA Champions League; Who Wants To Be A Millionaire; Pop Idol) and interactive advertising, across the UK’s digital platforms. In particular, we hope that by creating genuinely attractive interactive content that is fully integrated with our programming we will both improve the viewing experience and attract additional revenues, for example through advertising and the use of return-path technology.

90. All interactivity has to comply with the ITC’s Guidance on the Regulation of Interactive Television Services. This sets out broad principles to be respected (e.g. separation of content and advertising) whilst, in our view, providing sufficient regulatory flexibility for the market to develop.

91. Other new techniques have proved more difficult to embrace thus far on the UK market. We have experimented with split screen formats on our digital channel ITV2, but only as a means of allowing viewers to continue watching the programme during an advertising break, rather than running the advertising during the programme itself. There are currently no firm rules at UK level regarding the use of split screen and the regulator’s approach has been to assess its conformity with EU and UK regulation on a case by case basis. We would welcome further clarification from the Commission on the use of split screen, not least because we consider that it has the potential to offer real benefits to both viewers - who may not have to endure as many ad breaks - and advertisers, who may see this as a means of better retaining viewers’ attention.

92. The use of virtual techniques in the UK has been equally limited. The ITC Virtual Advertising Guidance Note permits the use of virtual advertising subject to certain regulatory conditions. However, it also prevents UK broadcasters from selling virtual advertising airtime. This would suggest that it is the regulator’s intention to prohibit UK broadcasters from inserting virtual advertising themselves, whilst accepting that its appearance on screen is unavoidable when it is packaged within a programme that has been acquired from abroad (e.g. a US sporting event). We do not entirely understand the logic of this guidance and consider that clarification from the Commission on the use of this technique would be useful.
An Interpretative Communication

93. We would therefore welcome an Interpretative Communication from the Commission that recognised the legality of these new forms of advertising and offered guidance as to which regulatory principles of the Directive should be applied to their use.

94. None of the new techniques appear, in principle, to be incompatible with the core advertising principles of the Directive. For example, identification/separation can be ensured, as can the protection of minors. However, it would be difficult, if not impossible, for certain provisions of the Directive to be applied to new advertising techniques. How could the duration rules be applied to interactive advertising, for example? Finally, there is the related question of how to apply the duration rules to other new techniques, such as split screen.

95. However, we do not believe that the best way of delivering legal certainty is for the Commission to issue an Interpretative Communication that assesses the compatibility of each individual new advertising technique with each provision of the Directive. This will not ‘future proof’ the Directive but instead limit its scope to the advertising methods that are in use today. Media companies are constantly experimenting with new ways of advertising to consumers and such an approach would mean that the Commission had to amend its Communication every time a new technique was developed.

96. Commercial broadcasters within the ACT consider that any Communication should therefore be limited to setting out the core principles that any new form of advertising must respect in order to be deemed legal under TWF. The operational detail of how these principles are applied in practice should be left to NRAs.

97. The Communication could therefore simply clarify that:

“NRAs shall not prohibit advertising techniques unless they infringe against the following core regulatory principles:

- Identification of advertising;
- Qualitative standards;
- The existing acquis on misleading advertising, data protection etc.;
- A high level of protection of minors.”

This approach would guarantee the continued delivery of the Directive’s core policy objectives relating to advertising as well as future proofing the text against the development of further new techniques.

Protection of Minors and Public Order; Right of Reply

98. It is vitally important that broadcasters retain high standards with regard to the protection of minors, both in recognition of the fact that they constitute a special case and because maintaining viewer trust in its programming is crucial to a broadcasters’ success. We therefore strongly support the retention of the provisions of Chapter V of the Directive, which we consider proportionate.
99. These regulatory principles are, in the main, implemented through the ‘Family Viewing Policy’ of the ITC’s Programme Code. This provides for acoustic warnings to be given before unsuitable programmes and also contains the ‘watershed’ rule, which fixes 9pm as the time up to which nothing unsuitable should be shown on terrestrial television. After 9pm, the Code allows for a gradual progression towards more adult content. Research published recently by the ITC and the Broadcasting Standards Commission suggests that the current rules are widely understood by viewers, and are working well. Awareness of the Family Viewing Policy and watershed is almost universal at 97% and continues to rise year by year. 64% of people also thought that 9pm was “about the right time for the watershed”.

100. The ITC’s rules are supplemented by self-regulatory measures from the broadcasters. For example, ITV employs compliance officers to pre-vet every single programme broadcast to ensure that it complies with the provisions of the ITC Code. As well as adding acoustic warnings, this process can also lead to programmes being re-edited, particularly in the case of acquired programming and films. ITV also runs a series of programme content advice pages on Teletext, which inform viewers of our family viewing policy and provide parental guidance on up-coming programming.

101. Evidence that these measures are working well and that the ITC rules are being closely adhered to is found in the low level of complaints upheld against broadcasters. For example, in 2002 there were only two complaints upheld against ITV that related to protection of minors. The first related to the inappropriate behaviour of a pop star on a children’s music programme whilst the second centred around the inappropriate scheduling of a daytime talk show dealing with adult themes prior to a children’s programme.

102. Whilst there is clearly a place for regulation in this area, we should not lose sight of the importance of family viewing and parental responsibility. Broadcasters cannot be held responsible for children staying up late, for example. This point is underlined by the ITC’s own research, which found that 65% of people thought that the responsibility for children’s viewing lay mainly with parents. Only 8% considered that this was mainly the broadcasters’ job.

Harmonised ratings systems

103. ITV does not believe that a harmonised EU approach to rating content is realistic or necessary at this point. As we heard during the hearing, harmonisation would not be an easy task given the varying cultural sensitivities of each Member State. The current combination of regulatory and self-regulatory practices in the Member States appear to be serving viewers well on ‘traditional’ television (e.g. terrestrial and other free to air) and Pay TV companies have a clear incentive to further develop and perfect content filters and parental security measures for digital television (e.g. pin coding) together with their national regulators. Harmonisation may also be difficult from a technology perspective - for example, control mechanisms based on the use of metadata may be deployed to good effect in future but are still in the developmental phase at present.

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9 The Public’s View 2002, an ITC/BSC Research Publication conducted by the British Market Research Bureau International
10 The Public’s View 2002, ITC/BSC
104. We note in this context the recently published European Commission study on ratings systems carried out by Olsberg/SPI.\(^{11}\) We support its recommendations to encourage benchmarking and information-exchange between Member States, but also note its conclusion that the existence of different ratings systems across the EU is not a source of confusion to consumers, even for the small minority that are regularly exposed to content from other countries.

The Recommendation on the protection of minors and human dignity

105. We support this Recommendation and regard it as a useful instrument. Its broad scope allows it to take a coherent approach to protection of minors issues across all media, without getting caught up in the legal minefield of what constitutes a broadcasting or information society service. In that regard, it provides helpful guidance to Member States and media companies alike. That said, we would be reluctant to see the Recommendation developed into a more binding instrument at this stage. Rather, it should retain sufficient flexibility to respond to future market developments.

Right to Reply

106. ITV has no problem with this provision. Ofcom will take over the existing powers of the Broadcasting Standards Commission, which deals with complaints concerning invasion of privacy and fair treatment of individuals or groups. In cases where a complaint is upheld, broadcasters can be required to broadcast an on-screen apology.

Application

107. The Commission raises important questions about the role of the Contact Committee. ITV would make only two observations here. Firstly, we refer back to paragraph ?? where we express the need for coordination between TWF and other Community instruments that affect broadcasting (e.g. infrastructure rules; other advertising initiatives). This would seem like a relevant issue for the Contact Committee to address with a view to proposing changes to current working practices.

108. Secondly, we have consistently argued in this response that there is a need to move away from prescriptive rules at EU level towards a more principles-based approach. We hope that the Commission’s Interpretative Communication on new advertising techniques will advocate this route. It should, in theory, be a route favourable to Member States since it will leave much of the detailed interpretation to individual NRAs. However, should concerns be expressed, it is worth considering whether they could in part be assuaged by an extension of the Contact Committee’s remit.

109. On the role of NRAs, we consider that the establishment of a European Regulators Group for content may be of benefit, not least because it would be consistent with the approach to infrastructure regulation under the new Communications Directives. However,

\(^{11}\) Empirical Study on the Practice of the Rating of Films Distributed in Cinema, Television, DVD and Videocassettes in the EU and EEA Member States, Olsberg/SPI and KEA European Affairs, May 2003
we would stress again the need to ensure a consistency of approach between these two regulatory groups on issues where infrastructure and content rules converge.

110. It is also worth reiterating the importance of the independence of NRAs in this context. Any new regulators group should not extend its membership to the ‘in house’ regulators of many of Europe’s public broadcasters. This view would also appear to be compliant with DG Competition’s conclusion that broadcasting regulators “would seem to be effective only if the authority is independent from the entrusted undertaking”.  

Access to Short Extracts of Events Subject to Exclusive Rights

111. ITV does not believe that the TWF Directive should be amended to include a right of access to short extracts which are subject to exclusive rights. This is a complex issue that cuts across several areas of law including copyright, property rights and contract law. However, the questions the Commission needs to assess are relatively simple in our view:

- Is there an EU-wide problem? i.e. is viewers’ fundamental right to information being compromised by current arrangements in the Member States?
- If so, is the TWF Directive the correct instrument to address this problem?

We consider the answer to be ‘no’ in both cases.

Is there a problem?

112. In the UK, a voluntary code (The Sports News Access Code of Practice) governs broadcasters’ use of short extracts from exclusive sports broadcasts for the purposes of news reporting. The Code, first signed in 1991, guarantees that all major news broadcasters in the UK are able to include in their bulletins, free of charge, footage from ‘newsworthy’ televised sporting events. It does this by setting out how footage should be accessed (by recording the broadcaster’s signal ‘off-air’) and the conditions that should be applied to its use (e.g. maximum duration of the extracts; time deadline for use of the footage; for inclusion in news bulletins only). It also contains provisions for the resolution of any disputes. The Code has as its starting point the principle that all signatories should respect each others’ right to exclusive television access to a sports event for the purposes of broadcasting that event. In its 12 years of existence, it has worked very well. The list of broadcaster signatories has also been expanded to accommodate new entrants to the UK broadcasting market.

113. The Code effectively clarifies broadcasters’ understanding of what constitutes ‘fair dealing for the purposes of news reporting’ in relation to the reporting of major sports events under UK copyright law. However, it obviously does not supersede this law. All parties, including news agencies, have recourse to the fair dealing provisions of the Copyright Act if they want to access footage for the purposes of reporting a newsworthy event. There is extensive case law that provides guidance in this area.

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12 European Commission, Communication on State Aid to Broadcasters, 2001, paragraph 42  
13 Section 30 of the Copyright, Designs and Patents Act 1988  
14 The UK courts have identified three factors to determine fairness: 1. The number and the extent of the quotation and extracts; 2. The use that has been made of the quotations and extracts; 3. The proportion of the work
114. A similar situation applies where the TV rights to a sporting event are held by a broadcaster or rightsholder in another EU country. ITV and its news provider ITN have never encountered difficulty in gaining access to footage from a sporting event exclusively televised by another EU country. Nor have we ever refused a non-UK broadcaster access to footage of an event televised exclusively by ITV. The reality is that all sporting events of interest to a national audience will be acquired for broadcast by a national broadcaster. This material can then be 'fair dealt' to other broadcasters and news agencies under the national copyright law or news access arrangements.

115. The recent transfer of England footballer David Beckham from Manchester United to Real Madrid is an instructive example in this context. Spanish League and UEFA Champions League matches involving Real Madrid will now be of increased interest to UK TV viewers and may, on occasion, be considered ‘newsworthy’ events. BSkyB hold the UK broadcast rights to ‘La Liga’ and ITV hold the Champions League rights. ITV has even acquired the rights to Real Madrid’s 2003 pre-season friendly matches for broadcast on ITV2. Both BSkyB and ITV will ensure that major games involving David Beckham are televised. All major UK broadcasters will therefore have access to the footage for use in their news programmes through the Sports News Access Code.

116. On the rare occasions that rights to a sporting event of national interest are not acquired by a national broadcaster, or that a ‘newsworthy’ event occurs at a foreign sporting event that would otherwise not hold any interest for a national audience, broadcasters and news agencies can of course privately negotiate access to footage. This private pan-national negotiation is also facilitated by the existence of the 2001 Copyright Directive, which, under Article 5(3), enables Member States to introduce an exception to copyright protection for the purposes of news reporting (which has in fact existed in the UK since 1956). ITV is aware that this exception may not apply in cases where ‘technical measures’ are used in the transmission of signals (such as the use of conditional access systems or anti-copying technology) but this would not necessarily allow the exception to be circumvented. It may simply mean that the cost of the footage increases to reflect the additional effort required to make it available.

117. We would also like to address the issue of physical access to sporting events, as raised in the Commission Discussion Paper. The paper states that general news items ‘risk not being reported unless independent media are allowed access’, suggesting that there is a risk that the controlling broadcaster will effectively censor any ‘unfavourable incidents’. ITV has never done this, and has never experienced such behaviour by other broadcasters. Indeed, the UK broadcasters’ Sports News Access Code specifically includes “off the field” activity such as crowd disturbances or disasters. We therefore consider that this argument in no way provides sufficient grounds for intervention on the part of the Commission. We would also point out the practical difficulties of allowing unspecified numbers of independent media to access the event, each bringing their own outside broadcasting equipment. Aside from the issue of stadium property rights, and the risk of diluting the exclusive rights of the host broadcaster, event organisers will always rightly insist on controlling physical access for health and safety reasons.
If there is a problem, is the TWF Directive the appropriate instrument to address it?

118. European States are already encouraged to introduce a right of short reporting through Council of Europe Recommendation R91(5). We understand that the proposal of news agencies is to include a similar right as a new provision of the TWF Directive, or as an extension of Article 3a (Listed Events). The difference would be that this new provision would be mandatory for all EU states.

119. In the first instance, we would note that the introduction of a mandatory provision would be far more interventionist than the current text of Article 3a, which affords Member States the right to list events of major importance to society, but does not oblige them to do so.

120. Secondly, the 2001 Copyright Directive already provides for (but does not mandate) the introduction of fair dealing under the news exception provisions. The Commission should, first of all, seek to ensure that the Copyright Directive is implemented in all Member States. This is not yet the case. Once implemented, the Commission will be better placed to assess the extent of fair dealing law in place in the Member States. At that point, should EU Member States conclude that there are insufficient safeguards for broadcasters and news agencies in the area of news access, efforts should be concentrated on amending the Copyright Directive. The EU could consider making the news exception mandatory, or at least clarifying its intent. In our view it would be entirely illogical to use a sector-specific directive like TWF to address a perceived failing in a ‘horizontal’ directive. This would, for example, mean that the loophole of the Copyright Directive was closed for television but none of the other sectors to which its provisions apply, e.g. news reporting on radio, in newspapers or on-line.

ENDS
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