EUROPEAN BROADCASTING UNION
Legal and Public Affairs Department

UNION EUROPEENNE DE RADIO-TELEVISION
Département des affaires juridiques et publiques

15.07.2003
DAJ/ACB/mp

Public consultation by the European Commission

on the review of the Television without Frontiers Directive

EBU Contribution

July 2003

***

EBU·UER
Ancienne Route 17A
Case postale 45
CH-1218 Grand-Saconnex GE
Switzerland / Suisse

Tel +41 (0)22 717 25 05
Fax +41 (0)22 717 24 70
e-mail daj@ebu.ch
Internet www.ebu.ch

SUMMARY

General questions

- There needs to be clarification of the objectives and the scope of future European audiovisual policy. The purpose of the Directive should not be limited to removing obstacles to the internal market but should take account of such other general interest objectives as access to information, cultural diversity and media pluralism.

- A consistent regulatory framework for television broadcasting and new interactive audiovisual services is required, it being acknowledged that this may include a graduated approach.

- The notion of co-regulation is promising in certain areas, such as advertising and the protection of minors. However, it would need to be clearly defined and specified, especially in the transfrontier context.

Theme 1: Access to events of major importance to society

- To achieve its objectives, Article 3a of the Directive needs to be upheld, and its operational modus should be improved. Following on from the primary aim of guaranteeing that virtually all citizens can view major events on free television, the following guiding principles should be introduced:

  - Member States should establish a "right of first refusal" by requiring that the rights to listed events are offered first to the qualifying broadcasters (i.e. national services which qualify to exercise the rights on an exclusive basis);

  - Member States should allow for arbitration or mediation proceedings to ensure that the rights offer is subject to reasonable conditions and a fair market price;

  - Member States should nominate an independent broadcasting authority to decide under which circumstances a non-qualifying service would have legitimate reasons to exercise the rights on an exclusive basis;

  - Determining whether an event is of major importance for national society should be left to the Member States to decide, notwithstanding the European list mentioned below.

- With a view to offering the highest degree of protection for the viewing public, at least two concrete improvements are suggested:

  - there should be a brief minimum *European list* of events which are part of the common European sports heritage, Member States naturally remaining free to complement it;

  - in order to prevent a "substantial proportion of the public" from being unable to follow the event via free television, qualifying services should have nearly *universal coverage*.

Theme 2: Promotion of cultural diversity and competitiveness in the European programme industry

- Before envisaging possible changes, it would be worthwhile to clarify the general policy objectives underlying the quota system.

- The definition of European works does not need to be made more specific at the European level. The EBU is working on improving the circulation of European works outside the national market through such means as programme exchanges, co-productions and the broadcasting of live events by various broadcasters. However, the introduction of sub-quotas for non-national European works or similar obligations would not be appropriate.

- The definition and notion of independent producer must be left for the Member States to assess, owing to the differences which exist between the national markets. If, however, a definition of independent production were to be envisaged at the European level, any binding criterion or measure which would limit rights being held by broadcasters in the case of works which they have commissioned and funded themselves should be excluded. There would be no good reason to reinforce the quota system for independent productions, notably by a percentage increase.

Theme 3: Protection of general interests in television advertising, sponsorship, teleshopping and self-promotion

- A set of fundamental principles, including precise identification of advertising and sponsorship and the separation thereof from the programme content, should be applied to all forms of traditional and new commercial communications.

- An interpretative communication from the Commission clarifying the extent to which new forms of advertising (particularly split-screen and virtual advertising) are compatible with the Television without Frontiers Directive would be desirable. Certain new advertising techniques tend to mix advertising and programme content.

- The development of new advertising techniques needs to take place within a clear, appropriate regulatory framework. A general consideration is that the introduction of any new form of advertising must respect the interests of the viewer/consumer, the integrity of audiovisual works, the integrity of the broadcasters' signal and broadcasters' editorial independence.

- With regard to quantitative restrictions concerning the insertion of advertising and its duration, the key requirement is to maintain or stabilize a certain level of advertising revenue for broadcasters and to guarantee a balance among the various interests involved. A basic minimum set of quantitative restrictions, standardized at the European level, may make it easier to achieve this balance.

- A solution needs to be found to the question of *advertising windows* specifically intended for another country, since these could undermine media pluralism (especially in the case of a small country or a limited linguistic area).

Theme 4: Protection of minors and public order
Right of reply

- The principle of protection of minors and public order is fundamental and needs to be extended to all audiovisual services communicated to the public.

- As regards traditional television broadcasting, the current system, which is largely based on the watershed and the age of viewers, remains an effective means of protecting minors.

- With respect to new digitally-enhanced services, other effective, appropriate means could be envisaged. However, the obligatory introduction of technical parental control systems should be avoided, since it could result in broadcasters taking less responsibility for the content which they transmit.

- The adoption of common criteria for rating audiovisual content at the European level appears impossible for obvious cultural and societal reasons, but the adoption of clear, common and readily understandable symbols, along the same lines as road signs, should be studied more closely.

- As regards the right of reply, the same need for a rapid form of defence exists for all media, including on-line services. A more horizontal approach would correspond to the idea of consistent regulation for all the media. However, this should not exclude, where justified, the application of rules which are specific to certain media on account of their particular character.

Theme 5: Application (related aspects)

- Special attention should be given to advertising windows/opt-outs. Although this issue is linked to the question of determining the competent authority, it is dealt with under Theme 3 of the present text.

Theme 6: Access to short extracts of events subject to exclusive rights

- A European rule on television news access to foreign events would create more coherence in the treatment of national and foreign broadcasters. As a fundamental citizens' right, access to information should include the right to be informed of all events which - even if taking place in other countries - are of high interest to society. Consequently, via a news access rule, complemented by co-regulation and/or self-regulation, Member States should give access to *foreign* broadcasters too.

***

The EBU is pleased to submit its comments on the review of the Television without Frontiers Directive, in accordance with the opportunity offered by the Commission's work plan.

Before responding to the detailed questions on the various themes, we mention a number of more general issues.

GENERAL POINTS

1. Objectives of a future European audiovisual policy and the role of the European Union

The review of the Directive necessitates a detailed examination of the objectives and priorities of future European audiovisual policy and the role of the European Union, given that all of these have a direct impact on the scope and functions of the Directive or any future instrument replacing it. The review also needs to take increased account of cultural diversity and differences of development in an enlarged Union; against this background, a common regulatory framework for audiovisual services is at once a challenge and an invaluable asset.

The main question is whether the European Union will have the requisite means to carry out a genuine European audiovisual policy which contributes, *inter alia*, to respecting and promoting cultural and media diversity at Union level, whilst also respecting, in accordance with the subsidiarity principle, Member States' competences with regard to audiovisual and cultural policy.

To ensure that a genuine European audiovisual area is created, the purpose of the Directive or any replacement instrument on audiovisual services should not be restricted merely to removing obstacles to the internal market. Account must be taken today of other general interest objectives already mentioned in the Commission's 1999 Communication on the Community's Audiovisual Policy in the Digital Age, such as freedom of expression and information and the right of reply, the protection of viewers/consumers, the protection of authors and their works, media pluralism and cultural diversity.

Achieving these objectives requires more attention to be accorded to issues such as respect for the editorial independence of broadcasters, the protection of the integrity of the broadcasting signal, the protection of privacy and personal data and, in particular, access to information issues.

Access to information is a crucial feature of the regulatory framework for the audiovisual landscape, for a number of reasons:

- *The basic human rights of freedom of expression and information gathering cannot be realized without guaranteeing access to such information;*

The right to have access to information fosters the ability to communicate and is thus fundamental to any democratic society, both today and in the digital age. Consequently, the need to provide access to information goes beyond, and is fully independent of, the mere desire to stimulate competition and innovation.

- *Access to information lies at the heart of the public interest;*

Any audiovisual legal framework would have to be based on the principle of the *free flow of information,* both within borders and across them. Such a principle cannot be upheld without guaranteeing that the information is also accessible.

- *Information is useful only if it can be accessed easily by everyone;*

Information on newsworthy events must be available when and where society expects it to be. If citizens are confronted with hurdles to obtaining easy access to the main sources of such information, they are practically deprived of it.

- *The increase in media outlets does not necessarily also mean that more information will be made freely available to a wider community*.

The potential for the provision of information may have grown with the emergence of the digital age. However, the investment made to create new outlets may need to be recouped by restricting access to paying audiences only, and such costs may be beyond the means of the average citizen. Free-to-air television is therefore vital for offering everybody access to information.

Legal guarantees for access to information exist in various forms and include, in particular, rules on the right of access to events of major importance for society, on the right to make short reports, as well as must-carry rules and rules on the display of services on electronic programme guides.

Precise identification of the objectives of future audiovisual policy, and the means necessary to achieve them, will reinforce legal certainty, which is essential for the development of digital television and new interactive audiovisual services.

2. A more horizontal approach to regulation of audiovisual content

The question now is whether a fresh approach to the regulation of audiovisual content is necessary in a new digital environment where users have access to a broad range of audiovisual content available at the time of their choice, or whether it is possible to make do with the current regulatory framework over the coming years.

The EBU believes that this second revision of the Directive should adopt a more horizontal approach to the regulation of content, taking account of the development of digital television and new interactive audiovisual services, as well as the convergence of technology. Such an approach could be achieved in a number of ways.

In its work programme the Commission indicates that it does not wish to question the distinction made in the *acquis communautaire* between television broadcasting services (covered by the Directive) and services supplied on individual demand (covered, in particular, by the e-commerce Directive). At the same time, however, with respect to the specific themes the Commission raises a number of questions which are directly linked to the field of application of the Directive and to new interactive audiovisual services.

In the EBU's view, a need exists for a regulatory framework for television broadcasting and new interactive audiovisual services which is as consistent as possible, it being understood that this may entail a graduated approach (e.g. with some basic rules for audiovisual services in general and some of the existing, or revised, rules of the Directive applicable solely to traditional television).[1]

In theory, it would also be possible to establish a consistent legal framework for television broadcasting and new interactive audiovisual services through two separate Directives. However, drawing up a Directive covering all services with audiovisual content would probably be the best solution.

At any rate, the present definition of "television broadcasting" is too limited to deal with new developments. It is necessary to anticipate the situation that will exist at the time when the Member States are due to transpose the new revised Directive into their national law (i.e. probably around 2007). A review of the scope of the Directive is therefore necessary.

In the current Directive the dividing-line between television services and information society services is placed between near-video-on-demand and video-on-demand. This does not make sense, given that, for the viewer, the technical difference between the two forms of distribution is irrelevant, and the democratic, cultural and social relevance of the audiovisual service may be the same.

[1] The EBU could accept graduated regulation of the different media but expresses strong reservations about the idea that "user control" can become a major criterion and, above all, a single criterion. Account must be taken too of the impact which a service may have on the formation of public opinion or on cultural life, which will also depend on the type of content distributed. For example:

- What is the difference between watching a specialized news channel and selecting news reports transmitted on-demand by the same provider? The reports will doubtless be the same in the two cases, and the viewer exercises no influence over their content.
- The fact that viewers pay for a service does not mean that they can have influence over its content or have a broader range of choice. In view of, in particular, the *de facto* monopoly which the pay-TV platforms enjoy on certain markets, nothing would justify pay-TV being subject to rules which are less strict than those covering free-to-air television.

3. Form of regulation: balance between regulation, co-regulation and self-regulation

Television is the most highly-regulated media sector, which sometimes reduces the opportunities for self-regulation. The revision of the Directive should not lead to even denser regulation of television. The place and role of self-regulation in the implementation of European legislation therefore need to be assessed. Nevertheless, it is clear that this approach should not result in a re-fragmentation of the internal market.

More detailed study is required of the concept of self-regulation and co-regulation, of which different interpretations and definitions currently exist at the national and European levels. In the present review process, clear, and if possible common, definitions are desirable. At the very least, there should be a joint understanding, with a more precise vision of the potential areas where such systems could be applied.

Overall, the EBU agrees with the Commission's indications in the White Paper on Governance in October 2001 regarding ways of improving and simplifying the regulatory environment,[2] and particularly concerning the conditions on recourse to co-regulation.

Co-regulation is a promising concept in areas such as advertising and the protection of minors and does not seem to create difficulties at the national level. Nevertheless, it needs to be fine-tuned, especially in cross-border contexts and in the light of the different legal and constitutional traditions which exist in various countries, including the candidate countries. The EBU draws the Commission's attention to its comments on Theme 3 of the present document, regarding advertising, where this point is dealt with in further detail.

[2] White Paper on Governance, 12.10.01, *Official Journal* C 287/15.

THEME 1: EVENTS OF MAJOR IMPORTANCE FOR SOCIETY

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

Both the necessity of Article 3a of the Television without Frontiers Directive and the need to maintain such a provision have been proven by the first "test case", i.e. the 2002 Football World Cup, for which the broadcasting rights were first acquired by KirchMedia. It is highly unlikely that the European public at large would have obtained, through the negotiations of free-to-air broadcasters, any reasonable access to enjoy the event via free television if such a provision had not been in place. Moreover, even the contractual obligation, imposed by the sports federation, for some parts of the event to be shown on free-to-air television did not prevent the highly speculative purchase of the rights by a media group with strong pay-TV interests.

The threat that an increasing number of events of major importance for society will no longer be available to the "ordinary" television audience is still a clear one. Experience so far has shown that this threat is not limited to countries which have not yet designated such events under their national law. However, it needs to be realized that since the purpose of the provision, and particularly the "appropriate means" mentioned in Article 3a(3), is *to ensure that virtually all citizens can view major events on free television*, this aim cannot be achieved through the free market or competition law. Moreover, to avoid the risk of being considered merely a "paper tiger", the provision needs to be reinforced so that it operates satisfactorily.

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)

Do you think the application of this provision (N.B. "binding elements" such as listing of events, modalities of transmission, and defining a substantial proportion of the public) ***leads to practical problems? If so, which means would you propose to solve these problems?***

Criteria for determining whether an event is "of major importance for society in a Member State" must necessarily be drawn from the circumstances prevailing in that State. Consequently, it would be preferable to clarify, for example in a Recital, that determining whether an event is of major importance for society at national or regional level is a matter for the sole decision of Member States. This does not preclude the Commission from issuing (or maintaining) certain "guidelines" on the most pertinent criteria for such a determination.

On the other hand, the EBU wishes to propose two improvements with a view to creating greater legal certainty and preventing the speculative purchase of broadcasting rights: a) the introduction of a brief European list of major events and b) a definition of the "substantial proportion of the public" which may not be deprived of following the event via free television.

a) European list

The experience of EBU Members shows that there are at least three events which can be regarded as being of major importance for all Member States, i.e. the (summer and winter) Olympic Games and all matches in the Football World Cup and in the European Football Championship.

Experience has shown that the attempt to sell the rights to such events on a country-by-country basis in Europe leads to various practical problems, concerning both the negotiation phase and the actual broadcasting thereof, to the detriment of the viewing public. Including these three events in a European list would be entirely in line with the clear preference, in the past and today, to sell these rights on a pan-European basis.

Moreover, it would thereby be explicitly recognized that these events are of great public interest in each Member State and belong to the European sports "heritage", thereby contributing to the idea of a united Europe. Indeed, they are already expressly mentioned in the Directive as examples, and their importance is also confirmed by their presence on all existing lists.

It should be understood that such a European list would be only a "minimum" which must be part of any national list but would not prevent any Member State from complementing it with any other events of major importance for society. The national lists are an expression of national and regional specificities.

b) Substantial proportion of the public

The provision in Article 3a of the Directive aims to prevent a "substantial proportion of the public" from being deprived of following the event via free television, i.e. without any extra costs for technical installations or subscriptions. The main purpose of the provision is thus to offer the *highest degree of protection for the viewing public*. Consequently, this aim goes far beyond the mere desire not to distort competition among broadcasters. The House of Lords' decision of 27 July 2001 made this perfectly clear: the purpose of Article 3a is "if necessary, to protect the public interest in free access to important sporting events against market forces" (...). "The obligation to achieve that result is in no way qualified by considerations of competition, free market economics, sanctity of contract and so forth."

This means that, as a matter of principle, it should be stipulated as another binding element of Article 3a that the notion of "not depriving a substantial proportion of the public" requires a qualifying broadcaster (i.e. a service qualifying for exercising the rights on a exclusive basis) to be of nearly "universal coverage" on "free television" (in accordance with the existing definition thereof), i.e. capable of being viewed, whenever this is possible, by at least 95% of the national television households.

The requirement for qualifying broadcasters of being "near universally available" free-to-air is also contained in the guidelines for the implementation of Article 9 of the Council of Europe's Convention on Transfrontier Television.

3. Reference dates (for Member States and rights holders) in relation to the obligation of enforcement of Article 3a

Do you think the application of this provision **(**N.B. the retroactive effect of paragraph 3 of Article 3a) ***leads to practical problems? If so, which means would you propose to solve these problems?***

A certain "retroactive" effect is inherent in the regulatory regime of Article 3a(3), as it follows on directly from the legislator's choice to act only at the stage of *exercise* of exclusive broadcasting rights and not already at the *acquisition* stage; the latter always takes place earlier (generally speaking, the larger the event the earlier the rights are sold). Such an effect is also in line with the political desire to protect the interests of its viewing public, which has no influence whatsoever on the date when the rights agreement was concluded.

4. Consultation requirements

(A) ***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?***

Guiding principles which are not legally binding would certainly be useful, and particularly for those Member States which have not yet finalized their national legislation. For example, it should be explicitly recommended that Member States nominate an independent broadcasting authority to decide whether, under the circumstances of the case concerned, a non-qualifying service would have legitimate reasons to exercise the rights, on an exclusive basis.

Particularly with a view to increasing legal certainty and preventing speculative purchases, another such principle should be the possibility for Member States to require that the rights to listed events should be offered first to the qualifying broadcasters ("right of first refusal"). Of course, in that case it would need to be ensured that the rights are offered on reasonable, non-discriminatory terms and at a fair market price. On this particular issue, the highest UK court indicated that a reasonable price level depends on "what qualifying broadcasters would be prepared to pay", if they had to compete for exclusive rights to the event in question.

The distinction between "qualifying" and other national broadcasters is made in the interests of the viewing public, and those interests are obviously best served when, with respect to listed events, the qualifying broadcasters are given a fair and reasonable opportunity to acquire the rights in the first place. The recent experience with the rights for the Football World Cup shows that in cases where non-qualifying broadcasters acquire the rights first, prices can be artificially raised beyond any normal market level. This type of speculative purchasing illustrates what the provision in Article 3a intends to prevent.

(B) ***Are provisions necessary at EU level to define arbitration or mediation proceedings to ensure that the offer of rights to qualifying services is subject to reasonable conditions and a fair price?***

The answer to this part of the question is also positive. Member States should be allowed, and preferably expressly recommended, to adopt measures to ensure that the offer of rights to qualifying services is subject to reasonable conditions and a fair price, e.g. via arbitration or mediation proceedings. It must be made sufficiently clear that foreign owners of rights to a nationally listed event could also be made subject to such proceedings, with a view to arriving at a *swift* solution at the national level.

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

General observations

It is difficult to deal with certain questions, such as the definition of European works and independent productions, without taking into account the future of the European system for quotas and support programmes for the European audiovisual industry.

Before any modification of these concepts is made, or attempts are undertaken to define them, it would be better to clarify the underlying general policy objectives and the competences of the European Union and the Member States in this regard.

Clarifying the general policy objectives is important not only for assessing the effectiveness of the quota system and justifying it in the eyes of the broadcasters and third parties but also to adapt it to the market conditions and to the structures of the industry.

I. Broadcasting of a majority proportion of European works (Articles 4, 6)

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?

EBU Members are fully committed to promoting the production and distribution of European works, an objective which normally coincides with their specific public service remit.

A certain degree of flexibility in the quota system will continue to be needed, also to take into account new developments and the situation of smaller countries. (For the latter it is more difficult to reach the quotas for European works, since they have fewer national productions than do the larger countries.) It is primarily for Member States to clarify the meaning of "where practicable and by appropriate means".

Any strengthening of this quota system through the imposition of supplementary sub-quotas or by additional programming obligations, for example in prime time, should be excluded, in order to protect the independence of programming.

The EBU understands the desire of the European cinema and audiovisual production industries to strengthen their presence, and is not unwilling to assist them in this regard. It would not, however, be appropriate to try to solve the cinema's problems by tightening already tight regulations in the television sector, while leaving the cinema essentially unregulated.

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?

The current definition of "European works" in Article 6 of the Directive is already very complex, and difficult to handle for an ever-increasing number of programmes which are broadcast. Adding further criteria could thus prove counter-productive and would be contrary to the principle of subsidiarity. It would probably reduce the definition's practical value and increase doubts as to the effective application of the quota system as a whole.

3. Any other aspects not raised in the preceding questions.

Better circulation of European works outside their national home markets

The EBU is favourable to measures which facilitate and promote, *on a voluntary basis*, the circulation of European works within Europe. A number of possible ways of improving the circulation of European works outside their national market may arise:

- *Programme exchanges, co-productions and sharing of live events:* While they cannot work in all cases in the same way and with the same success, there is clearly scope for an extension, which can provide important cultural and economic benefits. The organization of programme exchanges, co-productions and sharing of live events among Members has long been among the key objectives of the EBU. Whereas collaboration in the areas of news, information, culture and sport have a longstanding tradition, the EBU has recently stepped up its activity regarding collaborative projects in areas such as documentaries, animation, youth and education, drama, music and light entertainment.

- *European funds:* The MEDIA plus programme already contributes to this objective, but it is limited in scope and hardly has a direct impact on broadcasters. Opening up the MEDIA programme more for broadcasters, or setting up a new fund covering extra costs for the circulation of non-national European works, could help to increase the number of European co-productions and enhance the circulation of audiovisual works within Europe[3].

[3] The success of *Northvision*, the programme exchange and co-production scheme of public service broadcasters in the five Nordic countries, is certainly partly the result of these countries being closely related in cultural and historical terms. But it can also be explained by the fact that extra money is made available for Nordic co-productions (through the Nordic TV Fund), so that extra costs for co-productions are covered and a financial incentive exists for the participating broadcasters.

Whilst appreciating the value of European funds such as MEDIA plus and Eurimages, the EBU and its Members would be opposed to the proposal of a European production fund financed by broadcasters themselves. Such a fund would not provide fresh resources but would merely redistribute existing ones at an additional cost, without ensuring that audiovisual productions correspond to what viewers want and what broadcasters require (particularly to fulfil their public service remit).

The diversity of cultures in Europe depends, to a large extent, on the existence of viable audiovisual production and broadcasting sectors in each Member State and region. Ensuring their development is the paramount objective of audiovisual policies (including cinema funds) at the national and regional levels. In the framework of these national/regional policies, broadcasters already contribute significantly to the funding of new cinematographic and television productions.

- *Additional quotas:* We are in favour of the promotion of the diversity of cultures in Europe. However, we do not believe that the introduction of *(sub-)quotas for non-national European works* or similar obligations imposed upon broadcasters would be an appropriate way of achieving this objective. In this sensitive area, positive incentive measures are more appropriate than binding obligations.

II. European works by independent producers (Article 5)

1. In your opinion, do 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?

The EBU considers that there is no problem with interpreting and implementing Article 5, the monitoring and control procedures at the national level being adequate. Moreover, there would be no reason to reinforce the quota system for independent productions, and certainly not through an increase in the percentage.

Before any reinforcement were to be considered, it would in any case be necessary to clarify the underlying public policy objectives and to analyse new industry structures. Potentially conflicting objectives such as cultural diversity and the competitiveness of the European industry need to be the subject of a proper balance, and new objectives such as media pluralism and technological neutrality need to be taken on board.

The new media environment is characterized by convergence, vertical integration, concentration and the emergence of big media groups. A small number of media groups have developed which are active not only in several European markets (and beyond) but also at different stages of the audiovisual value chain, including production, distribution and

transmission. Normally their activities extend to both traditional television and new electronic media. Moreover, new entrants, such as telecommunications, cable or information technology companies, have acquired, and will continue to acquire, stakes in audiovisual production and broadcasting companies. This has led to a change in the balance of power and a much more complex industry structure for audiovisual production and distribution. Production companies and broadcasters increasingly form part of, or depend on, such media groups.[4]

The independent production quota has been justified to date as a means of fostering pluralism of production, guaranteeing a certain role for SME production houses, and limiting vertical integration, but it would not be justified to restrict broadcasters' programme autonomy simply in order to favour the emergence of a few pan-European media groups.

2. Is there a need to harmonise or coordinate at Community level the definition of the concept of independent production or producer, and if so under what criteria?

The definition of "independent producer" must, above all, remain a matter for the Member States, it being understood that national definitions should not give rise to discrimination against producers from other European countries.

There needs to be a degree of flexibility to take account of the differences which exist between the individual markets and the wide variety of contracts, depending on the parties' varying financial support and the nature of the works. In fact, depending *inter alia* on the market size and language(s) spoken, the structure of the independent production sector varies considerably from one Member State to another. In certain markets, specialized domestic producers may more or less have only one broadcaster to work for.

It is therefore necessary to have provisions properly suited to the various national structures and to avoid strict general rules applicable to all contracts and all works without taking account of their characteristics.

More generally, in view of new industry structures (see above), the definition of "independent producer" can no longer simply focus on the producer/broadcaster relationship. Nor can it ignore the fact that many production houses are, although not directly owned by a broadcaster, linked to media groups which have vested interests in different parts of the audiovisual value chain, including broadcasting and new audiovisual media. At the same

[4] See page 3 *et seqq.* of the EBU Comments of 9 July 2001 on the Commission staff working paper on certain legal aspects relating to cinematographic and other audiovisual works SEC(2001) 619.

time, broadcasters such as public service broadcasters not belonging to media groups, find it increasingly difficult to compete with such groups, not least in terms of access to cinematographic and other audiovisual works.

Criteria to define an independent producer

If a definition of the "independent producer" is to be envisaged at the European level, it may be noted that Recital 31 mentions three criteria: ownership of the production company, the quantity of programmes supplied to the same broadcaster and the ownership of secondary rights. However, this latter criterion has no relevance to the independence of a producer.

Any measures or mandatory criteria limiting the holding of rights by broadcasters in works which they have themselves commissioned and funded would run counter to the underlying objectives of the Directive.[5] One possible consequence would be that broadcasters would be virtually obliged to give preference to big production companies which are able to provide a large proportion of the funding.

Limitations on the rights retained by the commissioning broadcaster, with regard to works which are fully or primarily financed by him, deny the broadcaster the fruits of his investment and risk-taking. Such measures oblige the broadcaster to invest in independent productions without receiving full value in exchange. In other words, broadcasters would be forced to subsidize independent producers.

Limitations on broadcasters' rights will - depending on the "affiliation" of the independent producer - have distortive effects. For example, if in a given market most producers were linked, in some way or other, to one or more media or communications groups, independent broadcasters, and particularly public service broadcasters, would have no choice but to commission works from such producers in order to fulfil their quota obligations. The result could be a serious distortion of competition between integrated media groups and independent broadcasters, and this could have an adverse effect on the quality, creativity and pluralism of programme output.

If broadcasters were no longer able to acquire the necessary rights to their commissioned productions, this could also become an obstacle to the transfrontier and pan-European distribution of their television channels (in particular via DTH satellite).

[5] For more details, see page 17 *et seqq.* of the EBU Comments of 9 July 2001 on the Commission staff working paper on certain legal aspects relating to cinematographic and other audiovisual works SEC(2001) 619.

However, a certain value exists in definitions where independence is required only in the relationship between the producer and the particular broadcaster that has commissioned, co-produced or acquired the work in question (independence vis-à-vis a particular broadcaster rather than independence vis-à-vis all broadcasters). Apparently there are two Member States (France and Luxembourg) which currently understand the independence requirement in this sense ("independent of the transmitting broadcaster"). Such a definition would allow a subsidiary of a broadcaster to qualify as an independent producer in so far as it produces for other broadcasters. However, such a definition would still leave open the question of whether additional criteria are needed to prevent the quota from reinforcing trends towards media concentration and vertical integration; for this purpose, a market share threshold (with regard to audiovisual production) may be considered.

In conclusion, it is unlikely that the challenges relating to the independent production quota in Europe can be addressed simply by a different or more detailed definition at the European level.

III. Media chronology (Article 7)

1. Do the provisions of Article 7 appear adequate to you with regard to the aims pursued? Is there a problem with the interpretation or application at national level of this Article? Does the lack of harmonisation in terms of media chronology hinder the exploitation and circulation of European audiovisual works?

The EBU is in favour of maintaining the current rules in Article 7 of the Directive, which give priority to the principle of contractual freedom, as the EBU indicated in its comments on the Commission staff working paper on certain legal aspects relating to cinematographic works and other audiovisual services.[6]

[6] See pages 12-13 of the EBU Comments of 9 July 2001 on the Commission staff working paper on certain legal aspects relating to cinematographic and other audiovisual works (SEC (2001) 619) at the EBU website (www.ebu.ch) under Position Papers.

THEME 3: PROTECTION OF GENERAL INTERESTS IN TELEVISION ADVERTISING, SPONSORSHIP, TELESHOPPING AND SELF PROMOTION

Before discussing the questions more specifically, the EBU would like to make a number of general observations:

The need for a coherent regulatory framework

A coherent regulatory framework has to be guaranteed for all forms of commercial communication (both traditional and new) and for all audiovisual services offered to the public. A set of basic principles needs to be applied not only to television but also to new interactive audiovisual services.

Various principles already exist, such as:

- precise identification of advertising and sponsorship, and separation thereof from programme content

- respect for the broadcaster's editorial independence and the integrity of the signal broadcast and of audiovisual works

- ban on surreptitious advertising and on the use of subliminal techniques

- regulation of advertising targeted at minors, especially in programmes/products for children

- principles regarding tobacco, medicinal products and alcohol.

These principles, and particularly the principle of identification and separation, are all the more important with regard to new advertising techniques in that some of them tend to combine advertising and editorial content.

A general point is that the great majority of EBU Members funded from public resources are subject to even stricter rules than those laid down in the Directive, particularly regarding limitations on the insertion and the duration of advertising. However, the Directive can only lay down general minimum rules and must not differentiate between public service and private broadcasters.

1) Concepts and definitions (Article 1 (c)–(f))

Do the provisions of these Articles 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 recent technological and market developments (particularly with regard to new advertising techniques; see 8 below)?

Overall, the current definitions are satisfactory and give rise to no particular difficulties.

However, it would be worthwhile examining two concepts:

(a) Self-promotion

The concept of self-promotion may need to be clarified. Article 1(c) of the Directive regards self-promotion as a form of television advertising, whereas Article 18(3) gives a narrower definition and clearly excludes it from the maximum time that may be devoted to advertising.

To prevent any confusion about the concept of self-promotion, the latter should be clearly defined and taken out of the scope of the definition of television advertising in Article 1(c). However, if necessary, it would still be possible to extend explicitly certain rules for television advertising to self-promotion.

(b) Teleshopping

The definition of teleshopping should be understood as programmes including any direct offer which encourages the purchase of a product by telephone, fax or the Internet. On the other hand, if the offer refers only to shops or other places where the consumer can go to buy the product, it is a case of television advertising

(c) Political and social advertising

The concept of political and social advertising is excluded from the scope of the current definition of television advertising. Is there a case for a more precise definition of political and social advertising combined with some minimum requirements for political and social advertising, particularly during election campaigns?[7] For the time being the rules on political advertising vary widely from one Member State to another. Some ban it, whereas others accept it although often under strict conditions.

[7] See the Council of Europe Recommendation No. (99)15 on measures concerning media coverage of election campaigns and the judgment of the European Court of Human Rights of 28 June 2001 in case 24699/94 VgT Verein gegen Tierfabriken v. Switzerland.

Although this is primarily a matter for the national or regional legislators/regulators and for self-regulation, it may be useful to draw up minimum rules at the European level (with Member States retaining the possibility to adopt stricter provisions if they so wish) to guarantee the free circulation of information. Currently, national provisions may ban the transmission of foreign channels' output concerning election coverage (as this is an area not coordinated by the Directive). Moreover, minimum rules in this field would also make it possible to prevent election campaigns from being distorted by broadcasters operating, for example, from another country and offering air-time on a preferential basis to a particular political party.

The EBU thus invites the Commission to consider this issue.

2) General standards (Article 12) and those for the attention of minors (Article 16)

Do the provisions of these Articles 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 recent technological and market developments (particularly with regard to new advertising techniques; see 8 below)? If so, what solutions would you propose?

These provisions are fundamental and must be applied to new advertising techniques.

3) Form and presentation of television advertising and teleshopping (Article 10)

Do these provisions enabling the separation of the editorial content of the programme from the different forms of advertising 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; see 8 below)? If so, what solutions would you propose?

The provisions of Article 10, and particularly the principle of identifying and separating advertising from editorial content, are the basic rules which need to be maintained and extended to new advertising techniques (see under 8).

4) Insertion of advertising and teleshopping spots (Article 11)

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; see 8 below)? If so, what solutions would you propose? Any other aspects not raised in the context of the preceding questions.

Article 11 leaves some scope for interpretation over the insertion of advertising during sports programmes and other similarly structured events. This scope should be used to allow broadcasters greater flexibility. A harmonized interpretation of natural breaks could also be envisaged. On the other hand, with regard to the wish of certain commercial broadcasters to have more extensive advertising opportunities during feature films and other programmes, it is necessary to recall that the current rules already constitute a compromise between the legitimate funding of programmes on the one hand and, on the other, the importance of respecting the integrity of the value of audiovisual works and the specific contents of certain other programmes (notably for children).

However, note should be taken of the development of new interactive services or applications such as electronic programme guides (EPGs), which allow viewers to establish their own schedule, and of personal video recorders (PVRs), which may be integrated in new digital decoders and which allow viewers to avoid or to pass swiftly over certain advertising or to view only those advertisements which are of particular interest to them.

5) Advertising and teleshopping for certain products (Articles 13, 14 and 15)

Do the provisions of these Articles 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 recent technological and market developments (particularly with regard to new advertising techniques; see 8 below)? If so, what solutions would you propose?

These rules give rise to no particular problems and should be maintained for new advertising techniques. Some EBU Members apply stricter rules.

6) Duration (Article 18)

Do these provisions aimed at ensuring that the duration of the different forms of advertising is neither excessive nor prejudicial to the primary task of broadcasting 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; see 8 below)? If so, what solutions would you propose?

Does it seem appropriate to you to modulate the application of the rule in accordance with the nature of the channel (for example, for teleshopping or self-promotion channels) and the size of the audience? Additionally, does it seem worthwhile to you, in order to facilitate the coherent application of the Directive, to make use in certain cases of self-regulation or co-regulation? Any other aspects not raised in the context of the preceding questions.

The key requirements are to maintain or stabilize a certain level of advertising revenue for broadcasters and to ensure a balance between the various interests involved. A basic set of quantitative restrictions, harmonized at the European level, can help to achieve this balance. Although commercial broadcasters and certain EBU Members relying entirely on advertising and sponsorship are asking for further liberalization of advertising limits, the interests of viewers and the advantages of having a common European regulatory framework in this sector should not be underestimated.

At any rate, no variation of these rules on the basis of the nature of the channel, the programmes or the audience should be operated at the European level, as this could lead to discrimination among broadcasters.

In accordance with the principle of subsidiarity (Article 3 of the Directive) Member States may still, if they so wish, adopt stricter rules for certain broadcasters under their jurisdiction. Stricter rules apply to the majority of EBU Members.

Concerning the application of these rules to certain new advertising techniques, see point 8 below.

7) Sponsorship (Article 17)

Do the provisions of this Article seem appropriate to you? Are there in your opinion problems with the interpretation of these concepts with regard to recent technological and market developments (cf. definition under 1)? If so, what solutions would you propose?

As regards the development of new forms of sponsorship, such as sponsorship reminders, the provisions in the Directive regarding sponsorship are sufficient. However, it should be specified that the broadcaster's editorial independence must be guaranteed. It has to be able to maintain control over its signal.

This is not always the case with certain forms of on-screen identification, such as timing and data-processing injections, which are, however, not to be regarded as television sponsorship. In sports contracts broadcasters are sometimes obliged to accept, at the risk of losing the contract, injections or on-screen identifications for timing and data processing in favour of companies whose principal activity lies in another area.

Such timing and data on-screen identification needs to be distinguished from sponsorship reminders, which should be seen as compatible with the Directive. The brand name displayed by such timing and data on-screen identification is usually different from the one mentioned in sponsorship credits at the beginning and end of programmes.

Although sponsorship reminders and other new forms of advertising and sponsorship may make it more difficult for viewers to distinguish between the two forms of commercial communication, the EBU believes that the distinction between television advertising and sponsorship is still valid and should be maintained.

8) New advertising techniques[8]

General observations

Clear, appropriate rules for new advertising techniques

The development of new advertising techniques should not be impeded, but it needs to be part of a clear, appropriate regulatory framework. In the interests of technological neutrality a set of fundamental principles should be applied to the totality of traditional and new commercial communications.

Some new forms of advertising (interactive, split-screen and virtual) are, as yet, relatively uncommon, but give rise to questions requiring more detailed study.

It would be difficult for certain provisions of the current Directive to be applied, as they stand, to new advertising techniques, and they should be clarified or, indeed, adapted. A progressive or graduated regulatory approach should be adopted, with measures suited to each new form of advertising.

The introduction of any new form of advertising needs to respect the interests of the viewer/consumer and the editorial independence of broadcasters. Accordingly, the insertion of any commercial communications in the broadcast signal as it appears on viewers' screens must be subject to the prior consent of the broadcaster(s) and should not spoil viewing comfort.

a) Split-screen advertising

By way of illustration, the development of separate-/split-screen advertising raises the practical question of calculating the length of transmission time devoted to the different forms of advertising broadcast (application of Article 18). This technique also leads to questions on the application of the rules governing the form and presentation of advertising (application of Article 10) during programmes (application of Article 11). In your opinion, is split-screen 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? If so, what solutions would you propose, particularly with regard to the application of the rules governing insertion (see 4 above) and duration (see 6 above)? Do you consider it appropriate to specify the way in which the Directive should apply to split-screen advertising?

[8] See also the EBU preliminary views on regulatory aspects of new advertising techniques of 6 November 2002 (www.ebu.ch), under Position Papers.

Split-screen advertising gives rise to a number of questions, especially with regard to the principle of separation of, and the risk of confusion between, programme output and advertising, the integrity of the audiovisual work and the public's viewing comfort. There needs to be clarification of how the Directive's provisions should apply to this new form of advertising.

i) Principle of separation

The principle of separation of advertising from editorial content is to be interpreted as meaning that spatial separation is accepted alongside separation in terms of time. This should not call into question the principles of identification and separation contained in the Directive.

ii) Rules on the insertion and duration of advertising

As regards the Directive's other provisions, particularly concerning the insertion of advertising and the quantity thereof, the same logic as for traditional advertising should in principle apply to split-screen advertising. This is in keeping with Opinion No. 9 (2002) of the Council of Europe on split-screen advertising.[9]

iii) Rules on advertising content

It needs to be determined whether there are specific programme categories (e.g. children's programmes and feature films) where split-screen advertising should be the subject of particular restrictions, and whether permanent split-screen advertising should be banned altogether.

In any case it should not be assumed that split-screen advertising needs to be limited to certain types of programme or services, such as sports programmes, the weather reports, EPGs, etc.

iv) Respect for the broadcaster's editorial independence

It also needs to be stressed that, as in the case of virtual advertising,[10] no split-screen advertising should be inserted in the broadcaster's signal without his prior agreement. The broadcaster must maintain editorial control over his programme output. Consequently, no advertising messages must be added at any level (programme production, transmission and on-screen display) without the broadcaster's authorization.

[9] Split-screen advertising is covered by the European Convention on Transfrontier Television but cannot be regarded as acceptable in application thereof unless it satisfies the following criteria: (i) a clear and recognizable separation of programming and advertising, and (ii) full compliance with all the other requirements of the Convention and particularly Articles 7 (responsibilities of the broadcaster), 11 (general advertising standards), 12 (duration of advertising), 13 (form and presentation of advertising), 14 (insertion of advertising) and 15 (advertising of particular products).

[10] See EBU Memorandum, principle 10.

Difficulties could also occur with broadcaster's editorial independence if split-screen advertising encouraged the purchase of a product or service which more or less simultaneously appeared in the programme. This raises issues similar to those dealt with in Article 17(1)(c) of the Directive, regarding sponsorship.

A general issue is the influence of the size of the part of the screen carrying advertising on programme content and its impact on the viewer. In some cases advertising occupies over three-quarters of the screen and thus completely overwhelms the programme output. In some cases the audio output is for the advertising and is not the programme sound.

b) Interactive advertising

The development of interactive advertising raises a number of questions, particularly as it is not broadcast in linear fashion but in interaction with the viewer. It could be argued in this regard that, being broadcast in non-linear fashion, interactive advertising should not be subject to the provisions of the Directive. In any event, the Directive and particularly the provisions relating to the form and presentation of advertising still apply (Article 10) up until the changeover to the non-linear mode for interactive advertising. Given that the aim of these provisions is to avoid any confusion between advertising or teleshopping broadcasts and other elements of the programme service (see 3 above), does it seem appropriate to you to interpret them in such a way as to oblige broadcasters to indicate by visual or acoustic means the fact that the user is leaving the editorial content in order to access advertising content?

The issue of interactive advertising is linked to the scope of the Directive, which does not cover such interactive audiovisual services as video-on-demand but does include near-video-on-demand and pay-per-view. Distortion of competition between the operators could thus be caused if different rules applied.

Regardless of the current scope of application of the Directive, the main question is how different forms of advertising can be distinguished. It is far from satisfactory for the sole criterion to be the viewer's individual choice to leave the linear environment, whereby a dividing-line is fixed between linear and interactive.

According to the Bird & Bird study, an interactive service or interactive advertising obtained from a television programme is likely to fall within the Directive's scope of application.

Technological developments and convergence are progressively calling into question the distinction made between broadcasting and new interactive audiovisual services founded on a technical criterion (point-to-point and point-to-multipoint) and also on the criterion of individual demand.

This situation requires an adaptation of broadcasting regulation.

Interactive advertising has to respect certain fundamental principles such as identification/ separation, as well as the rules on advertising content. A visual and/or acoustic signal should be used to remind viewers that they are accessing advertising content.

i) Electronic programme guides (EPGs)

What happens when, for instance, advertising is included in, or obtained from, an electronic programme guide (EPG)? What rules regarding editorial content and advertising should be applied to EPGs? Advertising on EPGs is clearly within the scope of media regulation.

The Council of Europe Recommendation Rec. (2003) 9 of 28 May 2003 on measures to promote the democratic and social contribution of digital broadcasting has identified this as an issue for regulators. Point 14 indicates that "the use of EPGs as an advertising medium should prejudice neither their functionalities nor the integrity of programmes".

The purpose of EPGs is to assist viewers and listeners in finding digital programmes of interest to them, and this process could be jeopardized if EPGs were essentially used as carriers of advertising (to be distinguished from broadcasters' self-promotion).

Moreover, some channels which have little or no advertising would find their editorial policy compromised if viewers had to pass through a commercial environment to find their programmes. Any superimposition of EPGs and related advertising on the programmes would also undermine the broadcaster's editorial independence and harm the integrity of the signal.

Finally, it is not certain that the distribution of commercial revenue from advertising on EPGs would help to fund content/programmes, as opposed to merely benefiting the platform operators.

ii) Protection of private life and personal data

Interactive advertising also raises such questions as the protection of privacy and personal data, with the risk of abuse of personal data gathered from consumption of television programmes and interactive services related thereto. As regards interactive advertising, the gathering of personal data can be carried out through digital decoders with a return path or digital decoders equipped with PVRs. Such personal data can be put to various uses by the operators (audience measurement, definition of commercial targets, sale of database, etc.).

In the EBU's view, the use of such techniques can be justified only if the technological means are deployed to permit users to preserve their privacy and if they are given the option of not providing any or all personal information concerning, for instance, their user profile or their past viewing selections. Anonymous reception of radio and television signals must remain possible so that individual liberties are preserved.

The Directive 2002/58/EC on personal data and privacy in electronic communications already covers some aspects, but not all of them. The Commission should encourage the industry to develop technological instruments making it possible for viewers to control or block the use of their personal data.

c) Virtual advertising

The development of virtual advertising raises questions about the way in which it can be reconciled with the interests of rights holders and viewers in maintaining the integrity of the audiovisual work on the one hand and the ban on surreptitious advertising on the other. In your opinion, to what extent is virtual advertising compatible with the Directive and the general interest objectives it pursues? If applicable, do you consider it appropriate to specify the way in which the Directive should apply to virtual advertising?

The fact that, in regulatory terms, virtual advertising is dealt with differently from one country to another is no reason for its nature to be misunderstood or for hasty conclusions to be adopted which would equate it with sponsorship or "sponsorship reminders" and subject it to the Directive's rules on television sponsorship[11] or which would regard it as akin to surreptitious advertising.

A distinction needs to be drawn between the virtual technique (virtual imaging) and the various uses which can be made of it for advertising and sponsorship purposes.

Virtual techniques are used in the case of sports events to insert advertising, either by virtual replacement of the existing advertising banners around the competition area or by adding advertising banners or other elements elsewhere. In the first case, the practice may be compared with event advertising/sponsorship, while in the second case a comparison may be made with television advertising. After all, the Directive allows for the possibility of other forms of advertising.

At any rate, the Directive's rules on television advertising (particularly regarding the duration of advertising) should not be applied to the use of virtual techniques consisting merely of replacing existing advertising located at the event venue.

To ensure that virtual advertising is used in a balanced way which is satisfactory for the viewer, in May 2000 the EBU adopted a Memorandum suggesting a series of rules and principles. The text, which is intended to help achieve a coherent, coordinated approach to the virtual technique throughout Europe, can be found at the following EBU web address: http://www.ebu.ch/departments/legal/pdf/leg_virtual_advertising.pdf

[11] That, however, is what the Carat Crystal/Bird & Bird study seems to recommend, without providing a reasoned legal analysis.

A number of basic principles may be recalled here:

- the presence of virtual advertising must be indicated to viewers by appropriate means, normally at the beginning and/or end of the programme;

- no virtual advertising may be inserted in the signal by the organizer of the event, his agents or any third party without the prior agreement of the broadcaster(s) holding the transmission rights;

- no virtual advertising may be inserted in the signal without the prior agreement of the event organizer, and no virtual advertising should break any existing contract with advertisers or sponsors of the event;

- virtual advertising may be inserted only on surfaces at the venue which are customarily used for advertising; it may also be inserted on the field of play/surface, but only outside competition times;

- virtual advertising must not be used for products or services for which television advertising is prohibited in the country where the broadcaster is established.

In general, do these new forms of advertising recover, in your opinion, a substantial proportion of their investment? Do you know of new services (pilot or on the market) which would apply these new techniques? How can any difficulties identified be resolved? Is it necessary to specify the way in which the relevant provisions of the Directive are likely to apply to these new techniques? Additionally, does it seem worthwhile to you, in order to facilitate the coherent implementation of the Directive, to make use in certain cases of self-regulation or co-regulation? Any other aspects not raised in the context of the preceding questions.

a) Commission Interpretative Communication

It would be useful to recognize in a Commission Interpretative Communication or a Council Recommendation the legality at the European level of certain forms of advertising such as split-screen, virtual and interactive advertising, and to specify the fundamental principles and which rules apply.

The goal is to encourage the development of new advertising techniques by guaranteeing legal certainty and the balance between the various interests involved.

b) Concept of co-regulation

Another question is whether it would be useful, to make it easier to implement certain provisions of the Directive, to have recourse to co-regulation.

Moreover, a distinction needs to be made between co-regulation at both the national level and the European level.

i) Co-regulation at the national level

The very principle of the Directive is to link the Member States together in terms of the results to be achieved and to leave them free to choose the form and means of implementation. Thus the Member States can, if they so wish, envisage or encourage co-regulatory systems at the national level in certain sectors or for certain provisions.

The chapter on advertising is the most detailed and precise part of the Television without Frontiers Directive and leaves limited scope for self-regulation. Nevertheless, most public service broadcasters have adopted internal rules of conduct to complement the national law with rules which are even stricter and more detailed.

Given the development of new advertising techniques, co-regulation provides a degree of flexibility compared to regulation. It permits the various parties involved, and especially in the broadcasting sector, to fulfil their responsibilities vis-à-vis the public.

However, if co-regulation is to operate smoothly, a number of conditions have to be fulfilled.

- the public interest objectives and basic principles must be part of a legislative or regulatory framework, remaining within the competence of the Member States;

- the representativity of all the parties' participation in the process - operators, users, consumers, governments and national regulatory authorities - must be guaranteed;

- control mechanisms and sanctions, as well as effective appeal systems before the traditional jurisdictions, must be set up.

Under these conditions it would seem that co-regulation in such fields as advertising can be a useful, effective complement to regulation, although in some cases it may be inadequate and offer insufficient legal certainty.

ii) Co-regulation at the European level

A question arising today is whether a co-regulatory system at the European level for the television advertising sector would be a possibility.

In the interests of implementing certain provisions of the Directive regarding advertising or encouraging the development of new advertising techniques, would it be worthwhile having recourse to co-regulation?

The Directive represents a minimum degree of harmonization and puts all the European operators on an equal footing. It is important to prevent co-regulation from fragmenting the internal market. Some enterprises which dominate the market could impose their will and create distortion in competition.

Co-regulation needs to maintain this minimum degree of harmonization. The aim therefore is to adopt codes of conduct at the European level. In other words, all professionals in the sector should agree on common standards at the European level on, for instance, new advertising techniques.

Virtual advertising is an interesting case in point which has not, for the time being, resulted in a harmonized solution at the European level, although this would seem necessary in view of the large number of international sports events.

It would be necessary for all interested parties, both public and private broadcasters, event organizers and sports federations to be able to agree on drawing up codes of conduct[12] at the European level, but it would seem that the interests involved are too divergent.

However, active involvement by the (European and/or national?) public authorities in a co-regulatory system would certainly make it easier to conclude such an agreement. The question that arises is at which level these authorities should become involved (drawing up a legislative framework with clear, precise, objectives, encouraging the adoption of codes, formal recognition of the codes of conduct by the regulatory authorities).

Moreover, can European self-regulation transpose certain provisions of a Directive? It may be wondered whether this is compatible with the current Television without Frontiers Directive and, in particular, Article 3(1), under which Member States have the right to adopt stricter rules for broadcasters under their jurisdiction.

At first sight, such a system would seem inoperable within the current structure of the Directive.

A starting-point would be to make a distinction between provisions in the Directive such as quantitative restrictions (insertion and duration of advertising) which can be left to national regulation and other provisions in the Directive whose interpretation may be more complex, examples being the principle of separation, surreptitious advertising and new advertising techniques, which could be left to co-regulation or self-regulation at European level.

Without a clear legal framework it may be very difficult to draw up detailed self-regulatory provisions. The above-mentioned conditions for co-regulation, adapted to the European level, could be applied here too.

The Commission is thus invited to clarify how, at the European level, a co-regulatory system could operate in the television advertising sector.

[12] In its Memorandum on virtual advertising, which was sent in May 2000 to the regulatory and self-regulatory bodies, the EBU proposed that a set of rules should be established to guarantee that virtual advertising would be used in a coherent, harmonized manner throughout Europe. VIA and FIFA adopted their own rules.

9) Broadcasts intended only for the national territory (Article 20)

Do these provisions seem appropriate to you? Are there problems with interpretation and/or implementation with regard to recent technological and market developments? If so, what solutions would you propose?

It is not so much programmes intended only for the national territory which create a problem but, rather, the issue of advertising intended only for another territory (see under 10 below).

10) Advertising windows

The EBU would like to see particular attention accorded to the question of advertising specifically intended for another country. For the time being, the Directive does not deal with this question, although in practice certain channels have introduced opt-outs or "advertising windows" for various countries (to be distinguished from "programme windows", which also include programme content specifically produced for the receiving country). This situation has created many bilateral problems between certain countries. It is necessary to find a solution in cases where such advertising windows tap the advertising market in the receiving country to an extent which would affect media pluralism, especially in the case of a small country or a limited linguistic area.

In a way, this would be an extension at the European level of what already exists in some countries: in the interests of media pluralism (particularly with respect to local and regional media) some national generalist channels are not allowed to carry local or regional advertising.

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

I. PROTECTION OF MINORS AND PUBLIC ORDER

General observations

The protection of minors and public order is of particular importance to EBU Member broadcasters. The term "protection of minors" should not be understood in a purely defensive sense (a technical system for parental control) since it also includes positive features; programming of quality and media awareness should be seen as priority objectives.

The chief responsibility and key role of broadcasters (and particularly public service broadcasters) are to provide children with programmes which are of interest, of high quality and specially conceived for them, and which thereby contribute to their physical, moral and social development. In parallel, EBU Members are pursuing their efforts to increase awareness and information regarding the existence of rating systems and parental choice for certain types of programme.

It should also be recalled that the protection of minors entails shared responsibilities among the various parties concerned (the public authorities, broadcasters, viewers/parents, schools, etc.).

1. Prohibition or limitation of broadcasts likely to harm minors

Has there been any problem in applying the national legislation in respect of this subject? Is the difference between programmes which might seriously impair the development of minors (art. 22 par. 1) and programmes which are likely impair the development of minors (art. 22 par. 2) clearly defined and applied? Should this distinction be reviewed, notably in the light of technical and commercial developments (in particular in connection with digital television)? Should co-regulation or self-regulation be developed in this area?

The distinction made in the Directive between programmes which might *seriously* impair the development of minors (Article 22(1)) and programmes which are likely to impair the development of minors (Article 22(2)) is as clear as it can be and needs to be extended to all audiovisual services communicated to the public. The general interest objectives of protecting minors does not alter as technology evolves. It might be worthwhile clarifying Article 22(1), but in view of the cultural and societal differences between Member States it would seem difficult to define clearly at the European level what might seriously impair the development of minors.

Article 22(3) needs to be reconsidered. No need exists for the programmes covered by that paragraph to be identified by a visual symbol throughout their duration. That could, indeed, run counter to the Directive's aims; the permanent on-screen presence of a warning attracts the attention of minors and could encourage them to watch programmes not intended for them. Greater impact could be achieved through the use of such other means as programme guides and teletext to inform viewers of the nature of the programme.

The current system for traditional television, which is essentially based on the watershed and the age of viewers, is still an effective means of protecting minors.

As regards new digitally-enhanced audiovisual services, other effective, appropriate means could be envisaged. However, it is necessary to avoid any obligatory introduction of technical systems of parental control for television. This would merely be counter-productive and could result in broadcasters not taking responsibility for the content that they broadcast. On the other hand, the voluntary development of technical systems for parental control should be encouraged.

In the interests of a consistent approach to the regulation of audiovisual content, the idea of a common rating system for electronic content could prove worthwhile. It nonetheless gives rise to a number of questions on implementation, particularly concerning the establishment of common descriptive criteria which are clear and non-evaluative. Each medium and its content require particular attention and, as the case may be, a specific (technical) solution to ensure that minors are protected.

It would seem easier to harmonize the common descriptive criteria for audiovisual content at the national level than throughout the Community, where the cultural and social differences are evident. The Dutch experiment *Kijkwijzer*, which provides a uniform rating system for television, video, DVD, feature films and computer games, deserves detailed attention.

A general point is that the practices of the various parties on the rating of audiovisual programmes/content should be analysed and compared more closely to see whether clear, common, readily understandable symbols could be introduced, along the same lines as road signs, for instance. At the European level the Commission should strive for (harmonized) pictograms.

As regards the form of regulation, broadcasters apply very strict, detailed internal codes or guidelines which take up and complement national and European provisions on the protection of minors.

A co-regulatory approach could be envisaged, and, indeed, such already exists at the national level in the Netherlands, France and Germany. However, could this approach work at the European level? (See Theme 3 above.)

2. Prohibition of broadcasts containing incitement to hatred

Has there been any problem in applying the national legislation in respect of this subject, in particular in the light of technical and commercial developments (notably in connection with digital television)? Should co-regulation or self-regulation be developed in that area?

The Article in question is of fundamental importance and needs to be applied to all audiovisual services communicated to the public.

3. Derogation from the obligation to ensure freedom of reception

Is this provision adequate and proportionate to ensure the protection of the general interest involved? Has there been any problem in interpreting Article 2a or applying national legislations in this respect?

The implementation of Article 2a is linked to Article 22, and especially Article 22(1), which leaves Member States significant scope for interpretation. It is, however, also necessary to recall the fundamental importance of the principle of the country of origin. Article 2a is an exception to this principle and should be used in serious cases related to Article 22(1).

4. The recommendation on the protection of minors and human dignity

Do you consider that the Recommendation continues to constitute an appropriate instrument for the protection of minors and public order, taking into account the commercial and technological developments? Should certain provisions of the Recommendation be clarified or extended? Should certain issues not covered in the Recommendation be included in the future ? Please specify.

The horizontal approach adopted by the Recommendation has been a good solution so far and complements the Directive. However, in the context of revision of the Directive and coherent regulation of the full range of audiovisual services, a better solution would be to bring together the provisions on the protection of minors within a single instrument, it being acknowledged that this could include a graduated regulatory approach.

Moreover, cooperation and exchanges of information and experiences among the different sectors of the media should be strengthened. A new platform bringing together the various parties concerned, who would meet regularly at the European level, would be a possible solution.

The EBU also believes that media education and awareness, particularly regarding on-line services, are key issues which need to be dealt with alongside the effective protection of minors.

II. RIGHT OF REPLY

Has any specific national legislation with respect to the practical enforcement of the right of reply in the on-line environment been adopted and are there already some results as regards their efficiency? Is there a value-added to develop an action at European level in that respect? If yes, what would be the appropriate instrument (directive, recommendation, co-regulation, etc.)?

The EBU supports applying a right of reply, or equivalent remedies, to the on-line environment or, indeed, to all electronic media. The same need for a rapid form of defence exists for on-line services as for broadcasting services and is in keeping with the notion of a coherent regulation for all audiovisual services communicated to the public.

The EBU invites the Commission to study the work carried out by the Council of Europe. A draft Recommendation on the right of reply in the new media environment is currently being discussed by a group of specialists within the Council of Europe, the aim being to draw up a set of minimum principles which would apply to all the media: the press, television and radio, but also on-line services. It would replace Resolution (74)6 on the right of reply.

However, a more horizontal approach should not exclude applying specific rules to certain media according to their particular characteristics, where this is justified.

THEME 5: APPLICATION (RELATED ASPECTS)

I. Determining the competent authority (Article 2)

Do the provisions with regard to determining the competent Member State seem appropriate to you with regard to recent technological and market developments? Are there problems with interpretation and/or application? If so, what solutions would you propose?

The EBU would like particular attention to be accorded to advertising windows/opt-outs. Although this issue is linked to the question of determining the competent authority, it is dealt with under item 10 of Theme 3 of the present document.

II. Contact Committee (Article 23a)

1. ***Do you think the Directive defines an appropriate set of tasks for the Contact Committee? If not, what would be a suitable role for the Contact Committee? Do you think other or different tasks should be attributed to the Contact Committee?***

2. ***To what extent do you think the Contact Committee could play a role in a co-regulatory approach? Do you think a strengthened role for co-regulatory bodies at national level needs to be complemented by an adequate forum for the exchange of information at European level? Can the risks of co-regulation (legal uncertainty, fragmentation of the internal market, difficulty of enforcement) be overcome by co-regulatory models at European level or pan-European cooperation by co-regulatory agencies?***

In the EBU's view it would be helpful to have more transparency in the Contact Committee's work. The EBU encourages the Commission to make agendas and reports of the Contact Committee's meetings available publicly on its website.

III. Role of the national regulatory authorities

1. ***In your opinion, does it seem worthwhile strengthening cooperation and coordination at Community level between the national regulatory authorities in the Member States with competence in audiovisual matters in order to achieve the aims of the Directive?***

2. ***How can cooperation be encouraged and strengthened between the national regulatory authorities in the Member States on the one hand and, on the other, between these authorities and the European Commission with a view to ensuring coherent application of the Directive?***

3. Does it seem to you worthwhile establishing a committee comprising the national regulatory authorities in the Member States[13] with a view to exchanging best practices, particularly for contributing above all to the development and implementation of self-regulation in certain fields? How should responsibilities be divided between the Contact Committee and any committee of regulators?

4. Any other aspects not raised in the context of the preceding questions.

The EBU supports the idea of introducing into the Directive, or a future instrument replacing it, a principle regarding the independence of the national regulatory authorities, in keeping with the Council of Europe Recommendation Rec. (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector.

[13] It should be noted that a committee of this type has been set up by the Commission in the context of monitoring the application of the "electronic communications" package. Cf. Commission Decision of 29 July 2002, OJ L 200/38 http://erg.eu.int/about/indexy_en.htm

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

1. 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 media and especially news agencies 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?

It can certainly be said that there is little consistency among national measures for news access. The most important feature of such inconsistency is that in most countries the applicable rules with respect to events taking place there do not give direct access to *foreign* broadcasters.

It should be recalled that the right of access to information is a *fundamental citizens' right,* which should include the right to be informed on all events which - even if taking place in other countries - are of high interest to society. On the other hand, this right must not be turned into a mere business opportunity for the sale of images. A news access right is the right to provide information on the events as such and should thus not be abused for other purposes (supplementary reports, entertainment programmes), which would undermine the position of the broadcaster who has acquired exclusive rights to the event.

Today's practice on access to television coverage of foreign events is characterized by self-regulation through contractual relationships, usually on the basis of reciprocity. Any regulation or harmonization of news access rights must take this situation as a starting point, and must also take due account of the risk of abuse through ambush reporting. The latter would consist of competing broadcasters using supplementary reports plus any other related television footage and interviews to present a "parasitical" show which interferes with the legitimate rightholder's exclusivity. Broadcasters' access to the exclusive rightholder's coverage of the event is generally sufficient to ensure the provision of information to citizens on events taking place abroad. After all, as a matter of practicality no broadcaster would send an entire crew to another country merely to shoot a few minutes of news material. Other obstacles to allowing more cameras onto the event's premises are the limited availability of technical facilities and, obviously, security concerns.

Consequently, concerning television news access to a foreign event, in practical terms the key issue is off-air access by broadcasters to the signal transmitted by the broadcaster holding the exclusive rights to that event for the national territory.

In this context, it is also relevant that in the 2001 Copyright Directive an exception to copyright protection is made for news reporting, as this reflects the national copyright laws in Europe. In fact, in some Member States this exception is used as a basis for the news access regulation. However, the Copyright Directive does not provide any safeguards to ensure that

this exception can also be exercised against any *technical measures,* such as conditional access systems or anti-copying technology, which may be used to control access to the signal. From that perspective, a media law regulation would be a necessary complementary measure to guarantee universal access to information.

It can be expected that a general legal framework on the European level would facilitate the contractual arrangements as described above and provide for more coherence in the treatment of national and foreign broadcasters; precedents for this type of "framework" regulation can be found in other parts of the Directive (e.g. Article 7 on time windows for the exploitation of films).

Such regulation would need to be applicable for the benefit of all broadcasters around Europe, in order to guarantee that small, regional or local television broadcasters are also provided with direct access to the exclusive rightholder's coverage. Moreover, it should be made clear that it would also apply to events taking place outside Europe for which a European broadcaster had acquired exclusive rights.

2. If such harmonised right should be deemed to be necessary to which extent should it be granted (ex. 90 seconds per event or day of competition) and for which kind of use (ex in regularly scheduled general news bulletins or in regularly scheduled sports news programmes of dedicated sports news channels) and under which conditions (financial compensation)?

In view of the different nature of the (sporting and other) events which come into question here, and bearing in mind the variety of legislative/regulatory or contractual arrangements which already exist in the different Member States, it would appear rather unrealistic to attempt any harmonization of such details. Broadcasters may be granted news access via different legal measures, such as access to the host broadcaster's coverage, the right to off-air recording of the first transmission by the exclusive rightsholder, or the entitlement of access to the venue, or possibly a combination thereof. Thus, it would seem more appropriate for a rule in the Directive to be drafted in general terms, e.g. similar to Article 9 of the Council of Europe's Convention on Transfrontier Television, which allows account to be taken of the particular circumstances of each case, and of the preferences prevailing in each Member State, as long as the overall aim of enabling broadcasters to report on events of high interest to their audiences is achieved.

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

The answer to this question is included in the previous answers: a combination of (framework) legislation complemented by co- and/or self-regulation of any further conditions.
