

Issues Paper for Liverpool Audiovisual Conference

Issues Paper No 5: Protection of Minors and Human Dignity

Response on behalf of CARE for Europe

EXECUTIVE SUMMARY

0.0 BACKGROUND

- 0.1** CARE is a well established Christian NGO promoting the welfare of the most vulnerable groups in society. We have a particular interest in the well-being of children through the provision of a range of caring services right through from crisis pregnancy counselling centres to remand fostering schemes for the rehabilitation of young offenders.
- 0.2** Having participated in the 2003 Public Hearings on the review of the Television Without Frontiers Directive we are now pleased to take the opportunity to respond to the current consultation on the future European regulation of audiovisual services in preparation for the Liverpool Conference.

1.0 Comprehensive Coverage

- 1.1** We totally agree that regulations for the protection of minors need to be part of the core provisions which are applied horizontally across both linear and non-linear services. We welcome the indications of Commission support for this approach in the 2003 Communication, the 2004 proposal for a Recommendation of the European Parliament and Council and the 2005 Communication i2010.

2.0 Regulation of Linear Services

- 2.1 **We are not convinced that merely retaining the current wording of Article 22 of TVWF Directive would suffice for an effective future regulation system for the protection of minors in respect of linear services. The 2003 hearings revealed a significant mismatch between the wording of this Article and the actual practice of Member States. As Member State authorities showed no inclination to follow the current wording by censoring out all pornography and gratuitous violence as required by Article 22 (1), it needs to be made clear that the provisions of Article 22 (2) and (3) are the only effective protection.**
- 2.2 **However, to be effective the provisions of Article 22 (2) and (3) need strengthening by limiting the technical means that may be used to prevent inappropriate material being seen by minors to those with a proven track record of success. This would mean the removal of the ‘watershed’ option and a concentration on encryption technology which would restrict access to unsuitable programmes to those with the necessary decoding technology and the splitting of programme bundle offers so that adult only content channels are not included with those offering general family viewing.**

3.0 Regulation of Non-Linear Services

- 3.1 **The comments above apply with equal force to non-linear services. The technical means available to operators to prevent inappropriate material being seen by minors need to be limited to those which can demonstrate a consistent track record of past success. This also means that reliance cannot be placed on self-regulation only and effective co-regulation is required to ensure Member States and providers are fulfilling their commitments.**
- 3.2 **Where regulation is effectively retrospective by responding to complaints after material has been broadcast, means need to be developed for the small third party complainant to be able to feel they are taken seriously and cases dealt with in a fair, transparent and timely manner without the need for recourse to formal judicial procedures.**

FULL PAPER

0.0 BACKGROUND

- 0.1 CARE (Christian Action Research & Education) is a registered charity and ethical campaigning association supported by 100,000 individual Christians and churches of all denominations, the greatest concentration of these being in the United Kingdom. Our activities include the provision of a range of services concerned with the care and development of children – from crisis pregnancy counselling centres, through fostering and adoption services, support for teachers and governors in Christian education to rehabilitation of young offenders through our remand fostering scheme.
- 0.2 Because of this we have a particular concern for the healthy development of children and young people which includes recognition of the need for them to be protected from harmful content on visual image services to which they are likely to have access, whether by accident or design.
- 0.3 We support the approach of the European Union in seeking to support national authorities in the exercise of their responsibilities to regulate the content of visual image services. We recognise the need for the current European legislation to be adapted and updated in view of the vast technological and supply side changes that have taken place in this sector in the sixteen years since the original ‘Television without Frontiers’ Directive was adopted.
- 0.4 CARE was represented at the Public Hearings into the Review organised by the European Commission in Brussels on 24th and 25th June 2003. This submission is in response to the fifth Issues Paper summarising input concerning “the protection of minors and human dignity, right of reply”, in preparation for a major audiovisual conference hosted by the European Commission and the UK Presidency in September 2005.
- 0.5 CARE would like the provisions of the current Directive & Council Recommendation to be consolidated in a single new legislative text with the status of a Directive. Within such a Directive, a two-tier system including basic rules applicable to all audiovisual content services must be implemented. For further discussion of this issue, please see our submission to the first Issues Paper summarising input concerning “rules applicable to Audiovisual Content Services”.

1.0 Comprehensive Coverage

- 1.1 **We totally agree that regulations for the protection of minors need to be part of the core provisions which are applied horizontally across both linear and non-linear services. We welcome the indications of Commission support for this approach in the 2003 Communication, the**

2004 proposal for a Recommendation of the European Parliament and Council and the 2005 Communication i2010.

- 1.2 Visual image services in Europe are currently regulated under two separate pieces of European legislation. These are the EU Directive of 3rd October 1989 (as amended on 30th June 1997) *on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities* – otherwise known by the shorter title of the ‘Television without Frontiers’ Directive and the Council Recommendation of 24th September 1998 *on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity*. Whilst the former document is a Directive with binding force requiring the Member States to achieve effective implementation by bringing forward appropriate national legislation, the latter document is merely advisory seeking the voluntary co-operation of national authorities and the private sector.
- 1.3 Whilst CARE understands the historic reasons for the segmentation of European regulation in this way and the impossibility of drafting an appropriate document to comprehensively cover the wide range of visual image services that have now become available back in 1989, we are firmly of the view that the time has come to level the playing field and have a consistent approach for all visual image services to which minors are likely to gain access regardless of the technical means of delivery. In view of the presence in this sector of a broad range of commercial interests, including those originating in relatively unregulated economies outside the EU, we believe that only a binding Directive will have the necessary force to secure compliance on an even basis. The child in the home or at school faces the same threat to their ‘physical, mental or moral development’ (to quote Article 22 of the current Directive) from images reaching their screen via unprotected internet sites or video or DVD recordings as from images originating from traditional analogue or digital TV broadcasts. This would also be in line with the recommendations in Commission Communication (COM(2001)534 final) ‘*on certain legal aspects relating to cinematographic and other audiovisual works*’ of 26.09.2001 and the Commission’s Evaluation Report (COM(2001)106) on the Council Recommendation in relation to ‘*the protection of minors and human dignity*’ of 27.02.2001. It is also in line with the proposals of the Education and Culture Committee of the European Parliament (De Sarnez Report) on the European Commission’s proposal for a Recommendation of the European Parliament and Council (COM(2004) 341 final) which are due to be endorsed at this week’s plenary session of the European Parliament.

2.0 Regulation of Linear Services

- 2.1 **We are not convinced that merely retaining the current wording of Article 22 of TVWF Directive would suffice for an effective future**

regulation system for the protection of minors in respect of linear services. The 2003 hearings revealed a significant mismatch between the wording of this Article and the actual practice of Member States. As Member State authorities showed no inclination to follow the current wording by censoring out all pornography and gratuitous violence as required by Article 22 (1), it needs to be made clear that the provisions of Article 22 (2) and (3) are the only effective protection.

- 2.2 **However, to be effective, the provisions of Article 22 (2) and (3) need strengthening by limiting the technical means that may be used to prevent inappropriate material being seen by minors to those with a proven track record of success. This would mean the removal of the ‘watershed’ option and a concentration on encryption technology which would restrict access to unsuitable programmes to those with the necessary decoding technology and the splitting of programme bundle offers so that adult only content channels are not included with those offering general family viewing.**
- 2.3 Discussion of Article 22 at the Public Hearings revealed a degree of confusion, including on the part of national regulatory authorities. The Article seeks to protect ‘*the physical, mental or moral development of minors*’ and makes a clear distinction between ‘*programmes which might seriously impair*’ such development (para 1) which are not to be broadcast at all and ‘*programmes which are likely to impair*’ such development (paras 2 and 3) which may be broadcast provided there are safeguards in place to ensure that minors ‘*will not normally hear or see*’ such broadcasts. The Article also cites ‘*programmes that involve pornography or gratuitous violence*’ as examples of the former (i.e. ‘serious harm’) programmes that should not be broadcast at all. However, many Member State authorities do currently permit the broadcasting of programmes involving pornography and gratuitous violence but merely seek through rating and other technical or timing provisions to ensure that they will not normally be seen or heard by minors.
- 2.4 Various contributors at the Public Hearings sought to advocate a variety of linguistic contortions to try to adjust the wording of the Directive to fit the reality of practice by the national regulatory authorities. This included a suggestion that the original drafters of paragraph 1 had only meant to refer to pornography or gratuitous violence in programmes specifically aimed at minors, and a suggestion that the reference to pornography and gratuitous violence should be replaced by a reference to illegal or illicit content. But many contributors objected to the latter as an unhealthy mixing up of criminal and civil law provisions.
- 2.5 CARE does not consider any useful purpose is served by retaining wording in legislation which is not being enforced and which it appears the relevant authorities have no intention of enforcing. Member State representatives at the Public Hearings appeared to be adamant that they were not prepared to countenance a situation in which all pornography was censored out and removed from broadcasting schedules.

- 2.6 Therefore, the focus of the Directive should be on ensuring that material “*which may seriously impair the physical, mental or moral development of minors*” is not accessible to minors. However, for ‘*pornography and gratuitous violence*’ to be formally accepted as transferred from the provisions of Article 22 (1) to Article 22 (2) and (3) will require much greater vigilance in preventing the accidental or intentional viewing of inappropriate programmes by minors.
- 2.6 There is widespread evidence that many of the technical measures currently advocated to restrict access to undesirable programmes are just not working in relation to linear services.
- 2.7 The ‘watershed’ approach to controlling output by time of day is clearly breached where minors are watching programmes after the declared watershed time in substantial numbers¹, they clearly also have the ability to set recording devices before the watershed to capture unsuitable programmes broadcast after the watershed for later daytime viewing. Technical approaches which require parents to enter codes to scramble programmes and prevent viewing by minors limit control to those with the time, commitment and technical competence to consistently achieve this. Only systems where material is encrypted by the broadcaster and the viewer must make a conscious effort to unencrypt have any hope of meeting the objective of the Article that minors ‘*will not normally see or hear*’ such material.
- 2.8 However, for such encryption to be effective in denying access to minors there has to be a greater degree of responsibility observed by those distributing the access codes/unscrambling devices. In the UK, service operators commonly advertise decoders in magazines sent to all customers and very likely to be accessible to children. Response forms merely require the ticking of a box to indicate the applicant is over 18. Furthermore, there is often not an option to families to only obtain access to non-adult channels as adult channels are sold as part of a ‘bundle’ of channels not accessible separately.

3.0 Regulation of Non-Linear Services

- 3.1 **The comments above apply with equal force to non-linear services. The technical means available to operators to prevent inappropriate material being seen by minors need to be limited to those which can demonstrate a consistent track record of past success. This also means that reliance cannot be placed on self-regulation only and effective co-regulation is required to ensure Member States and providers are fulfilling their commitments.**
- 3.2 **Where regulation is effectively retrospective by responding to complaints after material has been broadcast, means need to be developed for the small third party complainant to be able to feel they are taken seriously and cases dealt with in a fair, transparent and timely manner without the need for recourse to formal judicial procedures.**

- 3.3 Non-linear services pose an even greater challenge in terms of protecting minors from harmful content. Children are frequently more adept and confident in using new technologies than are their parents, guardians or teachers, making it far harder to restrict access from their end. With improved mobile technology, it becomes virtually impossible for parents to control their children's viewing.
- 3.4 Consequently, the providers of audiovisual services must take seriously their responsibility in protecting minors from harmful material. This may be done by ensuring that unrestricted access is not automatic, but rather that only audiovisual content controlled at source and filtered for harmful content is easily available, with the option for access to content which might be harmful to minors only available on subscription.
- 3.5 The Public Hearings saw much discussion of the merits of the various alternative ways of regulating broadcast content as well as numerous requests for clarification of just what the various expressions actually meant. CARE appreciates the efforts that have been made by a number of associations of private sector producers and distributors to seek to establish common standards and police them, particularly in the field of seeking to establish an objective system for content rating.
- 3.6 However, because these various associations are voluntary and not necessarily inclusive of every player in the market, as well as the large volume of recorded material originating from outside the EU which finds its way onto the screens in the family home in Europe, we feel it is essential that an element of public sector involvement is retained. This public sector involvement needs to serve both as a safety net to catch material originating from outside the circle of those participating in voluntary schemes and as a validation check in the public interest on the standards being adopted by voluntary groups and their enforcement. Where boards or other oversight groups are established to represent the public sector regulatory interest it is essential that they have significant 'lay' involvement and are not just confined to industry professionals. Representation of civil society including consumer interests, parental and family associations is vital.
- 3.7 The current wording of the Directive largely appears to assume a prior vetting of programme content on the part of the regulatory authorities. With the advent of multi-channel television and the digital age this is increasingly becoming the exception rather than the norm for original content broadcast material, although for recorded and film material – through voluntary or mandatory content rating systems – it may have increased. There is a large swathe of programme material where the implementation of the provisions of the Directive effectively relies on complaint on the part of concerned or offender viewers *after* the material has been broadcast.
- 3.8 In these circumstances the provisions for redress in Article 3 need considerable strengthening. Broadcasters are naturally defensive about material which has already been transmitted and the complainant starts off

with an inbuilt disadvantage in these circumstances. Too often responses received from broadcasters to complaints are dismissive and have the effect, with repeated use, of discouraging all but the most motivated members of the general public from pursuing the issue. There needs to be some mechanism whereby justice can be seen to be done for the small or individual third party complainant without the need to have recourse to judicial proceedings.

4.0 CONCLUSIONS

- 4.1 The regulations contained in the current Directive for the protection of minors in Article 22 of the TVWF Directive are a good starting point for future regulation of both linear and non-linear services. However, clarification is needed as to whether there is a continuing role for paragraph 22(1) given the unwillingness of Member States to enforce a strict interpretation of it. This means that even greater weight needs to be given to the provisions of 22(2) and 22(3) as the only effective defence against the viewing of unsuitable content by minors. Social and technological changes have made control by ‘watershed’ no longer effective and there therefore needs to be a concentration on technical measures to restrict access to programmes which can be demonstrated to be effective, and widening its application to cover all means by which visual image services reach the screen in the family home.
- 4.2 Whilst encouraging maximum industry participation there should never be a situation in which public sector involvement in regulation is totally excluded. Regulatory bodies must include a fair representation of concerned elements of civil society and not be the exclusive domain of professionals. Procedures need to be established to enable small third party complainants, seeking to uphold the provisions of the Directive, to receive a fair and transparent hearing without needing to have recourse to formal judicial proceedings.

SUPPORTING INFORMATION

References

- 1 - ‘What Children Watch’ ITC/BSC (UK), June 2003, p56.
Interviewed children aged 4 to 15 and found that 19% regularly watch programmes after 21h00 ‘watershed’.