



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.1.2003
COM(2002) 778 final

**FOURTH REPORT FROM THE COMMISSION TO THE COUNCIL, THE
EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

on the application of Directive 89/552/EEC "Television without Frontiers"

**FOURTH REPORT FROM THE COMMISSION TO THE COUNCIL, THE
EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

on the application of Directive 89/552/EEC "Television without Frontiers"

TABLE OF CONTENTS

1.	Introduction	3
1.1.	Background of this report	3
1.2.	Development of the television market in Europe (2000-2002).....	4
1.3	Independent study	7
2.	State of play in implementing the directive	7
3.	Application of the Directive.....	8
3.1.	Main principles	8
3.2.	Jurisdiction	8
3.3.	Events of major importance for society (Article 3a).....	9
3.4.	Promotion of distribution and production of television programmes	10
3.5.	The application of the rules on advertising (Articles 10 to 20).....	12
3.6.	Protection of minors and public order (Articles 2a, 22 and 22a).....	15
3.7.	Coordination between national authorities and the Commission.....	16
4.	International Aspects.....	17
4.1.	Enlargement: Analysis of audiovisual legislation in the Candidate Countries	17
4.2.	Cooperation with the Council of Europe	18
5.	Conclusions and Prospects.....	18
	Annex : Work programme for the review of the "Television without Frontiers" directive and time table of future actions.....	21

1. INTRODUCTION

1.1. Background of this report

By means of this Communication the Commission is submitting to the European Parliament, the Council and the Economic and Social Committee the fourth report on the application of Directive 89/552/EEC¹, as amended by Directive 97/36/EC², "Television without Frontiers" (referred to below as 'the Directive').

Article 26 of the Directive provides that, not later than 31 December 2000, and every two years thereafter, the Commission must submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Directive as amended and, where appropriate, make further proposals to adapt it to developments in the field of television broadcasting, in particular in the light of recent technological developments.

This report follows the Third Report³ that was published at the end of the year 2000 and deals with the application of the Directive in the years 2001 and 2002.

The report describes and analyses the salient facts relating to the application of the Directive during the reference period. These cover, in particular, the application of Article 3a on events of major importance for society, the application of the rules on protection of minors and of the rules on advertising, coordination between the national authorities and the Commission and an analysis of audiovisual legislation in the applicant countries wishing to join the European Union. Furthermore, it should be noted that, the Commission in keeping with Article 4(3) of the Directive published a separate report on the application of Articles 4 and 5 of the Directive⁴. Point 3.4. of this report outlines the separate report's main conclusions regarding Articles 4 and 5 (promotion of distribution and production of television programmes) of the Directive.

In an annex to the report the Commission proposes a work programme to open a debate on the possible need to adjust the regulatory framework because of the developments in markets and technologies. This debate will be forum-driven and concentrate on a number of horizontal and specific questions. The purpose of this exercise is to provide the Commission with the necessary input to evaluate the need to update or adapt the present regulations. Depending on the results of this consultative process, the Commission will assess the need to propose more coherent measures to reinforce European audiovisual policy to the Community legislator, taking also full account of the objective of creating a pro-competitive and growth oriented environment for the development of the audiovisual sector⁵.

¹ OJ L 298/23, 17.10.1989

² OJ L 202/60, 30.07.1997

³ COM(2001) 9 final

⁴ COM(2002)612 final

⁵ According to the Commission's long-term objective set out by the Lisbon European Summit of making the Union the world's most competitive, knowledge-based economy.

1.2. Development of the television market in Europe (2000-2002)⁶

The industry

During the years 2001-2002 the favourable trend that characterised the development of the EU television industry at the end of the past century seems to have reached a turning point where business models face hard tests and most operators have to carry out a profound re-assessment of their investment plans for both content and infrastructures.

The number of available channels, which is an indicator of both the economic health of the television sector and the benefit in terms of choice of content for the consumer, clearly reflects the uncertainty characterising the underlining trend of this industry. At the beginning of 2001, over 660 channels with potential national coverage were broadcast in the EU via terrestrial, satellite or cable means. This represents a healthy increase of over 25% compared to the relevant data of the previous year. Over the same period, investments continued to grow in the relatively marginal - from the point of view of mass audience - sector of channels with no analogue terrestrial transmission (+ 30%).

There has been a significant increase in the number of channels transmitted across the EU territory. Many channels are regularly broadcast over more than one type of transmission infrastructure and are often received in more than one EU country, mainly via satellite. Moreover, a growing number of channels available in certain markets, notably the smaller ones, are actually originated in other countries. At the beginning of 2001, in the EU there were 68 channels of this kind (+13 % compared to the relevant data of the previous year).

The growing number of available channels was coupled with a parallel 2/3 increase in the number of digital packages proposed to the public. At the beginning of 2001 the development of this form of technical and commercial delivery of TV Programmes covered almost all EU markets. The success of digital broadcasting relies largely on satellite infrastructures since the launch of Digital Terrestrial television did not encounter a quick positive response from the public. According to recent surveys, only about 1.5 million households⁷ were connected at the end of 2001 via a set-top-box to DTT broadcasters in Spain, Sweden, Finland and the United Kingdom, the country where the largest number of connections are operational. At the same time, EU wide digital TV reception via satellite concerned over 19 million households, while 3 million households received digital signal via cable connections. The overall penetration of digital broadcasting at the end of 2001 can be estimated at nearly 16% of EU households.

Overall, satellite broadcasting is becoming more and more popular. The number of EU households receiving TV channels directly or through collective antennas has increased to over 33 million in mid 2001 with a 21% increase vs. the previous year and a 52% increase since mid 1997. Moreover, many more households receive TV signals originally broadcast by satellite through local cable operators.

The structure of cable industry remains largely different from country to country. Overall, investments in new cable connections are progressing rather slowly amid the public's relative indifference. The percentage of EU households connected to cable networks in 2001 remained at the level of 53% of all TV households, and the rate of connected households actually

⁶ The European Audiovisual Observatory supplied all the statistical data in this communication, unless otherwise specified.

⁷ Total EU TV households are estimated at 151 444 000 in 2001

subscribing to audiovisual services was almost unchanged compared to the previous year at about 61% of connected households (about 49 million households, +24% vs. 1997).

Programming patterns of generalist channels have not substantially changed in recent years. However, "reality shows", characterised by relatively low production costs and high adaptability to national contexts, have consolidated their roles in the programming schedules of many large audience channels along TV fiction productions. In 2001, specialised surveys⁸ covering the EU largest markets showed that the programming of "first run" TV fiction of national origin was still increasing and tended to prevail during prime time while imported - mainly of US origin - fiction continued to be largely programmed during the other fiction slots of the schedules. The presence of European non-domestic TV fiction and feature films remained quite limited while the number of titles of TV-fiction co-produced at EU level continued to recover since the slump recorded in 1999.

Overall, trade in TV rights with the US continued to deteriorate and in 2000 it recorded a deficit estimated at about 4.1 billion € (+ 17.5% vs. 1999) out of a total audiovisual deficit evaluated at 8.2 billion € (+14% vs. 1999). The trade imbalance continued in 2001.

The audience

Almost all EU households (over 155 million in 2000) are equipped with TV sets and in many member States more than half of the households are equipped with two or more sets. The number of 16:9 TV sets is expanding and cumulative (1992/2000) sales indicate an installed base in the EU of about nine million sets at the end of 2000.

In 2001 viewing time in the EU Member States varied from a minimum of 142 minutes per day in Austria⁹ to 243 minutes in Greece¹⁰. The increase in the supply of audiovisual services, measured in terms of available channels, did not entail a parallel increase in viewing time by the public in the years 2000 and 2001. In a number of countries the positive trend observed throughout the past decades (years) seems to have come to a halt. However, statistical data do not indicate if such new consumption patterns are due to a switch in public preference from watching TV to other occupations like Internet surfing. Actually, the apparent modifications in consumer habits occurred mainly in countries where connections with the Web are relatively scarce, while countries with relatively higher proportions of Internet users recorded increasing or stable viewing periods.

In 2001, public service channels substantially maintained their audience shares in the different national contexts. Pay-TV channels continue to hold a substantial part of audience in the markets where they were first launched. However, their importance in terms of audience seems strictly linked to the economic events characterising the life of the few companies operating on each market. Overall, at the end of 2001 the number of subscriptions to Pay-TV digital satellite packages in the EU reached the level of about 15.5 million. The main market remains the UK, while in certain Member States the development of Pay-TV channels is made difficult by various forms of piracy.

Foreign channels capture an important part of audience in certain Member States, notably the smaller ones and those who share their national language with larger neighbours. In certain cases their audience share can go beyond 40%. However, the presence of channels especially

⁸ Report 2001 'Television Fiction in Europe' by Eurofiction.

⁹ Age group over 12 years

¹⁰ Age group over 6 years

targeting foreign markets is important only in a few Member States, while at EU level it is more common for the public to view foreign channels that are not meant for its national market.

Overall value of the market

The overall turnover of the TV and radio broadcasting sector in the European Union in 2000 can be estimated at about € 62 billion (+ 11.6% vs. 1999). Advertising remains the main source of finance for EU TV broadcasters. After several years of uninterrupted expansion, the gross TV advertising market has reached about € 22.5 billion (+ 8 % vs. 1999). In 2001, the disappointing development of the economic trend world-wide has directly affected advertising expenditure including with regard to television. For 2001 the contraction of advertising revenues can be estimated¹¹ at about 6.3%. 2002 should witness a stabilisation of the advertising market (+ 0.5%), while a recovery (+ 4.5%) is expected for 2003.

Pay-TV subscriptions have also increased the revenue flow of the audiovisual sector to an overall amount of € 10.7 billion in 2000, an increase of 22.8% compared to the previous year.

Public service broadcasters continue to be funded mostly through licence fees paid by viewers. The total revenues of radio-television public services reached € 26.3 billion in 2000 (+ 4.0% vs. 1999). Grants and loan guarantees remained an important form of financing for some public broadcasters, while in certain countries the licence fee has been replaced by funding through the general taxation system. The share of commercial revenues of the public service broadcasters is increasing in several countries and accounts, in general, for about 1/3 of total revenues.

Industry financial results

During the most recent years, several private broadcasters have implemented a policy of strategic alliances and mergers taking advantage of favourable conditions on the capital markets. These initiatives aimed at strengthening their industrial competitiveness. In 2002, the impossibility for many operators to deliver the promised financial returns in a context of bearish capital markets has obliged many of the most aggressive companies to devalue the acquired stakes. In certain cases companies were unable to survive and had to file for bankruptcy.

According to certain analyses, in 2000 operating results remained positive for the majority of EU television companies. However, such results were largely reduced compared to what was recorded in previous years (- 80% vs. 1997) and were insufficient to allow positive net results. Within the general trend, television companies financed by commercial advertisement were successful in improving their economic performances, public service operators saw their economic performances become negative, while television packagers and other companies operating in niche markets recorded worsening of already negative results.

The years 2001 and 2002, for which no exhaustive statistical data are available, witnessed the failure of many hopes for a sustainable economic development of the most innovative initiatives in the audiovisual industry, and confirmed the long-term viability of more traditional business models.

¹¹ Source: European Advertising & Media Forecast, August 2002

1.3 Independent study

In order to receive independent advice on the economic trends of the audio-visual industry, the Commission at the beginning of 2001 asked a consultant to draw an overall analysis of the recent developments of the sector in the EU together with an outlook of future developments up to 2010¹².

The study has highlighted the emergence and/or consolidation of a number of trends such as the continuous growth of multi-channel and/or digital platforms, the maintenance of traditional audience share by Public Service and commercial free-to-air stations, the decreasing financial strength and progressive consolidation of all operators, the increase in the importance of subscription revenues, the creation of large integrated and international groups, some of which originate from operators active on other markets: press, consumer electronics, civil engineering and construction.

The study has also pointed out that although a large number of households can have access to multi-channel access platforms (such as cable, satellite or digital terrestrial television), some households still only have access to less than 5 channels and that the European consumer has not changed his behaviour yet and tends to watch the same preferred channels. This means that advertising revenues continue to be captured by the main broadcasters.

The consultant has identified three directions in which the offer of audiovisual services could evolve : a "business as usual" scenario, which is more likely to develop in the case of a negative economic environment. An "interactivity" scenario dependent on the rapid development of new interactive services. A "personalisation" scenario based on the development of a personalised offering of existing audiovisual services.

"Interactivity" and "personalisation" scenarios are more likely to develop in a positive economic environment. They would lead to a substantial modification of the respective roles of the market players and of the structure of the industry.

2. STATE OF PLAY IN IMPLEMENTING THE DIRECTIVE

In 2001 the Court of Justice in two cases decided that Member States had not implemented the Directive within the timeframe stipulated. The Court held that Luxembourg¹³ and Italy¹⁴ had failed to fulfil their obligations under the Directive. In both Member States the provisions of the Directive have been duly implemented in the meantime. The Commission in 2001 was able to close a case against France concerning the implementation of the Directive.¹⁵ In 2002 there was still a case against the Netherlands¹⁶ pending before the ECJ, but the Commission was able to withdraw its application, because also the Netherlands have now implemented the Directive in substance. Furthermore the Commission notes that Member States have devoted adequate resources to apply national legislation implementing the Directive effectively.

¹² The study "Outlook of the development of technologies and markets for the European Audio-visual sector up to 2010" by Arthur Andersen is available on the Audiovisual policy Web site: http://europa.eu.int/comm/avpolicy/stat/tvoutlook/tvoutlook_finalreport.pdf

¹³ ECJ C-119/00 Judgement of the Court (Fourth Chamber) of 21 June 2001. Commission of the European Communities v Grand Duchy of Luxemburg.

¹⁴ ECJ C-207/00 Judgement of the Court (Fourth Chamber) of 14 June 2001. Commission of the European Communities v Italian Republic.

¹⁵ ECJ C-140/99

¹⁶ ECJ C-145/00

Independent regulatory authorities have been established and budgets for technical resources as well as staff have been considerably increased where they were insufficient.

3. APPLICATION OF THE DIRECTIVE

3.1. Main principles

The Treaty establishing the European Community provides in its Article 151 (4) that the Community shall also in its action under other provisions of the Treaty take cultural aspects into account, in particular in order to respect and to promote the diversity of its cultures. Community policy in the area of the regulation of media content is essentially internal market policy, and is governed by internal market objectives of freedom of movement for goods (including newspapers and magazines, for example) and the freedom to provide services (including radio and television broadcasts).

Pursuant to Article 6.2 of the Treaty and ECJ cases, the European Union must respect fundamental rights, as guaranteed by the Convention on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950. In this respect, Article 10 of this Convention states in its first paragraph that the right of freedom of expression includes the freedom to receive information. This implies that no freedom of expression is possible without a free circulation of information. By guaranteeing the freedom to provide cross-border television services, internal market policy contributes to the freedom of expression, fundamental for the functioning of our democratic societies. Furthermore, the removal of barriers to a free circulation of information has to take account of general interest objectives such as pluralism, cultural diversity, protection of copyright, consumer protection and protection of minors.

Community legislation must be proportionate in respect of the objectives to be achieved¹⁷. The paramount importance of freedom of speech in a free society means regulation must be kept to the minimum necessary to achieve these public interest objectives.

3.2. Jurisdiction

The Television without frontiers Directive provides the legal framework for television broadcasting within the European Union. When the Directive was amended in 1997, certain practical criteria were introduced, designed to determine by an exhaustive procedure the Member State that has jurisdiction over a TV broadcaster.

It is clear that there cannot be double jurisdiction under Community law. The Directive lays down a number of criteria designed to determine the Member State with jurisdiction. In addition, the Directive states clearly that where jurisdiction cannot be determined using the criteria laid down in Article 2(3), the competent Member State is to be determined by reference to Articles 52 (now Article 43) and following of the Treaty establishing the European Community. It is therefore not possible under Community law for more than one Member State to have jurisdiction.

The Commission has monitored compliance with and the effectiveness of these principles during the reference period.

¹⁷ As defined by the European Court of Justice, see C-84/94, C-233/94, C-76/90 etc.

In addition, the European Court of Justice considered the issues of jurisdiction and action by a receiving Member State in the case of the Commission v. Kingdom of Belgium¹⁸. In respect of jurisdiction, the Court held that there was a clear division of obligations as between the Member States from which programmes emanate and those receiving them. It is solely for the Member State from which television broadcasts emanate to monitor the application of its law applying to such broadcasts and to ensure compliance with the Directive. The receiving State is limited to ascertaining that the programmes in question emanate from another Member State.

Following the lodging of a complaint, the attention of the Commission has been drawn to the application of these provisions of the Directive, by the Dutch Media Commission (Commissariaat voor de Media).

The complainant, CLT-UFA SA, is a satellite broadcaster, licensed in Luxembourg, directing the services RTL 4 and 5 to the Dutch market. The Dutch Media Commission, by decision of 5 February 2002, upheld its previous decision of 20 November 1997. In this initial decision, it held that RTL/Veronica de Holland Media Group SA was the responsible broadcasting organisation for RTL 4 and RTL5, which therefore fell under the jurisdiction of the Dutch authorities.

The Commission considers that, according to the criteria laid down in the Directive, RTL 4 and 5 fall under the jurisdiction of the Luxembourg authorities. The parties do not contest the fact that the channels are licensed in Luxembourg. This case will be closely followed to ensure that the interpretation given to the criteria is in line with the case law of the European Court of Justice.

3.3. Events of major importance for society (Article 3a)

Article 3a(1) of the Directive allows Member States to take *national measures* to protect events regarded as being of major importance to society, so that a significant part of the public in that Member State is not deprived of the possibility of seeing such events on free television. Article 3a(2) describes the procedure for obtaining a preliminary assessment by the Commission as to the conformity of these measures with Community law. Article 3a(3) aims to ensure that broadcasters established in other Member States respect the measures drawn up by the respective Member States.

By the end of 2002 measures in relation to Article 3a(1) of the Directive have been taken by Italy, Germany, the United Kingdom and Austria. At the beginning of the year 2002, Denmark withdrew its measures.¹⁹ In accordance with Article 3a(2) of the Directive, a consolidated list of the measures taken by Member States has been published once a year in the Official Journal of the European Communities. The last consolidated list was published in August 2002²⁰.

In the period covered by this report the Austrian measures have been discussed in the Contact Committee and published in the Official Journal of the European Communities on 19 January 2002²¹.

¹⁸ ECJ C-11/95 - judgement of 10 September 1996.

¹⁹ Published in OJ C Nr 45, 19.02.2002

²⁰ OJ C 189, 9.8.2002, p. 2

²¹ OJ C 16, 19.1.2002, p. 8

The measures are defined in the Exclusive Television Rights Act (Fernseh-Exklusivrechtsgesetz – FERG) and a list of events of major importance is set out in the Ordinance on events of substantial social interest. The FERG creates an obligation for broadcasters having acquired exclusive rights to listed events to ensure that these events can be followed by at least 70% of the viewers²² on a channel freely accessible in Austria. The consultation procedure provided for in the draft bill was quite far-reaching and also included the right owners.

The listed events are: the Summer/Winter Olympic Games; World Cup and European Championship football matches with Austrian participation together with opening matches, semi-finals and finals (men); the final of the Austrian Football Cup; FIS World Alpine and World Nordic skiing championships; the Vienna Philharmonic Orchestra's New Year concert; the Vienna Opera Ball.

Belgium submitted draft measures on 5 September 2002. This proposal was not complete and the Belgian authorities were informed accordingly. At a first meeting, the Irish authorities indicated their intention to present draft measures in the near future and were informed about the procedure outlined above.

Implementation of Article 3a(3) of the Directive is mandatory for all Member States. Its effective implementation is essential to ensure that Member States' specific provisions with regard to events of major importance, as provided for under Article 3a(1), are not undermined by broadcasters under the jurisdiction of other Member States. The Commission considers application of Article 3a in the reference period to have been satisfactory. Article 3a has been the subject of proceedings before courts at national and European level. The House of Lords²³ found that „*the result which Article 3a(3) requires Member States to achieve is perfectly clear. It is to prevent the exercise by broadcasters of exclusive rights in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following a designated event*”. Another case is pending before the European Court of First Instance²⁴. The major issue in this case seems to assess the role of the Commission in relation to Article 3a of the Directive.

3.4. Promotion of distribution and production of television programmes

The Commission adopted on 8 November 2002 the fifth Communication to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC, as amended by Directive 97/36/EC, for the period 1999-2000 on promoting distribution and production of television programmes.²⁵

Article 4 states that Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time. Article 5 states that Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, or alternately, at the discretion of the Member State, at least 10 % of their

²² 70% of the viewers cover the number of "viewing" households disposing of a cable or satellite TV infrastructure. This threshold makes the following broadcasters eligible for the broadcasting of listed events: ORF 1 and 2, ARD, ZDF; RTL, PRO7, SAT1, 3 Sat, BFS (Bayern), RTL 2, Vox [data origin: <http://mediaresearch.orf.at>].

²³ Regina vs. ITC, 25 July 2001, UKHL 42

²⁴ Case T-33/01

²⁵ COM(2002)612 final

programming budget, for European works created by producers who are independent of broadcasters. This proportion must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five years of their production.

For both Articles 4 and 5, the majority of Member States, in accordance with Article 3 (1), has opted for more detailed or stricter rules in this area.

Within the framework of the review of the Directive, the Commission has highlighted the general trends observed both at Community level and in the individual Member States concerned. To this end, a series of indicators based on the criteria set out in Articles 4 and 5 of the Directive has been developed to provide an objective analysis grid.

For the reference period (1999-2000), the national reports reflect generally satisfactory application by the European Union Member States of the provisions of Article 4 (European works) and Article 5 (European works created by independent producers) of the Directive.

Detailed examination of these reports by the Commission reveals, for both Articles 4 and 5, a positive and dynamic trend in the broadcasting of European works, including those by independent producers, in the context of a general increase in the number of channels over the reference period.

The average transmission time of European works²⁶ for all European channels, in all Member States, was 60,68% in 1999 and 62,18% in 2000, representing a 1,50 point increase over the reference period.

The average proportion of works by independent producers²⁷ broadcast by all European channels in all Member States, was 37.51% in 1999 and 40.47% in 2000, representing a 2.95 point increase over the reference period.

The average share, for all European channels in all Member States, allocated to recent European works by independent producers (“*adequate proportion*”) was 53.80% in 1999 and 55.71% in 2000, representing a 1.91 point increase over the reference period.

The communication also records the reasons given by Member States for channels failing to meet the obligations set out in the Directive. Amongst them, the following reasons were given:

- Grouping of channels belonging to the same broadcaster. Member States' reports often pointed out that the channels concerned, if taken together, met or exceeded the minimum proportion laid down by the Directive.
- Special-interest nature of the channels' programmes and progress achieved. In many cases, the special interest theme does not enable the minimum proportion to be met (very specific niche market).

²⁶ For each year under consideration, the audience share is based on the most recent figures published by the European Audiovisual Observatory: Statistical Yearbook 2002 (Volume 2) “Household audiovisual equipment, transmission, television audience”. Except in specific cases, all channels with over 3% audience share (whole day) over each of the two years under consideration were taken into account.

²⁷ *Average air time*, or alternatively, depending on the choice made by the Member State when implementing the Directive, *the average proportion of the programming budget* allocated to European works by independent producers.

- Recent nature of the channel. Nevertheless, many of the new entrants broadcast a large proportion of European works in their first years of operation in order to penetrate the market concerned.
- Subsidiaries of non-EU companies. Such channels tend to make systematic use of their own catalogue material and rarely show European works.

In practice, these reasons are often combined in Member States' reports. The channels in question are often the same in the various Member States concerned.

With regard to the measures envisaged or adopted to remedy cases of non-compliance, it is worth noting that various types of measure were reported: ongoing dialogue, subjecting the channels concerned to surveillance, formal notices and proceedings against broadcasters.

3.5. The application of the rules on advertising (Articles 10 to 20)

The Directive lays down certain obligations and rules in its Chapter IV relating to television advertising, sponsorship and teleshopping: these concern the amount of advertising permitted on screen (daily and hourly limits, Article 18), the number of and form of advertising interruptions (Article 11), and rules applicable to the content and presentation of advertising messages (Articles 10, 12, 13, 14, 15 and 16). Specific rules (Article 17) are applied to sponsorship of television programmes.

The Commission had received several complaints - often coming from consumers' associations - about alleged failure in certain Member States to comply with the rules on advertising and sponsorship in respect of the time limitations. During the period covered by this report the problems particularly concerned the practices of certain broadcasters in Greece.

With respect to the application of the provisions in Directive 89/552/EEC infringement proceeding, for poor application, were initiated in three cases concerning Greece, Spain and Italy (for non-compliance with the provisions on advertising). The cases in respect of Spain and Italy were closed during the reference period. The allegations concerning Greek broadcasters were the subject of a monitoring exercise. This case has been followed up by the Greek authorities, which is in the process of taking corrective measures.

On the basis of monitoring of respect of the advertising provisions, carried out for the Commission by an external consultant, Audimetrie, infringement procedures were initiated in three cases concerning Germany, Italy and Portugal. During the reference period the Commission launched two independent and specific studies concerning this chapter of the Directive. The first study on the impact of television advertising and teleshopping on minors was carried out by INRA (under the legal direction of Bird & Bird).²⁸ The aim of the study was to identify and describe the national provisions on advertising provided in legislation, regulation and self-regulatory codes, which are applied to advertising in each State for the protection of minors. In addition, the national system for the handling of complaints was described fully, covering administrative, legal and self-regulatory measures.

The first part concerns the situation in each of the Member States and the EEA Members. It provides a complete account of the legislation, regulation and other administrative practices in the Member States in respect of advertising and teleshopping to children. It charts the evolution of such provisions from 1988 (i.e. prior to the adoption of the Television without

²⁸ All studies are available on the europa server:
http://europa.eu.int/comm/avpolicy/stat/studi_en.htm

frontiers Directive) to the present. It includes information on any debate that took place and the principles on which such provisions are based. The second part of the report concerns the legislation that applies at European and International level.

The study shows that the provisions of the Directive provide an adequate and flexible framework for Member State rules in this area. It is worth noting the extensive use of self-regulation in this area, both in respect of the rules applied and the complaints procedures available. There is a clear difference between the regulation of television and other media, with television being more heavily regulated than other media.

There are a remarkable number of differences at Member State level, ranging from the age limits in definitions (that vary in addition within a Member State for different activities) to specific provisions on certain sectors (for example on financial activities or alcohol advertising). The number of complaints is extremely low, and has not increased significantly throughout the period covered by the study, showing that the Directive, as implemented in the Member States works effectively.

There are a limited number of proposals in certain Member States, whose aim would appear to be mainly to clarify the application of existing legislation.

The study shows which Member States have taken measures that are more restrictive than those of the Directive; only one Member State has a total ban on advertising aimed at minors below the age of 12 (Sweden), one has a ban on toy advertising from 7.00 a.m. to 10.00 p.m. (Greece), whilst a small number of Member States have legal (Belgium – Flanders, and Italy) or voluntary (Denmark) restrictions on advertising around children's programming. A large majority of Member States do not restrict advertising aimed at children but do provide for detailed rules as to the content of such advertising (for example: no advertisement may encourage children to enter strange places or to converse with strangers; the use of personalities known to children may be forbidden or restricted; advertisements for sweets should feature a toothbrush symbol on the screen). These rules are effected both through regulation and self-regulation

The second study, on the development of new advertising techniques, has been carried out by Bird & Bird and Carat Crystal.²⁹ The purpose of the study was to provide the Commission with a thorough understanding and accurate vision of the state of play and likely further development of advertising, sponsorship and teleshopping techniques, across the different forms of media, namely television, radio, cinema and Internet. This included the development or evolution in current practices, such as product placement or spot advertising.

The study covered in particular the techniques of interactive and virtual advertising (in particular for sports events), as well as the use of split screens, and banner adverts. Different provisions exist within the Member States and the EEA States to implement Chapter IV of the Directive. The study consists of two parts, analysing respectively the economic aspects and the regulatory framework for advertising in each Member State. In respect of the regulatory framework, the handling of different techniques, such as interactive advertising, split screen techniques and virtual advertising were examined to see whether they are used and whether specific regulation exists.

²⁹ Published at: http://europa.eu.int/comm/avpolicy/stat/studi_en.htm

In general, it can be said that often the situation differs substantially from one Member State to another, as to the actual use and importance of certain techniques, as well as concerning the approach of national authorities. The existence of specific rules for these new techniques is infrequent:

Interactive: At present the only Member State with a specific regulation for interactive advertising is the United Kingdom. Other than the ITC (UK media authority) rules and the EGTA code, no specific regulation applies to commercial interactive services, since interactive advertising is still at an experimental stage in most Member States.

Split-screen: There is a ban on using the technique in some Member States: the Netherlands, Portugal, Sweden and France. Other countries have authorised the use of this technique: for example the United Kingdom and Germany. Germany is the only country to have adopted a specific regulation on the subject. In the United Kingdom the ITC allows the split screen to be used, but in a more limited form (during the advertising, information can be displayed about the programme, but only in the form of text).

Virtual advertising (or sponsorship): Italy, France, Portugal and Norway consider virtual advertising to be TV advertising and as contrary to the principles that govern the insertion of advertising in programmes, and it is therefore banned. In the United Kingdom and Germany there are specific regulations, which subject the use of this technique to certain conditions.

From the economic part of the study it appears that a wide range of sponsoring techniques is used in the Member States. It is clear that the technique has greatly increased since the original Directive was adopted in 1989. Even if sponsorship is not a new technique as such, it has been considered in depth since the techniques that are used today differ substantially from the classic TV-sponsorship which existed at the time of the drafting of the rules on sponsorship.

The preliminary results of the study show that these new techniques are in their infancy, and have not, as yet, a real financial impact on media advertising revenues. Indeed as the figures show, between 96-99% of all advertising revenue across the different media is still on traditional advertising.

The Commission has also launched two rounds of consultation in the field of consumer protection in general³⁰: the Green Paper on EU Consumer Protection (COM (2001) 531 final) and its follow-up communication (COM (2002) 289 final).

The two documents set out questions and ideas on the future of the regulation and enforcement of consumer protection. In particular, the follow-up communication sets out the idea of developing a framework directive on fair commercial practices and EU-wide codes of conduct. In addition, it suggested the development of a legal instrument for cooperation between enforcement authorities. The follow-up communication also sets out an action plan for further consultation with the Member States and stakeholders.

The Commission's preparatory and consultation work on a framework directive is ongoing, with a proposal announced for 2003 in its work programme. These initiatives are fully consistent and compatible with existing Community policies such as the Commission's audiovisual policy (notably the "Television without frontiers" Directive) and its policy on

³⁰ http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/follow_green_en.html

commercial communications and the follow-up to the Commission's Internal Market Strategy for Services.

3.6. Protection of minors and public order (Articles 2a, 22 and 22a)

Article 2a(2) of the Directive allows the Member States - provided that they respect a special procedure - to take measures against broadcasters under the jurisdiction of another Member State who "manifestly, seriously and gravely" infringe Article 22 and/or Article 22a of the Directive as a provisional derogation to the general principle of freedom of reception and non-restriction of retransmission. This is designed to protect minors from programmes which might seriously or are likely to impair their "physical, mental or moral development", and to ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.

A number of specific conditions must be respected by the receiving Member State. The broadcaster must have infringed Article 22 and/or 22a on at least two prior occasions. The Member State concerned must notify the television broadcaster and the Commission in writing of the alleged infringements and the measures it intends to take if any such infringement occurs again.

Consultations must be undertaken. If they do not produce an amicable settlement within 15 days of the notification, and the alleged infringement persists, the receiving Member State may take unilateral provisional measures against the channel concerned.

The Commission must decide whether the measures taken are compatible with Community law, within two months following notification of the measures taken by the Member State. If it decides that they are not, it may require the Member State to put an end to the measures in question as a matter of urgency.

During the period in question, only one Member State (Germany) has notified the Commission of its intention to use this procedure. The Commission is pursuing contacts with the Member States concerned.

The Commission considers application of Article 2a(2) in the reference period to have been satisfactory. It has protected the general interest and provided a secure framework for the protection of minors with a minimum potential for a restriction of the freedom to provide services.

However, the Commission would stress that when it carries out an assessment of the measures taken under Article 2a(2), this assessment is based on factual and legal considerations; the moral assessment of the content of the programmes depends on the judgement of each Member State, which has the principal responsibility for authorising or prohibiting the transmission of certain television programmes by broadcasters under its jurisdiction who may be caught by Article 22. The Directive anticipates the possibility of a difference in judgement between the authorities of the originating country and those of the receiving country.

Furthermore, the measures taken by the receiving Member State are without prejudice to those taken, if necessary, by the Member State which has jurisdiction over the broadcaster in question. It is not, therefore, a question of transferring jurisdiction from one State to another, but of an exceptional possibility offered to the receiving Member State to take measures to protect its interest in situations of incontestable gravity, according to a precise procedure.

It is also important to highlight the fact that, in the system of Community rules created by the Directive (Article 2a(1)), Member States are not permitted to apply discriminatory moral criteria to the broadcasters under their jurisdiction: a stricter attitude to programmes to be received in their territory and a more lenient attitude to programmes destined to be broadcast abroad (typically, satellite channel programmes) would not be acceptable. On the contrary, the Member States are bound to ensure that all broadcasters under their jurisdiction comply with Article 22.

According to Article 22 Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts. Member States shall also ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality. As a consequence, the question of rating becomes essential.

Rating may differ not only between EU and EEA Member States, but also within a Member State and/or non-EU EEA-State according to the way of distribution. A film rated in a given way for cinema may be rated differently when it comes to cinema exhibition, television broadcasts and on-line delivery or videocassettes/dvd. In certain Member States, such as in the Netherlands with NICAM³¹, rating across media has been already started. On the basis of an industry initiative, a pan European rating system for video games has been established. The Council welcomed this initiative in a resolution discussed on 1 March 2002³².

The Commission has therefore launched a study, carried out by the consultant Olsberg SPI, in order to identify the practice of rating in the different EU and EEA Member States, depending on the different distribution channels and evaluate the impact of differences between the national legislation and practice with respect to rating on the commercialisation of films. It also will analyse potential confusion amongst the persons responsible for minors arising from differences in rating.

3.7. Coordination between national authorities and the Commission

Application of the rules of the Directive is the responsibility of each Member State's national authorities (ministries and/or independent authorities) responsible for regulating the audiovisual industry. Systematic contact with the national bodies (ministries and/or independent regulatory authorities) has been maintained, particularly through the Contact Committee set up by the Directive (Article 23a). A Commission representative chairs this Committee, which is composed of representatives of Member States' competent authorities. In the period covered by this report the Committee met on four occasions. Two of these meetings were followed by a meeting of the Members of the Contact Committee with representatives of the Candidate Countries.

The Committee has fulfilled the tasks conferred on it by the Directive, and has, in particular, facilitated effective implementation of the Directive; it has delivered opinions, under the

³¹ Nederlands Instituut voor de Classificatie van Audiovisuele Media; www.nicam.cc
³² OJ C 65/02, 14.3.2002

procedure laid down in Article 3a(2) concerning events of major importance for society (see Point 3.3, the Austrian draft measures were discussed in the 13th meeting). To facilitate the implementation of the Directive through regular consultation on practical problems arising from its application the Contact Committee discussed i.a. the interpretation of Article 18(2) of the Directive (when should the « given hour » start) and of Article 11 (2) (advertising during sports events). At the meetings of the Contact Committee the Commission presented the evaluations and studies conducted (Evaluation report on the application of the Recommendation on the protection of minors, Study on advertising and children, Study on new advertising techniques, Study on the development of the audiovisual sector etc.). Member States reported on new legislation (the UK Communications Bill and the German Jugendmedienschutz Staatsvertrag (state treaty on the protection of young people in mass media)). The Contact Committee on various occasions also discussed the conflict of jurisdiction between two Member States (see 3.2.).

The Commission was also able to coordinate with the national audiovisual regulatory bodies within the framework of the European Platform of Regulatory Authorities (EPRA) set up in April 1995 in Malta. The aim of this platform is to provide regulatory authority representatives with a forum for discussion and mutual exchange of views on regulatory matters in the audiovisual field, both at European and national level. EPRA currently gathers 43 regulatory authorities from 35 countries. The European Commission has permanent-observer status. The Commission actively participates in the Platform's meetings and activities.

EPRA held four meetings during the reference period, the last one in Ljubljana on 24 and 25 October 2002.

4. INTERNATIONAL ASPECTS

4.1. Enlargement: Analysis of audiovisual legislation in the Candidate Countries

Thirteen candidate countries are in the process of integrating the European Community audiovisual policy; at the same time they are consolidating and further developing national audiovisual structures capable of meeting the needs of democratic societies. The first step towards the integration of European audiovisual policy has been the implementation of the provisions of the Television Without Frontiers Directive into the candidate countries' broadcasting legislation.

Most of the candidate countries have now reached a high degree of alignment with the Community acquis. On this basis, closure of the Chapter concerning audiovisual policy has already been achieved for 11 countries : Bulgaria, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Czech Republic, Slovakia and Slovenia. Furthermore, the Romanian Parliament adopted a new Broadcasting Law in June 2002 which is generally in line with the TWF Directive. Provisional closure of Chapter 20 with Romania is thus expected to happen in the near future.

Further developments are, however, still expected.

Firstly, while major legislative developments are still required in Turkey, most candidate countries have undertaken to pass minor legislative adjustments before accession. A legislative process is underway, for example, in Poland and in the Czech Republic.

Secondly, for all candidate countries except Turkey, the priority has now shifted from alignment efforts to actual implementation of the new legislative provisions. In this context, the issue of administrative and judicial capacity is now at the forefront of the negotiations with the candidate countries. The effective implementation of the Community *acquis* depends on the overall national audiovisual policy environment, its effectiveness, transparency and on the degree of legal security it brings to broadcasters. In this connection, the capacity of the Country's Regulatory Authority to monitor and sanction, in an independent manner, the behaviour of broadcasting operators, is very often at the centre of these implementation efforts.

4.2. Cooperation with the Council of Europe

The Council of Europe **European Convention on Transfrontier Television** was amended by a Protocol, to take account of developments in the broadcasting market, and to remain consistent with the Directive. The protocol amending the Transfrontier Television Convention was adopted by the Committee of Ministers of the Council of Europe on 9 September 1998. The revised Convention entered into force on 1st of March 2002.

Co-operation between the European Commission and the Council of Europe has been further developed, in particular with regard to exchange of information on the development of audio-visual policies in Member States of the Council of Europe, which are not members of the EU. Meetings have been held on 18 September 2001 and 27 June 2002 between European Commission officials and members of the Council of Europe Secretariat for Media policy.

These meetings allowed both parties to have an informal exchange of views on the current situation of the audio-visual sector in non-EU members of the Council of Europe and to inform the Commission about the priorities of the Council of Europe concerning assistance programmes in these countries.

Further co-operation has been developed on a pragmatic basis, in particular through mutual consultation on legislative developments in these countries. Following the second meeting, contacts were established between the Commission services in charge of administering European Union Programmes in European third countries and the relevant services of the Council of Europe.

5. CONCLUSIONS AND PROSPECTS

In an overall assessment it can be concluded that the Directive continues to function successfully as a means of ensuring the freedom to provide television services in the Community. The overriding objectives of public interest³³ that the Directive aims to safeguard are still valid and more than ever before Member States have given themselves the means to achieve these objectives. Independent national regulatory authorities have been set up and most Member States have allocated additional staff and resources to effectively implement the Directive. The “Television without Frontiers” Directive provides effective regulation for the European audiovisual sector and the report confirms the validity of the common European approach to audiovisual matters. The separate report on the application of Articles 4 and 5 of the Directive indicates generally satisfactory results in terms of channels meeting the requirements concerning European works and independent production.

³³ See point 3.1. (Main principles).

Article 26 of the Directive provides that the Commission shall submit not only the report on the application of the Directive, but also make further proposals to adapt the Directive, if necessary, to developments in the field of broadcasting. The Commission therefore decided to commission a study from an independent consultant on the Outlook of the development of technologies and markets for the European Audio-visual sector up to 2010³⁴, in order to provide input for a prospective analysis. The study has pointed out that in the future a number of technological and economic developments may challenge the present patterns of the audio-visual industry. Technological advances are expected to enable new forms of consumption of broadcast media, and to modify the overall market dimensions as well as the relative market strength of audio-visual industry operators. The new technologies could create the conditions for new business models to emerge. New ways of advertising are emerging. Television viewing time, hence the television advertising potential, is expected to decrease.

The European Parliament has had several opportunities to raise the issue of revising the Television Without Frontiers Directive. On 13 November 2001 it adopted a Resolution, based on an own-initiative report by the European Parliament³⁵, on achieving better circulation of European films in the internal market and the candidate countries. More recently, on 26 September Parliament adopted a Resolution calling for an EU Action Plan for the Successful Introduction of Digital Television in Europe³⁶ and calling on the Commission to take account of these issues in the review of the Television Without Frontiers Directive.

During the meeting of the EU Council of Ministers held on 23 May 2002, the Commission presented the options which could be used as a basis for a review of the Directive and it was agreed that the best approach was to draw up a work programme with a view to drafting a proposal at a later date.

On 11 November 2002 the Council adopted conclusions on the review of the "Television without Frontiers" Directive³⁷, recalling the broad consensus that there is a need for extensive preparation before the elaboration of any future proposals concerning the Directive.

Following on from these debates and discussions, the aim of the attached work programme is to give rise to a public debate that is open to all interested parties, and involves the candidate countries and nationals of those countries, on questions related to

³⁴ The study "Outlook of the development of technologies and markets for the European Audio-visual sector up to 2010" by Arthur Andersen is available on the Audio-visual policy Web site:
http://europa.eu.int/comm/avpolicy/stat/tvoutlook/tvoutlook_finalreport.pdf

³⁵ Parliamentary own-initiative report, tabled on 21 October 2001, on achieving better circulation of European films in the internal market and the candidate countries (2001/2342(INI)) - Committee on Culture, Youth, Education, the Media and Sport - Rapporteur: Mr Luckas Vander Taelen.

³⁶ European Parliament Doc. B5-0488/2002

³⁷ <http://ue.eu.int/pressData/en/educ/73183.pdf>

the review of the “Television without Frontiers” Directive, in particular as specified in its Article 26 in the light of recent technological developments.

The objective of the Commission is to assess the need to update or adapt the “Television without Frontiers” Directive and, where necessary, adopt related or additional measures. In this case the Commission could, when the time comes, submit a proposal to the Community legislator containing a range of measures to reinforce coherent European audiovisual policy taking also full account of the objective of creating a pro-competitive and growth-oriented environment for the development of the audiovisual sector³⁸.

³⁸ According to the Commission’s long-term objective set out by the Lisbon European Summit of making the Union the world’s most competitive, knowledge-based economy

ANNEX

Work programme

FOR THE REVIEW OF THE “TELEVISION WITHOUT FRONTIERS” DIRECTIVE

AND TIMETABLE OF FUTURE ACTIONS

CONTENTS

I. – METHODOLOGY

- 1.1. Specific instruments of European audiovisual policy
- 1.2. Links with other Community policies
- 1.3. Public consultations

II. – WORK PROGRAMME

2.1 GENERAL CONSIDERATIONS

1. Scope
2. Linkages between regulation, co-regulation and self-regulation

2.2. SPECIFIC THEMES

1. Access to events of major importance for society
2. Promotion of cultural diversity and of competitiveness in the European programme industry
3. Protection of general interests in television advertising, sponsorship, teleshopping and self-promotion
4. Protection of minors and public order - The right to reply
5. Application (related aspects)
6. Issue not covered by the Directive: access to short extracts of events subject to exclusive rights

III. - TIMETABLE AND FUTURE ACTIONS

The “television without frontiers” Directive³⁹, based on Article 47, second paragraph (ex Article 57, second paragraph) and Article 55 (ex Article 66) of the EC Treaty, establishes the legal framework for the free provision of television services in the European Union with a view to promoting the development of a European market (principles of freedom of reception and retransmission of television programmes) while taking into account certain general interest objectives.

Article 26 of the Directive provides that, no later than 31 December 2000 and every two years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee “*a report on the application of this Directive as amended and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting, in particular in the light of recent technological developments*”.

The Member States had until 30 December 1998 to transpose the amended Directive into their national laws⁴⁰. The Directive has thus been in force for a little over four years. As a result, the current review provides the first opportunity for in-depth assessment of the practical implementation of the new Directive.

The conclusions of the application report noted that the “television without frontiers” Directive, the cornerstone of European audiovisual policy, is now broadly applied by the candidate countries and represents a pertinent and effective instrument in support of the European audiovisual sector and of cultural diversity. It accompanies the development of the European audiovisual landscape (increasing number of channels) and has, in practice, been the subject of very few disputes or complaints.

However, recent developments in audiovisual technologies and markets lead the Commission to further develop its thinking. To this end, the present work programme has been divided into three parts:

- **methodology;**
- **themes for discussion; and**
- **work timetable and future actions planned on certain legal aspects of European audiovisual policy.**

I. - METHODOLOGY

The implementation of the present work programme, which represents a Commission priority for 2003, will be based on the following three elements:

³⁹ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997.

⁴⁰ http://europa.eu.int/comm/avpolicy/regul/regul_en.htm
Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities
http://europa.eu.int/comm/avpolicy/regul/twf/newint_en.htm

(i) the specific instruments of European audiovisual policy to be taken into account with a view to strengthening its overall coherence;

(ii) the relevant interaction with other Community policies which affect or are likely to affect the implementation of the “television without frontiers” Directive; and

(iii) in the interest of transparency, the launch of public consultations open to all interested parties, in association with the candidate countries and their citizens. The objective of these public consultations is to stimulate an open debate on the recent technological and market developments in the audiovisual sector and their likely direction with a view to providing the Commission with the information necessary to assess whether there is a need to adapt the applicable regulations and, if such a need exists, what principles should be used.

In this respect, it should be pointed out that, pursuant to Article 151 (4) of the Treaty, with a view to respecting and promoting cultural diversity, the Community takes cultural aspects into account in its actions pursuant to other Treaty provisions.

Furthermore, the Commission now uses impact assessment⁴¹ as an instrument for improving the quality and coherence of the process of drawing up Community policies. Impact assessment, which from 2003 is to be progressively applied within the Commission to all important initiatives, is a measure which forms part of the action plan for improving regulation⁴². Indeed, at the Laeken Council the Commission undertook to implement principles for improving regulation, including a mechanism for assessing the impact of regulation. This undertaking was in follow-up to the Commission White Paper on governance⁴³.

Impact Assessment identifies the likely positive and negative impacts of proposed policy actions, enabling informed political judgements to be made about the proposal and identify trade-offs in achieving competing objectives. It also permits to complete the application of the Protocol on subsidiarity and proportionality annexed to the Treaty of Amsterdam.

1.1. Specific instruments of European audiovisual policy

The internal dimension of European audiovisual policy is based on a combination of different specific Community instruments. It consists, inter alia⁴⁴, of binding legislative measures (e.g., the “television without frontiers” Directive⁴⁵), funding mechanisms (e.g., the Media +⁴⁶

⁴¹ Communication from the Commission on impact assessment (COM (2002) 276 final, 5.6.2002).
http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0276en01.pdf

⁴² Communication from the Commission - Action plan “Simplifying and improving the regulatory environment” (COM (2002)278 final, 5.6.2002, and COM (2002) 278/2 final, 6.6.2002).
http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0278en02.pdf

⁴³ “European governance, a White Paper”, COM(2001) 428 final, 25.7.2001.
http://europa.eu.int/comm/governance/white_paper/index_en.htm

⁴⁴ Not mentioned here are Commission Communications laying down guidelines, such as the Communication from the Commission on certain legal aspects relating to cinematographic and other audiovisual works (COM (2001) 534 final), the Communication from the Commission on the application of State aid rules to public service broadcasting (COM (2001) C320/04) or the Communication from the Commission on the application of the general principles of free movement of goods and services - Articles 28 and 49 EC - Concerning the use of satellite dishes (COM (2001) 351 final, 27.5.2001).

⁴⁵ http://europa.eu.int/comm/avpolicy/regul/twf/newint_en.htm

programme, the “i2i Audiovisual”⁴⁷ initiative) and non-binding instruments (e.g., the 1998 Council Recommendation on the protection of minors and human dignity⁴⁸).

The different interacting audiovisual policy instruments are based on the principles of the national and Community levels complementing each other and of Community added value.

With a view to reinforcing the synergy with the “television without frontiers” Directive, the Commission will take into account all the specific European audiovisual policy instruments in the implementation of the present work programme.

1.1.1. Directives

In addition to the “television without frontiers” Directive, which constitutes the legal framework for the pursuit of television broadcasting activities in the European Union, reference should be made to Directive 93/83/EEC “cable and satellite”⁴⁹, which aims to coordinate certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission with a view to facilitating cross-border broadcasting of audiovisual programmes.

1.1.2. Recommendations

On 24 September 1998, the Council adopted a Recommendation 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 dignity⁵⁰. This text, which complements Chapter V of the “television without frontiers” Directive on the protection of minors, is the first Community legal instrument covering all the electronic media, including the content of on-line audiovisual and information services transmitted via the Internet.

This Recommendation, a legal act provided for by Article 249 of the EC Treaty and aimed at providing guidelines for national legislation, complements the regulatory framework by establishing guidelines for the development of national self-regulation of the protection of minors and human dignity.

In application of this document, and without prejudice to the responsibility of broadcasters in this area, television channels are invited to experiment with new parental control mechanisms linked to the development of digital television (personal codes, filtering software or control chips). Furthermore, providers of on-line or Internet services are invited to adopt codes of good conduct with a view to clarifying and better applying the laws in force.

The implementation of this Recommendation provides an interesting illustration of the complementary linkage, at Community level, between legislative and self-regulatory

⁴⁶ http://europa.eu.int/comm/avpolicy/mediapro/media_en.htm

⁴⁷ http://europa.eu.int/comm/avpolicy/media/index_en.html

⁴⁸ OJ L 270, 7.10.1998, p. 48.

http://europa.eu.int/comm/avpolicy/regul/new_srv/recom-intro_en.htm

⁴⁹ http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm

⁵⁰ http://europa.eu.int/comm/avpolicy/regul/new_srv/recom-intro_en.htm

measures involving all stake-holders with a view to strengthening the protection of minors and human dignity, including on the Internet.

1.1.3. Funding measures

Among the support measures implemented by the Commission, mention should be made of the MEDIA Programme (2001-2005)⁵¹ which aims to strengthen the competitiveness of the European audiovisual industry through a series of incentives and financial support for the training of professionals, the development of production projects and the distribution and promotion of cinematographic works and audiovisual programmes. Technological developments are taken into account in the context of specific support to pilot projects⁵².

The “i2i Audiovisual” initiative, an action of the European Investment Bank (EIB) and the European Investment Fund (EIF) in conjunction with the European Commission, also deserves special mention. This is a new package of actions⁵³ aimed at strengthening the financial base of the audiovisual sector and accelerating its adaptation to digital technologies. Complementing the Media Plus Programme, the objective of this “financial package” is to increase the competitiveness of the audiovisual industry and promote the development of audiovisual products with a European content.

Other support mechanisms include the “eContent” multiannual Community programme (2001-2005) aimed at promoting the development and use of European digital content on global networks and linguistic diversity in the information society⁵⁴.

1.2. Links with other Community policies

It should be stressed that, in addition to the direct application of the provisions of the Treaty, and in particular those governing the four fundamental freedoms derived from primary law (free movement of services, goods, capital and people), several European Union policies are connected with European audiovisual policy. Examples include competition, intellectual

⁵¹ The Media Plus Programme is based on the following Decisions: Council Decision No 2000/821/EC of 20 December 2000 on the implementation of a programme to encourage the development, distribution and promotion of European audiovisual works (MEDIA Plus - Development, Distribution and Promotion) (2001-2005) and Decision No 163/2001/EC of the European Parliament and of the Council of 19 January 2001 on the implementation of a training programme for professionals in the European audiovisual programme industry (MEDIA-Training) (2001-2005).

http://europa.eu.int/comm/avpolicy/media/index_en.html

⁵² http://europa.eu.int/comm/avpolicy/media/pilot_en.html

⁵³ (i) credit lines (or “global loans”) from the EIB to the specialised banking sector for the funding of small and medium-sized enterprises (SMEs) in audiovisual creation, audiovisual technology or the performance of subcontracting in this sector; (ii) medium- and long-term funding by the EIB, in cooperation with the banking sector, of infrastructure investments by large private or public television, production or audiovisual distribution groups; (iii) financing of specialised venture capital funds via EIF holdings; and (iv) development of joint EIB Group and European Commission actions in favour of cultural creation or the development of the film or television industry (finance training sessions, cooperation between European distributors, etc.).

⁵⁴ Council Decision 2001/48/EC of 22 December 2000, OJ L14, 18.1.2001.

http://europa.eu.int/comm/secretariat_general/sgc/aides/forms/infso02_en.htm

property⁵⁵ and media⁵⁶, information society - notably the Directive on electronic commerce⁵⁷ and the “electronic communications” package⁵⁸, or consumer protection⁵⁹.

These policies thus interact and influence each other in the process of pursuing the Treaty’s objectives.

It is also in this context that the particular significance of the provisions of Article 151, fourth paragraph, of the EC Treaty, according to which the Community, in order to respect and promote the diversity of its cultures, takes account of cultural aspects in actions taken pursuant to other provisions of the Treaty, can be seen.

With a view to strengthening the overall coherence of European audiovisual policy, in the context of the implementation of the present work programme the Commission will take account of relevant interactions between these different policies.

In the specific case of intellectual property rights, it should be recalled that they provide an incentive to creation and investment in numerous artistic fields, including the audiovisual sector (television, film, music, etc.), and contribute to competitiveness, employment and innovation in the information society. These rights have been subject to considerable European harmonisation aimed at removing obstacles to trade and adapting the applicable framework to new forms of exploitation.

Thus, Directive 93/83/EC “cable and satellite”, which is linked to the “television without frontiers” Directive, aims to coordinate certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission so as to facilitate cross-border broadcasting of audiovisual programmes. As part of the follow-up to the report on its application adopted by the Commission on 26 July 2002⁶⁰, this Directive is currently

⁵⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10.

⁵⁶ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993; Report from the Commission Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (COM (2002) 430 final, 27.7.2002; Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ L 320, 28.11.1998, p.54; and Communication from the Commission on the application of the general principles of free movement of goods and services - Articles 28 and 49 EC - Concerning the use of satellite dishes (COM (2001) 351 final, 27.5.2001).

http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm.

⁵⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1.

⁵⁸ http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/index_en.htm

⁵⁹ See Communication from the Commission - Follow-up Communication to the Green Paper on EU Consumer Protection, Brussels, 11.6.2002, COM (2002) 289 final. Cf. work in progress on a framework directive at the following address:

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/follow_green_en.html

⁶⁰ COM (2002) 430 final.
http://europa.eu.int/comm/internal_market/en/media/cabsat/report1993-83/index.htm.

subject to a process of research and reflection in the Directorate-General for Internal Market (working sessions, in close cooperation with the various interested parties and the competent national authorities). The Commission will ensure that the possible review of the two instruments will be carried out in a coherent and coordinated manner with a view to furthering the development of the different channels for broadcasting audiovisual content, while taking into account the interests of all interested parties (notably rights holders, broadcasters and viewers).

The Commission will also take into consideration any relevant interface between the “television without frontiers” Directive and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁶¹ and the Directive on electronic commerce⁶².

1.3. Public consultations

The present work programme represents an important step towards a better understanding of all the economic, cultural and societal challenges linked to the implementation of the “television without frontiers” Directive. It follows on from the 1999 Commission Communication on the principles and guidelines for the Community's audiovisual policy in the digital age⁶³.

With a view to gathering elements of appreciation and indications on the need to update or adapt, in future, the “television without frontiers” Directive and, where applicable, adopt related or complementary measures, the Commission will launch public consultations open to all interested parties and involving the candidate countries and their citizens during the first quarter of 2003.

In this context⁶⁴, the Commission will hold a series of public hearings during the first half of 2003 and will invite all interested parties to submit written comments on the various specific themes identified in the present work programme.

These consultations should make it possible to assess whether the economic and technological development of the sector requires adaptation of existing regulatory measures, notably taking

⁶¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, pp. 10-19.
http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm

⁶² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, pp. 1-16.
http://europa.eu.int/comm/internal_market/en/ecommerce/index.htm

⁶³ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 14 December 1999 on the principles and guidelines for the Community's audiovisual policy in the digital age (COM (1999) 657 final).
http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/av_en.pdf

⁶⁴ Cf. Commission work “towards a reinforced culture of consultation and dialogue - proposal for general principles and minimum standards for consultation of interested parties by the Commission”.

into account the increase in the number of channels for broadcasting audiovisual content. Special attention will be paid to the principles of proportionality and subsidiarity⁶⁵.

On the basis of the results of these public consultations, by the end of 2003 or the beginning of 2004 the Commission will submit to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions a communication accompanied by possible proposals.

II. - WORK PROGRAMME

Pursuant to the provisions of the Treaty⁶⁶, the “television without frontiers” Directive establishes the legal framework for the free provision of television services in the European Union with a view to promoting the development of a European market (principles of freedom of reception and of retransmission of televised programmes) while taking account of certain general interest objectives⁶⁷.

To this end, it coordinates, at Community level, national legislation in areas such as determination of the law applicable to broadcasters (principle of country of origin), promotion of distribution and production of European works, access to events of major importance, advertising, teleshopping, sponsorship, protection of minors and public order and the right to reply.

Today, through the impetus of digital technology and the increase in the number of television channels available on the various platforms (terrestrial, cable, satellite, Internet, etc.) and of new forms of broadcasting and consumption (on-demand television, personal video recorders, interactive television, large flat-screens, new image-compression technologies, etc.), the audiovisual sector is going through profound changes. These developments have been the motivation behind the Commission’s review of the interpretation and implementation of the “television without frontiers” Directive and its proposed means for resolving possible problems, while taking into account legislative and regulatory developments in the Member States.

In particular, with a view to countering risks of legal uncertainty and distortion of competition and while taking into account the aforementioned general interest objectives, the Commission must satisfy itself that recent developments in the laws, regulations and administrative practices are compatible with the main objective of free movement of services.

Public consultations will enable all interested parties to submit written comments and to take part in the public hearings. These public consultations will be conducted on the basis of working documents mentioned in the present work programme.

⁶⁵ In application of the Protocol on subsidiarity and proportionality annexed to the Treaty of Amsterdam.

⁶⁶ Articles 49 of the Treaty prohibit restrictions on the freedom to broadcast beyond the borders of the Member States. The Treaty, along with judgements of the ECJ, allow only three exceptions to this principle: measures justified on the grounds of public order, public safety and public health.

⁶⁷ For a reminder of the general interest objectives, see point 3.1 of the report on implementation.

2.1. GENERAL CONSIDERATIONS

In terms of the future of European regulation, two general considerations must be taken into account: the scope of regulation and the linkages between the various relevant Community instruments.

The reflection will notably cover the linkages between legislative measures, co-regulation and self-regulation.

The questions will be dealt with only in the context of the general interest objectives of European audiovisual policy and, in this regard, with the aim of ensuring the free movement of services through the identification and removal of possible obstacles to the single market.

In this context, the application of the principles of proportionality and subsidiarity as defined in the Protocol annexed to the Treaty of Amsterdam will also be taken into account.

1. *Scope*

As regards scope, certain principles which form the basis of existing Community regulation should be borne in mind.

First of all, it should be stressed that **the “television without frontiers” Directive is “technologically neutral”**, insofar as its provisions apply indiscriminately to analogue and digital television, regardless of broadcasting method (terrestrial, satellite, cable, etc.).

Secondly, it should be recalled that **positive Community law makes an important distinction⁶⁸ between “television broadcasting” services, which concern television programmes intended for the reception by the public, and “information society services”**

⁶⁸ Thus, Article 1(a) of the “television without frontiers” Directive defines “television broadcasting” as *“the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services”*.

Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, **defines an “information society service”** as *“any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”*. This latter Directive explicitly provides that television services - within the meaning of the “television without frontiers” Directive - and broadcasting services are not information society services as they are not supplied on individual demand. Cf. Annex V, “Indicative list of services not covered by the second subparagraph of point 2 of Article 1”, to the Directive.

<http://europa.eu.int/scadplus/leg/en/lvb/l21003.htm>; see also recital 18 of Directive 2000/31/EC.

The definition of “information society services” also features in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, and in the Directive of the European Parliament and of the Council on the approximation of laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (political agreement of the Council of 2.12.2002 on the amended proposal of the European Parliament - not yet published).

supplied on individual demand. The notion of “individual request of a recipient of services” refers to a service supplied by transmission of data on individual demand.⁶⁹

“Television broadcasting” services are covered by the “television without frontiers” Directive. “Information society services” are notably covered in the framework of the Directive on electronic commerce⁷⁰.

The Commission is not aiming at challenging the distinction made in the acquis communautaire between information society services and services covered by the “television without frontiers” Directive.

In the light of recent and likely future market and technological developments, for each of the themes defined in point 3.2 the Commission will examine whether the provisions of the Directive have fully met the target objectives and whether it is necessary to take measures at Community level. If so, it will examine whether it would be preferable to review the provisions currently contained in the Directive, to amend them or to draft other measures for achieving the objectives of the Directive. The questions will be considered only from the perspective of the general interest objectives targeted by the “television without frontiers” Directive. Questions which will therefore not be addressed include, in particular, those relating to broadcasting, to access or regulation of broadcasting-related transactions, to access, including access to associated resources, to “must-carry” rules, to standardisation, which is covered by the new regulatory framework⁷¹ on electronic communications networks and services, or to regulation of transactions.

2. *Linkages between regulation, co-regulation and self-regulation*

The review will also consider the type of regulatory measure to apply.

In its White Paper on European governance⁷², the European Commission proposed to make the drafting of European Union policies a more open process in order to ensure wider participation by citizens and organisations in their design and implementation. The White Paper encourages greater use of the different public policy instruments, in particular co-regulation⁷³ and self-regulation. The Commission has adopted an action plan for improving regulation and simplifying the regulatory environment⁷⁴.

⁶⁹ Cf. Article 1, point 2, second paragraph, third indent of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998.

⁷⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, pp. 1-16.

http://europa.eu.int/comm/internal_market/en/ecommerce/index.htm

⁷¹ http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/index_en.htm

⁷² European Governance, A White Paper, COM(2001) 428 final, 25.7.2001.

http://europa.eu.int/comm/governance/white_paper/index_en.htm

⁷³ For details of the conditions for using co-regulation, see in particular p. 25.

⁷⁴ Communication from the Commission - Action plan “Simplifying and improving the regulatory environment”, COM (2002) 278/2 final, 6.6.2002.
http://europa.eu.int/comm/governance/suivi_lb_en.htm

The Commission has undertaken to clarify the choice and use of the various legislative instruments at its disposal. However, it would like to recall that Directives must be used in compliance with the spirit and the letter of the Treaty: Directives must revert to being instruments which define a legal framework and the objectives to be achieved. The Commission would therefore like to limit as much as possible the use of Directives to establishing the general framework, including the objectives, the deadlines and the main elements of the legislation. It would be up to the legislator to take a political decision on these main elements and to have the technical details set out in implementing measures.

Furthermore, the Commission would like to stress that alternatives to regulation may, where relevant, be used without infringing the provisions of the Treaty or the prerogatives of the Community legislator.

Thus, co-regulation and, in certain cases, self-regulation are tools which, under clearly defined conditions, may enable the achievement of Treaty objectives while simplifying the legislative work and the legislation itself by taking into account the principles of proportionality and subsidiarity without jeopardising the fundamental principles of the Internal Market.

Within the framework of a legislative measure, *co-regulation* allows for the implementation of the objectives defined by the Community by means of measures taken by the recognised stakeholders in a given area. It might prove a useful tool for adapting legislation to the problems and sectors concerned, focusing the legislative work on the most important aspects and, finally, taking advantage of the experience of stakeholders, notably operators and social partners. Recourse to co-regulation in the framework of a legislative measure must add value to the pursuit of the general interest. This approach may prove useful where flexible and/or urgent measures are required, provided that these measures do not require uniform enforcement throughout the Community and do not affect competition. Within this regulatory framework, with a view to guaranteeing legal certainty the legislator⁷⁵ defines the main aspects of the legislation: the objectives to be achieved, the deadlines and implementing mechanisms, the methods for monitoring enforcement and possible sanctions. The legislator decides to what extent the design and application of implementing measures may be entrusted to stakeholders on account of their recognised experience on the issue. Where this mechanism fails to produce the expected results, the Commission reserves the right to submit a classic legislative proposal to the legislator.

Self-regulation refers to a variety of practices, common rules, codes of conduct or voluntary agreements defined, on a voluntary basis, by economic and social actors, NGOs or other organised groups themselves for the purpose of governing and organising their activities. Unlike co-regulation, self-regulation does not necessarily imply legal measures. When such practices exist and enable the achievement of the Treaty's objectives, the Commission may consider it preferable not to put forward a legislative proposal. It may also suggest, for example by means of a Recommendation, recourse to self-regulation by the parties concerned with a view to avoiding the adoption of a Regulation, without however ruling out the possibility of legislating if self-regulation proves inadequate or ineffective.

⁷⁵ Even where the Commission proposes legislation which allows for co-regulation, it will be for the European Parliament and the Council to adopt the proposal. Cf. conditions for recourse to co-regulation, p. 13 of the aforementioned Communication (COM (2002) 278 final/2).

In the context of the review, the key question may be summed up as follows: “*What are the effective and proportional means, at Community level, for ensuring respect for general interests in the digital environment?*”. As far as the Commission is concerned, the digital revolution does not remove the obligation to identify, at Community level, relevant general interests and, when necessary, to ensure respect for these interests through regulation, complementary co-regulation or, in some cases, self-regulation.

In accordance with the principle of subsidiarity⁷⁶, this work programme will take into account all these elements.

2.2. SPECIFIC THEMES

Theme 1: Access to events of major importance to society

During the revision of the Directive in 1997, an Article 3 bis was introduced allowing Member States to take measures, in accordance with Community law, to ensure that television broadcasting bodies within their jurisdiction do not broadcast events judged to be of major importance to society on an exclusive basis which denies a significant part of the public the possibility of following these events, live or pre-recorded, free of charge. Based on the principle of mutual recognition, this mechanism applies only to television broadcasting bodies within the meaning of Article 1 (b) of the Directive. **The Commission does not wish to extend this mechanism. However, it believes that it would be useful to examine the wording of Article 3 bis with a view to improving its implementation.**

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

In line with Article 151 (4) of the Treaty, which imposes an obligation on the Community to take cultural aspects into account in its action under other provisions of the Treaty with a view to respecting and promoting cultural diversity⁷⁷, the dual objective of promoting cultural diversity and the competitiveness of the European programme industry finds its concrete expression in a series of measures in favour of the distribution and production of European television programmes contained in the “television without frontiers” Directive. This mechanism, which is linked to complementary financial support mechanisms such as the Media programme, is based on the provisions contained in Chapter III of the “television without frontiers” Directive: Article 4 (promotion of European works), Article 5 (promotion of European works by independent producers), Article 6 (definition of “European works”), Article 7 (chronology for broadcasting cinematographic works) and Article 9 (exemption of local television broadcasts not forming part of a national network).

Article 4 (3) of the Directive provides for a review of the application of this Article on the basis of a Commission report which, with regard notably to information provided by the Member States, takes into account the evolution of the Community market and the

⁷⁶ Cf. Protocol on subsidiarity and proportionality annexed to the Treaty of Amsterdam.

⁷⁷ Ex Article 128 (4). Cf. recital 25 of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

http://europa.eu.int/comm/avpolicy/regul/twif/newint_en.htm

international context. Article 25 bis also specifies that this review must take into account an independent study on the impact of the measures concerned at Community and national level.

In addition, in its follow-up to the “Cinema” Communication⁷⁸, the Commission identified a series of questions to be considered in the context of the review of the “television without frontiers” Directive. The first series of questions concern the definition of “European work” and the definition of “independent producer and independent production”. The second series of questions concern the chronology for the broadcast of cinematographic works and the definition and exploitation of on-line rights.

In this respect, the present work programme plans: (i) to commission the independent study foreseen by Article 25 bis of the Directive; (ii) to give further consideration to the application of Chapter III of the “television without frontiers” Directive; and (iii) to pursue exchanges of views on the series of questions identified in the context of the “Cinema” Communication.

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

Chapter IV of the Directive lays down a series of rules on advertising, sponsorship and teleshopping, including rules on advertising aimed at minors, covering broadcasting of television programmes. It provides rules concerning the amount of advertising allowed (daily limits and timetables, Article 18), the number of and conditions for interruptions for advertisements (Article 11) and rules applicable to the content and presentation of advertising spots (Articles 10, 12, 13, 14, 15 and 16). Specific rules apply to sponsorship (Article 17).

The aim of the Directive is to protect the interests of television viewers by, for example, establishing a clear distinction between editorial content and advertising, and to protect the integrity and value of audiovisual works and rights holders by, for example, avoiding excessive interruptions. With reference to the principle that regulation should be limited to the minimum necessary to achieve the objectives sought, the Commission will specifically examine the proportionality of the existing measures. In particular, it will be necessary to examine whether certain rules limiting the quantity of advertising might be relaxed in the light of the degree of user choice and control.

In addition, as far as non-linear programming is concerned, it will be necessary to examine whether specific rules are required, notably with the aim of guaranteeing the separation between editorial content and commercial messages.

Various Member States have, in accordance with Article 3 of the Directive, adopted stricter and more detailed rules than those of the Directive, for example in the area of sponsorship (on the length of the message, the sponsor or the content of the message). Similarly, different Member States have applied different interpretations of the Directive with regard to new advertising techniques, such as split screens, virtual advertising or interactive advertising. **The Commission will examine the legal implications of new advertising techniques with a view to determining whether the existing legislation can cover these techniques in an appropriate manner or needs to be adapted. The Commission will also examine the economic and financial implications of possible adaptations.**

⁷⁸ Cf. Point 8 of the “Cinema” Communication.
http://europa.eu.int/comm/avpolicy/regul/cine1_en.htm

During its review, the Commission will take into account the possibility of self-regulation with regard to the rules on advertising, while bearing in mind that these rules are supposed to ensure or even improve legal certainty and must be compatible with the principle of free movement of services.

Furthermore, as far as the work on audiovisual policy and the future framework directive on fair commercial practices is concerned, it will be necessary to ensure coherence and compatibility, as pointed out in the Follow-up Communication to the Green Paper on Consumer Protection⁷⁹.

Theme 4: Protection of minors and public order - The right to reply

- Protection of minors and public order

Articles 22 and 22 bis of the Directive lay down principles relating to the protection of minors and public order which the Member States must observe. The Articles provide that the Member States shall put in place appropriate measures and mechanisms (selection of the time of broadcast, technical measures aimed at ensuring that minors in the area of transmission will normally not hear or see these broadcasts or the introduction of an acoustic signal or visual identification symbol) aimed at ensuring that these principles are observed. **These principles and mechanisms will be subject to review during public consultations, not least in the light of recent technological developments.**

Article 2 bis of the Directive provides that the Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by the Directive. However, the Member States may, subject to certain conditions, temporarily derogate from this provision where a television broadcast coming from another Member State manifestly, seriously and gravely infringes the aforementioned Articles 22 and 22 bis. In this case, the Member State is required to notify the television broadcaster concerned and the Commission of its intentions. It is also required to consult with the broadcasting Member State and with the Commission. **Certain aspects of this derogation from the country of origin rule on which the entire Directive is based, including procedural questions, will be subject to review during public consultations with a view to a possible clarification.**

The provisions of the Directive on the protection of minors and human dignity apply to television broadcasting while those of the Council Recommendation on the protection of minors and human dignity⁸⁰ cover all the audiovisual and information services, including on-line services. On 20 February 2002, the European Parliament adopted a report⁸¹ on the assessment report from the Commission to the Council and the European Parliament on the

⁷⁹ Cf. footnote 59.

⁸⁰ Council Recommendation of 24 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, OJ L 270, 7.10.1998, p. 48.

http://europa.eu.int/comm/avpolicy/regul/new_srv/recom-intro_en.htm

⁸¹ http://www.europarl.eu.int/plenary/default_en.htm

application of the Recommendation⁸². This report stresses the importance of the self-regulation approach in this area and calls on all stakeholders to continue their efforts to guarantee the protection of minors and human dignity. It calls on the Member States to develop an approach which establishes common criteria for a comparable description of audiovisual content while stressing that the assessment of content should – not least in the light of cultural differences – remain the preserve of national or regional authorities while assessment systems for the various media should be better coordinated. Finally, the report calls on the Commission to draw up a further report on the implementation of the Recommendation with a view to assessing progress. **The Commission intends to finalise this new assessment report by the end of 2003 so as to enable further consideration of the linkages between the relevant provisions on the protection of minors contained in the “television without frontiers” Directive and in the Recommendation.**

– Right to reply

According to Chapter VI of the Directive, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. **The Commission will examine the implementation of the relevant provisions of the Directive.**

Theme 5: Application (related aspects)

The Member States whose authority vis à vis broadcasting bodies is determined by the rules laid down in Article 2 of the Directive, the contact committee set up under the aegis of the Commission by Article 23 bis and the national regulatory authorities play a key role in the application of the “television without frontiers” Directive. They do so by participating, within the framework of their respective powers and in accordance with the principle of subsidiarity, in the achievement of the objectives of the Directive and, at a more general level, the Treaty.

1. Determining the competent authority and the applicable law

According to Article 2 bis of the “television without frontiers” Directive, the Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by the Directive (application of the State of origin rule).

With a view to determining the competent authority vis à vis the broadcasting bodies, Article 2 defines establishment as the principal criterion (along with a series of material criteria of a subsidiary nature). **These criteria will be reviewed in the light of established practice and the case law of the European Court of Justice and of the effectiveness of the subsidiary criteria defined by Article 2 (4) of the Directive.**

⁸² Report by Mr Christopher Beazley on the evaluation report from the Commission to the Council and the European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity, (COM(2001) 106 – C5-0191/2001 – 2001/2087(COS)).

http://www.europarl.eu.int/plenary/default_en.htm

2. Contact committee

The contact committee set up under the aegis of the Commission by Article 23 bis of the “television without frontiers” Directive plays a key role in the application of these provisions by the Member States and constitutes an ideal forum for exchanges of views and information between the Commission and the Member States and between the Member States themselves.

In accordance with the conclusions adopted by the Council on 11 November 2002, under the Danish Presidency, the Commission will involve the contact committee closely in the implementation of the present work programme. In addition, the Commission will consider the possibility of strengthening the powers of the committee in the context of the implementation of Article 3 bis of the Directive which deals with access to events of major importance for society (application of the principle of mutual recognition).

3. Role of national regulatory authorities

Consultations at European level have led the Commission to propose guidelines for the creation of national regulatory bodies in the audiovisual sector. Thus, in its Communication on the principles and guidelines for the digital age⁸³, the Commission highlighted the following aspects:

- Regulatory bodies should be independent of government and operators.
- Questions relating to content are, by their very nature, mainly national, given their direct and close link to the cultural, social and democratic needs of a given society; in accordance with the principle of subsidiarity, regulation of content is thus mainly the responsibility of the Member States.
- Technological convergence requires closer cooperation between national regulatory authorities (electronic communications infrastructure, audiovisual sector, competition, etc.).
- Regulatory bodies can contribute to the development and implementation of self-regulation.

In the context of the implementation of the “television without frontiers” Directive, the Commission will engage in an exchange of views on the possibility of strengthening cooperation at European level between the various competent national regulatory authorities in the audiovisual field.

Theme 6: Issue not covered by the Directive: access to short extracts of events subject to exclusive rights

Finally, it would seem appropriate to reflect on the question of whether there are grounds for introducing, in future, provisions on access to short extracts of events subject to exclusive rights.

⁸³ Communication from the Commission of 14 December 1999 to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Principles and guidelines for the Community's audiovisual policy in the digital age (COM (1999) 657 final).
http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/av_en.pdf

Unlike the European Convention on Transfrontier Television⁸⁴, the “television without frontiers” Directive does not contain any such provisions.

Bearing in mind the interests at stake (event organisers, rights holders, agencies, television broadcasting bodies, the public) and taking into account the fact that some Member States have already adopted specific provisions on the subject, in the interest of having as broad an information base as possible, this new question should be addressed with a view to analysing whether the absence of Community provisions creates obstacles to the internal market.

III. - TIMETABLE AND FUTURE ACTIONS

The Commission believes that the principles and guidelines for Community audiovisual policy in the digital age contained in the 1999 Communication⁸⁵ remain valid. In order to assess the impact of recent technological and market developments on the implementation of the “television without frontiers” Directive and consider potentially necessary measures for strengthening the overall coherence of European audiovisual policy, the Commission is planning the following actions.

It should be noted that public consultations will enable all interested parties to submit written comments and take part in public hearings on the themes identified in the present work programme.

⁸⁴ European Convention on Transfrontier Television (STE No 132), Strasbourg, 5.5.1989, amended by the Protocol amending the European Convention on Transfrontier Television (STE No 171), adopted on 1.10.1998 and entered into force on 1.3.2002.
<http://conventions.coe.int/Treaty/EN/Cadreprincipal.htm>

It should be noted that the scope of Council of Europe Convention differs from that of the “television without frontiers” Directive of the European Parliament and of the Council in that it only covers the transfrontier movement of television services.

⁸⁵ Communication from the Commission of 14 December 1999 to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Principles and guidelines for the Community's audiovisual policy in the digital age (COM (1999) 657 final).
http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/av_en.pdf

Indicative timetable	Planned actions
First quarter of 2003	<ul style="list-style-type: none"> - Launch of an independent study on the impact of Community and national measures for promoting the distribution and production of European works - Possible launch of <i>ad hoc</i> complementary studies
March-May 2003	<ul style="list-style-type: none"> - Hearing of interested parties on the themes outlined in the present work programme
Early July 2003	<ul style="list-style-type: none"> - Deadline for submission by interested parties of written comments on the themes outlined in the present work programme
Third quarter of 2003 Late 2003 – Early 2004	<ul style="list-style-type: none"> - Adoption of an assessment report on the implementation of the Recommendation on the protection of minors and human dignity⁸⁶ - Adoption of a Communication on the results of public consultations and possible proposals

⁸⁶ Council Recommendation of 24 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
http://europa.eu.int/comm/avpolicy/regul/new_srv/recom-intro_en.htm