

## DISCUSSION PAPER

### REVIEW OF THE TELEVISION WITHOUT FRONTIERS DIRECTIVE

#### THEME 1 : EVENTS OF MAJOR IMPORTANCE FOR SOCIETY

During the revision of the Directive<sup>1</sup> in 1997, an Article 3a was introduced relating to measures taken by Member States, 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 deferred, in free-TV. This provision is based on the consideration that it is essential to enable Member States to take measures to ensure wide access by the public to television coverage of national or non-national events of major importance for their society (such as the Olympic games, the football World Cup and the European football championship)<sup>2</sup>. It was essential to provide for a Community framework, in order to avoid potential legal uncertainty and market distortions and to reconcile free circulation of television services<sup>3</sup> with the need to prevent the possibility of circumvention of national measures protecting a legitimate general interest.

**1 IN THE FOURTH REPORT ON THE APPLICATION OF THE TVWF DIRECTIVE<sup>4</sup> THE COMMISSION STATED THAT THIS PROVISION IN GENERAL WAS WORKING SATISFACTORILY. THE EXAMPLE OF THE 2002 FOOTBALL WORLD CUP IS PARTICULARLY RELEVANT IN THIS RESPECT. ADEQUACY OF THE MEASURE**

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

**2 BINDING ELEMENTS IN RELATION TO THE MEASURES TAKEN BY MEMBER STATES IN VIEW OF THE PRINCIPLE OF MUTUAL RECOGNITION RESULTING FROM ARTICLE 3A (3)**

Questions have been raised as to which elements of the measures taken by the listing Member State should be recognised by the other Member States. It is undisputed that the *listed events* ("...events which are designated...") and the provisions

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<sup>1</sup> Council Directive 89/552/EEC as amended by Directive 97/36/EC of the European Parliament and of the Council (Television without Frontiers)

<sup>2</sup> Recital 18 of Council directive 97/36 amending the TVWF directive.

<sup>3</sup> Services delivered by broadcasters within the meaning of Article 1 (b) of the Directive.

<sup>4</sup> COM (2002) 778 final.

regulating the *modalities* of the broadcast ("...via whole or partial live coverage or, ... whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1") constitute binding elements in view of the obligations of other Member States. There also seems to be a consensus that these elements which are to be mutually recognised in accordance with Article 3a (3) of the Directive comprise the definition of the "substantial part of the public" by the listing Member State. Consequently the other Member State would be bound by the definition of these terms by the listing Member State, without a need to harmonise that notion at European level.

**Do you think the application of this provision leads to practical problems? If so, which means would you propose to solve these problems?**

### **3 REFERENCE DATES (FOR MEMBER STATES AND RIGHTS HOLDERS) IN RELATION TO THE OBLIGATION OF ENFORCEMENT OF ARTICLE 3A**

Paragraph 3 of Article 3a TVWF directive provides that the adoption of a list may affect all contracts between right holders and broadcasters that were signed after 30 July 1997, the date of publication of the Directive. Recital 20 of the revised Directive specifies that "in order to avoid speculative rights purchases with a view to circumvention of national measures, it is necessary to apply these provisions to contracts entered into after the publication of this Directive and concerning events which take place after the date of implementation.

**Do you think the application of this provision leads to practical problems? If so, which means would you propose to solve these problems?**

### **4 CONSULTATION REQUIREMENTS**

Article 3a(1) of the Directive only provides that Member States shall "draw up the list of designated events ... in a clear and transparent manner..." Until now it has not been considered necessary to coordinate at European level the procedures followed at national level for the consultation of interested parties.

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

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

### **5 THE COMMISSION'S ROLE IN RESPECT OF MEASURES NOTIFIED ACCORDING TO ARTICLE 3A OF THE DIRECTIVE**

Unlike Article 2a(2) of the Directive, Article 3a(2) makes no mention of a "decision" to be taken by the Commission. The role of the Commission is simply to carry out a preliminary check on the compatibility of notified measures with Community law. If the measures seem, on the basis of the information in the Commission's possession, not to

give rise to any infringements of Community law, the Commission's services - after the Contact Committee has adopted its opinion - inform the Member State concerned that it does not intend to object to the measures taken. The measures are then published in the Official Journal so that the other Member States may be aware of them in view of their obligations under Article 3a(3) of the Directive.

If the Commission were to take the view that the notified measures did constitute an infringement of Community law, and if its informal discussions with the Member State concerned were not to result in the amendments desired by the Commission, the only course open to it in order to remedy this situation would be the initiation of infringement proceedings pursuant to Article 226 EC.<sup>5</sup>

The role of the Commission in the procedure foreseen by Article 3a(2) of the Directive is under scrutiny by the Court of First Instance<sup>6</sup> and it might be considered that a Commission decision might be a more adequate solution to verify the compatibility of national measures with Community law.

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

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<sup>5</sup> The administrative letter by which the responsible Director General informs the Member State in question that the Commission does not intend "on the basis of the facts available" to object to the measures notified is similar to a "comfort letter" within the meaning of the judgement of the Court of Justice in Joint Cases 253/78 and 1/79 and 3/79 Giry and Guerlain, [1980] ECR 2327.

<sup>6</sup> CFI case T 33/01