DISCUSSION PAPER

REVIEW OF THE TELEVISION WITHOUT FRONTIERS DIRECTIVE

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

I. PROTECTION OF MINORS AND PUBLIC ORDER

The "Television without Frontiers" Directive aims to promote the development of a European broadcasting market whilst also ensuring the respect of certain general public interest objectives, through commonly defined minimum rules. It sets up certain obligations regarding programming in respect of the protection of the physical, mental and moral development of minors and public order (see in particular Articles 22 and 22a)

The Directive is complemented in this area by the "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 dignity" (the Recommendation), which covers all audiovisual and information services, including on-line services.

1. Prohibition or limitation of broadcasts likely to harm minors

Article 22 of the Directive makes an important distinction between two types of programmes : programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence, should not be broadcast at all; on the other hand, programmes which are likely to impair the physical, mental or moral development of minors may be broadcast 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.

It is up to the national authorities to define the criteria, including in respect of violence and pornography, according to which it is determined which programmes **seriously** impairs the development of minors and therefore shall not be broadcast. The control of the Community in this respect is limited to a control of proportionality of the measures taken.

In general, Member States have adopted detailed rules in respect of this Chapter of the Directive. Because of social and cultural differences, these differ from one Member State to another, both in terms of what is considered to be harmful content and of acceptable technical methods to ensure that minors will not normally see such programming. The study on the ratings practice used for audiovisual work gives a detailed overview also with respect to rating of broadcasts and the watershed and/or warning method used.

Digital technologies have complicated the procedure for checking broadcasting content employed by statutory bodies. This is the result of the following:

1. An increase in the number of channels and as a consequence in the number of programming hours that cannot reasonably be systematically controlled.

2. The traditional way of controlling broadcast content being put into question, not only as a result of an increase in the number of programming hours but also because traditional tools are not adaptable to the new technological environment. For instance, the effectiveness of the watershed concept is questioned in the case of pay-per-view channels.

3. New possibilities brought by new technologies such as the development of digital decoders equipped with hard disks enabling viewers to compile their own viewing schedule.

The issue of content made available through digital channels has not been consistently dealt with under national legislation, at a time when most broadcasters do not yet have digital transmission. The Television Without Frontiers directive applies to digital television also, and as a result broadcasters cannot broadcast any content, which could be harmful to the mental, physical and moral development of children and must use the traditional tools such as watershed and visual or tonal signals.

A possible solution to the problems of lack of resources for classifying broadcasts and of the watershed problem may lie in the increased use of selfregulation; a particular interesting approach of classification under selfregulation has been started in the Netherlands with NICAM, where film and video production companies and broadcasters classify themselves their production using a specific method and attributing pictograms for different dimensions such as sex or violence, giving the necessary information to enable the parents to decide what their children may watch. Digital television also give parents and educators powerful technical tools to filter content.

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

2. Prohibition of broadcasts containing incitement to hatred

Article 22a of the Directive provides that Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality. The Member States are responsible for defining this notion in accordance with their national legislation and moral values. Digital technologies have complicated the procedure for checking broadcasting content employed by statutory bodies given the increase in the number of channels and as a consequence in the number of programming hours that cannot reasonably be systematically controlled.

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

3. Derogation from the obligation to ensure freedom of reception

Article 2a of the Directive allows Member States provisionally to derogate from the basic principle of the directive (freedom of reception and unrestricted retransmission of television broadcasts from other Member States) where they consider that another Member State manifestly, seriously and gravely infringes Article 22 and 22a, after following the detailed procedure provided in Article 2a.

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

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

The Recommendation offers guidelines for the development of national self-regulation regarding the protection of minors and human dignity. In particular, it requests on-line Internet service providers to develop codes of good conduct so as to better apply and clarify current legislation.

The report on the application of this Recommendation published in 2001 showed that the application of the Recommendation was already then overall quite satisfactory. Hotlines and awareness campaigns have been launched nearly in all Member States, and codes of conducts have been established. Industry has worked on the creation of reliable Internet filters and the Commission has intensified international cooperation in this field as much of illegal and harmful content is hosted outside of the European Union.

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

II- RIGHT OF REPLY

The Directive Television without Frontiers includes under Article 23 the right of reply to any natural or legal person whose legitimate interests have been damaged by an assertion of incorrect facts in a television program. The Commission is not aware of any major problem as regards right of reply with respect to services covered by Article 1a) of the Directive.

In an on-line environment there is the particular problem of the practical accessibility to the right of reply. This is in principal covered by general national anti-defamation legislation, which however, may be very difficult to apply in view of the particularities of the on-line environment; thus, the source may be more difficult to identify and the content may disappear from the net within a short period.

The problem of effective access to the right-of-reply in an on-line environment has an EU-wide if not global dimension, so that there may be need for specific rules creating a minimum of cooperation between the Member states; however, it may not be necessary to extend such rules on the right of reply to non-professional on-line media as their influence on public opinion may be very limited. A remedy could be obliging such professional on-line media to store a copy of their information made publicly available in order to permit the possibility of the introduction of a reply; also, an address where such a reply can be sent to should be clearly identified; furthermore, the reply should be clearly visible for a reasonable period of time on the same web-page.

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