

DISCUSSION DOCUMENT

REVIEW OF THE "TELEVISION WITHOUT FRONTIERS" DIRECTIVE

THEME 5: APPLICATION (RELATED ASPECTS)

The Member States, the Contact Committee established at the Commission under Article 23a and the national regulatory authorities play an essential role in applying and implementing the "television without frontiers" Directive. Within the framework of their respective competencies and in accordance with the principle of subsidiarity, they are helping to achieve the aims of the Directive and more generally of the Treaty.

I. DETERMINING THE COMPETENT AUTHORITY (Article 2)

In accordance with the country of origin rule and with the application of the principle of mutual recognition, the Member States cannot restrict retransmission in their territory of television broadcasts from other Member States for reasons which fall within the areas coordinated by this Directive (Article 2a). The result is that considerable importance is attached to the rules with regard to determining the Member State to which audiovisual broadcasters are subject.

Article 2(2) of the Directive lays down the principle whereby broadcasters established in a Member State fall within the competence of that Member State in accordance with the criteria in paragraph 3, as do those meeting one of the criteria in paragraph 4 (technical criteria). Thus the first series of connection criteria set out in paragraph 3 is linked to the concept of establishment. The broadcaster falls within the competence of the Member State in which it is established, i.e. in which it has its head office and management decisions on programming are taken (Article 2(3a)). In cases where decisions on programming are taken in a State other than the one in which the broadcaster has its head office, paragraph 4 lays down subsidiary rules (use of a frequency granted by the Member State; use of the Member State's satellite capacity; use of a satellite up-link situated in that Member State). Finally, in cases where none of the criteria linked to the concept of establishment can be applied, the competent Member State is then defined in accordance with the criteria defined in paragraph 4 or, where appropriate, with the rule referred to in paragraph 5 of the Article (establishment criterion in accordance with the Treaty).

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

II. CONTACT COMMITTEE (Article 23a)

Chapter VIa of the Directive (introduced by Directive 97/36/EC) provides for the creation of a Contact Committee comprising representatives of the competent authorities of the Member States under the aegis of the Commission and specifies as its tasks: to facilitate the effective implementation of the Directive through regular consultation, to facilitate the exchange of information between Member States and the Commission, to discuss the outcome of regular consultations which the Commission

holds, and to examine any development arising in the sector. The Contact Committee is explicitly mentioned in the Directive with regard to Article 2 (jurisdiction), Article 3a (major events), Article 4(3) (reports concerning quotas) and Article 25a (independent study). Besides its role as a forum for the exchange of information, the Commission (according to Article 3a(2) of the Directive) has to seek the opinion of the Contact Committee on draft measures notified by Member States concerning lists of major events. Article 23a(2) b states that one of the tasks of the Contact Committee is to deliver own-initiative opinions or opinions requested by the Commission on the application by Member States of the provisions of the Directive.

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

The fourth application report on the Directive¹ affirmed that the review process would consider the type of regulatory measures to apply. One of the results of the ongoing review might be to strengthen instruments for co- or self-regulation.

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

III. ROLE OF THE NATIONAL REGULATORY AUTHORITIES

In accordance with Article 6(2) of the Treaty and the judgements of the Court of Justice of the European Communities, the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Values, signed in Rome on 4 November 1950. In this regard, the first paragraph of Article 10 of the Convention states that the right of freedom of expression includes the freedom to receive information.

In this context, and with a view to strengthening freedom of expression, the Commission attaches particular importance to developing independent national regulatory bodies in the audiovisual sector. Thus the Commission, in its communication on the principles and guidelines for the digital age,² particularly emphasised the following aspects:

- the regulatory bodies should be independent of government and of operators;
- questions relating to content are by nature essentially national, since they are directly and closely linked to the cultural, social and democratic needs of a given society; in accordance with the principle of subsidiarity, regulation of content is therefore essentially the responsibility of the Member States;

¹ COM (2002) 778 final, Annex: Point 2.

² Communication from the Commission of 14.12.1999 to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions 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

- technological convergence requires increased cooperation between the national authorities in charge of regulation (electronic communications infrastructures, audiovisual sector, competition, etc.);
- the regulatory bodies may contribute to the development and implementation of self-regulation.

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

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

3. Does it seem to you worthwhile establishing a committee comprising the national regulatory authorities in the Member States³ with a view to exchanging best practices, particularly for contributing above all to the development and implementation of self-regulation in certain fields? How should responsibilities be divided between the Contact Committee and any committee of regulators?

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

³ It should be noted that a committee of this type has been set up by the Commission in the context of monitoring the application of the "electronic communications" package. Cf. Commission Decision of 29 July 2002, OJ L 200/38 http://erg.eu.int/about/index_en.htm