EUROPEAN COMMISSION
Directorate-General for Education and Culture

Culture, audiovisual policy and sport
**Audiovisual policy**

SEPTEMBER 2004

# FOCUS GROUP 1

## *REGULATION OF AUDIOVISUAL CONTENT*

The Commission Communication on the future of European audiovisual regulatory policy[1] stated that in the medium *term a thorough revision of the TVWF Directive*[2] *might be necessary to take account of technological developments and changes in the structure of the audiovisual market.* It concluded that the Commission will reflect with the help of experts (in Focus Groups) whether any changes to content regulation at Community level would be necessary. It is the mandate of Focus Group 1 to cover two main aspects: material and territorial competence.

## 1. MATERIAL COMPETENCE

### 1.1. Present framework

Community law at present has different regulatory regimes for television services and services of the information society. The definition of "television broadcasting" in Art 1 (a) of the TVWF Directive aims at covering mass media services and excluding phenomena of individual communication. Two main elements in Article 1 (a) define the borderline between television services and information society services: the first element is the reference to *television programmes*: this indicates that only audiovisual content is concerned, and more specifically, audiovisual content transmitted in the form of linear programming. A number of provisions in the Directive – on insertion of advertising, placement of spots etc – only make sense with regard to linear programming. The second element results from the fact that only programmes *intended for reception by the public* are covered while services on *"individual demand"* are explicitly excluded from the scope of the TVWF Directive. The examples mentioned in this provision (telecopying, electronic data banks) make clear that this division is made with reference to the distinction between individual and mass communication.

Correspondingly television services are covered by the TVWF directive and do not fall within the scope of the E-commerce directive[3]

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1 COM (2003)784

2 Council Directive 89/552/EEC as amended by Directive 97/36/EC.

3 Directive 2000/31/EC which itself refers in its Article 2(a) to the Transparency directive (98/34/EC as amended by 98/48/EC).

### 1.2. Is the present regime still justified?[4]

Whereas transmission and access issues are regulated by Community law for broadcasting and telecom services alike, in view of content regulation the TVWF Directive only covers broadcasting services including NVOD (near video on demand) but excluding VOD (video on demand). The justification for a sector specific regulation of television services lies within their "pervasiveness", and the "particular immediacy in the provision of audiovisual content". The same seems true for a number of services on the Internet and on mobile networks which have in common with traditional linear television that they offer audiovisual content in a "push" mode[5], and equally have great influence and spread effect as well as suggestive power and immediacy. Other new services, which are not received by a large number of persons at the same time, may nevertheless have a significant influence on society. This creates a grey zone which calls for a discussion of the appropriate regulation for different types of services.

- A first issue arises from the development of new networks (e.g. DSL, 3G) on which television signal can be transmitted without any difference from a viewer's perspective. Should this be therefore treated as broadcasting notwithstanding the technical background?

- What would be the appropriate regulatory regime for audiovisual content provided in an interactive manner?

- Can these changes be addressed by revising and clarifying the definition of "television broadcasting" in the TVWF Directive or do we in fact need a more general overarching framework for audiovisual content with a graduated regulation, as requested by the European Parliament in the Perry Report[6].

### 1.3. What might be the criteria to define a future regulatory framework?

Some Member States have already delineated different categories of services, for instance "media services" or "licensable services", which are subject to different obligations. These precedents constitute useful tools for analysis.

The methodology for determining the scope of any kind of possible future rules must be considered: A *"criteria" approach,* defining the services to be covered by general and abstract criteria raises the difficulty of finding suitable criteria; black or white lists *("listing" approach)* specifically naming the media services to be within or outside the scope of possible regulation could hardly be considered as technologically neutral and risk becoming rapidly obsolete. It is also possible to combine these two approaches by defining criteria *and* giving illustrative examples.

- A fist step could be to look at the present definition in the TVWF Directive in view of a possible lack of clarity in relation to services such as *web-casting* and the *streaming of television programmes*. This should be analysed to determine the boundaries of traditional television services.

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4 See: COM (2003) 784, p 14.

5 This means the recipient can not choose or influence the content, its sequence or composition.

6 A5-0251/2003.

- What criteria could be considered as significant and relevant to define services of mass communication that might be covered by graduated regulation in future? Examples of such criteria could be: (1) type of transmission (*one to one* as opposed to *one to many*); (2) the number of users; (3) the type of content provided especially with regard to editorial content and its importance for the formation of public opinion ("*Meinungsbildungsrelevanz*"); (4) the degree of choice the user has; (5) the amount of control he can exercise over the programme (linear programming) as well as (6) technical means by which the relevant programme is provided ("point to multipoint" as opposed to "point to point").

### 1.4. Graduated regulation - or what are the consequences?

The concept of an overarching framework is underpinned by the fact that some policy objectives now pursued by the TVWF Directive seem to be essential minimum standards with which any form of delivery of audiovisual content should comply . The public consultation last year showed that for instance the protection of minors and human dignity (e.g. prohibition of incitement to hatred) and the right to reply enjoy such wide acceptance. Other provisions of a more detailed nature are justified by the particular importance of television services for society. A necessary consequence of the possible expansion of the scope of the TVWF to a content directive seems to be that this would require a graduated regulatory approach.

Graduation can be discussed in various respects. Different classifications can be made in relation to the *nature of the service*; graduation can also be examined in view of the regulatory obligations to be imposed and of type of regulation: strict regulation, co-regulation and self-regulation.

- A preliminary consideration is to stress the complementarity between audiovisual regulation and horizontal regulation such as criminal law provisions in the Member States.

- Which criteria would require and justify graduated regulation? The *number of users* could be introduced as a sort of "de-minimis" criterion, which would exempt broadcaster below a certain audience share from some obligations (e.g. quantitative advertising restrictions or Chapter III of the Directive). Another criterion for differentiation in view of a possible general content regulation seems to be whether the offer is provide *in a linear or non-linear way*. In fact besides these especially evident aspects all criteria mentioned in the last bullet point of point 2.3 could be discussed in relation to the relevance they have for a differentiated approach of graduated regulation. The *language of the programme* can also be relevant: According to recital 29, channels broadcasting entirely in a language other than those of the Member States are not covered by the provisions of Article 4 and 5 TVWF; channels broadcasting mainly in a non-EU language are covered only for the part of their programme which is in an EU language. Is this provision appropriate? Should these programmes be excluded from some other provisions of the Directive?

### 1.5. Should graduated regulation be established by one legal instrument or in separate ones?

If an overarching framework for any delivery of audiovisual content is considered to be necessary it still remains to be decided how this should be done.

- Should there be one directive covering all different kinds of media services or would it be better to have separate legal instruments for different kinds of services?

- Should one or more directives be complemented by other instruments such as recommendations?

## 2. TERRITORIAL COMPETENCE - JURISDICTION

The country of origin principle is the core of the Television without Frontiers Directive. Broadcasters are regulated in at least one, but only one Member State. Even if Member States are free to take stricter measures for the broadcasters under their jurisdiction, Member States are not allowed to apply their national regulation to television broadcasts under another Member State's jurisdiction. This is a necessary condition for the creation of an internal market without legal obstacles to the free circulation of television broadcasts. This allows broadcasters fully to benefit from the positive economics effects of the single market and it favours the free circulation of information and ideas throughout the European Union.

Issues have been raised which refer to different situations. Firstly, problems occurred with respect to stricter national regulation as for example advertising restrictions or stricter rules in the field of protection of minors. Secondly the question of specific advertising windows explicitly targeting the market of another country has been raised. A relevant factor in a number of cases is the fact that two or more countries share the same language.

A first possible solution would be to replace some of the notions used in Article 2.

### 2.1. Significant part of the workforce

The term "a significant part of the workforce involved in the pursuit of the television broadcasting activity" has been the subject of differing interpretations.

It is clear for the Commission that "significant part" does not necessarily mean the majority. The term is related to the size of workforce and implies a significant part of the whole. It is possible that more than one significant part exists.

- Should this criterion be clarified? Would it be better to grant jurisdiction to the Member State where the broadcaster has the majority of his workforce in relation to a given channel?

### 2.2. Editorial decisions

The Television without frontiers Directive uses the notion of "editorial responsibility of schedules of television programmes" to define a broadcaster; it refers to the criteria of the place where "editorial decisions on programme schedules are taken" (Art. 2 paragraph 3b) and the place where "decisions on programming policy" are usually taken (recital 12) as criteria for jurisdiction.

It is not always clear how these criteria should be interpreted: The range of possibilities goes from a strategic decision taken once a year to the determination of the daily schedule, the day to day running of a broadcasting organisation.

- Should these criteria be clarified? Are they still necessary if a reference to the majority of the workforce is made?

### 2.3. Satellite uplink – Satellite capacity

The order of precedence in Article 2 paragraph 4 TVWF is the following:

- The use of a satellite capacity appertaining to a Member State

- The use of a satellite up-link situated in a Member State.

Most of the third country programmes use satellite capacities provided either by Eutelsat or by Astra. Due to this fact the ranking of Article 2 (4) implies that mostly two countries have the jurisdiction over a large number of third-country programmes received in Europe while these countries - France and Luxembourg - may have only very indirect contacts with the content providers.

- Should it be considered that there are more relations with the country where the uplink is established than with the country to whom the satellite capacity appertains? In this case should the ranking be reversed ?

### 2.4. Clarification of Art 2 (6) TVWF

Article 2 Paragraph 6 lays down the exemption for broadcasters intended exclusively for reception in third countries and which are not received directly or indirectly by the public in one or more Member States.

Although a lot of third country programmes are transmitted by European satellites these programmes can only be received in Europe by using a satellite dish with a diameter of more than one meter.

- Should Art 2 paragraph 6 of the Directive be clarified as follows in order to exclude these programmes from the application of the directive?

"This directive shall not apply to broadcasts intended exclusively for reception in third countries, and which are not received directly or indirectly by the public in one or more Member States, *using normal/standard consumer equipment*."

### 2.5. Digital terrestrial licensing

With the roll-out of digital TV several Member States introduced licence systems for digital terrestrial transmission including content-related provisions in conformity with the electronic communication package : According to Directive 2002/20/EC (Authorisation Directive) Member States can introduce national procedures where the demand for radio frequencies in a specific range exceeds their availability. Conditions which may be attached to rights of use for radio frequencies can be "the exclusive use of a frequency for the transmission of specific content or specific audiovisual services" (see: Annex of the Authorisation Directive).

If a broadcaster has already a license for a satellite programme and applies for a digital terrestrial frequency in another Member State the problem could be the following: This broadcaster already licensed will be subject to a second licensing system for the digital terrestrial frequencies with possibly a different set of obligations. In addition these different obligations could be monitored by two different Member State.

- Should this problem be clarified in the Directive?

### 2.6. Application of horizontal legislation and circumvention measures against broadcasters in case of evading the legislation

Art 43-48 of the Treaty lay down the fundamental right of the freedom of establishment. Therefore broadcasters are in general free to choose the Member States in which they are established. Whereas Article 3 of the Television without Frontiers Directive allows Member States to require television broadcaster under their jurisdiction to comply with stricter rules, broadcasters can establish themselves in the State where the national rules appear to them to be the least restrictive and following the principle of country of origin the broadcaster then falls under the jurisdiction of this Member State.

The Court of Justice has clarified that Member States may not apply to broadcasts from other Member States, provisions specifically designed to control the content of television advertising, thereby adding a secondary control to the control which the broadcasting Member State must exercise under that directive. On the other hand, the Court has considered that the Television without frontier Directive does not preclude a Member State from taking, pursuant to general legislation on protection of consumers against misleading advertising, measures such as prohibitions and injunctions against an advertiser in relation to television advertising broadcast from another Member State, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State[7].

In addition, the European Court of Justice stated in different cases[8], that a Member State can claim jurisdiction over a broadcaster established in another Member State, if the television services are directed at the first Member State and if the choice of the establishment has been made only to evade that Member State's legislation:

"Member State may regard as a domestic broadcaster a radio and television organisation which establishes itself in another Member State in order to provide services there which are intended for the first State's territory, since the aim of that measure is to prevent organisations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law"[9].

Furthermore the Court stated that Member States are entitled to take measures designed to prevent … individuals from improperly or fraudulently taking advantage of provisions of Community law[10]. According to this case law of the European Court of Justice the abuse or fraudulent conduct must be proven case by case and on the basis of objective evidence[11].

- Could the criterion of language of a programme be a suitable criterion for the Member States in the analysis to assess whether a broadcast is directed at a specific Member State?

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7 Case C-35/95 and C-36/95 De Agostini.

8 Case C-33/74 Van Binsbergen vs. Bestuur van de Bedriefsvereinigung; Case C-23/93 TV 10 SA v. Commissariaat voor de Media, paragraphe 21.

9 Case C-23/93 TV 10 SA v. Commissariaat voor de Media, paragraph 21.

10 Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen, paragraph 24.

11 Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen, paragraph 25.

- Should the procedure in Art 2a of the Directive be extended to cover other considerations of overriding public interest than those included at present (serious damage to minors)?