



**Expert Seminar on  
“The European Convention on Transfrontier Television  
in an Evolving Broadcasting Environment”**

**Strasbourg, 6 December 2001**

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**“Presence and topicality of the European Convention  
on Transfrontier Television: pluralism and diversity”**

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1. The preparatory work for the European Convention on Transfrontier Television (ECTT), which dates back to 1986, shows that the intention was to provide a binding legal framework for transfrontier broadcasts at a time when we were beginning to see the development of satellite broadcasting, for the purpose of ensuring that freedom of expression and information was protected, thus giving full impact to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup>.

The free reception of broadcasting services within the Council of Europe's member States should contribute to the free movement of information and ideas.

It will be remembered that freedom of expression and communication is a modern achievement.

Education and the circulation of information and ideas are clearly at the origin of democratic progress and are preconditions for democratic development.

In the 20th century, mass society means mass media: for many, television is the ideal vector for information and ideas.

By advocating freedom of expression and information, and the free circulation of information and ideas, the European Convention on Transfrontier Television made a major contribution to developing a communication technology that reflects our era.

My intention here is not to demonstrate to what extent the unlimited reception of images and accompanying ideas has been and is of benefit. We are aware that, since the end of the cold war, European unification has progressed very rapidly, precisely because television has transmitted the ideas of freedom and democracy almost everywhere.

2. The Council of Europe's existence is based on a wish to strengthen democratic development, by promoting joint agreements and activities in the economic, social, cultural, scientific and legal fields (see chapter 1, article 1 of the Council of Europe Statute). This extremely broad understanding of the Council's responsibilities has clearly influenced the content of the European Convention on Transfrontier Television.

During the implementation of the ECTT, the Council of Europe proceeded from a totalising humanist concept. There was more at stake than an exclusive focus on the issues of access to markets and the removal of barriers and obstacles; such a view would have concerned only the economic aspects.

Accordingly, if we are not to violate the spirit of this Convention or of the Council of Europe as the institution responsible for promulgating it, we must certainly measure its economic effectiveness, but must not stop there: I believe that cultural, social and ethical concerns should also be examined.

From this perspective, my talk will be concerned with this issue as a whole, and will focus on the problems inherent in Article 10 of the ECTT, "Cultural Objectives".

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<sup>1</sup> See also the Declaration on the Ministerial Conference on Mass Media Policy, 9-10 December 1986

3. Article 10.1 of the Convention states that: *“Each transmitting Party shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria”*.

This paragraph seeks to ensure the development and re-use, notably in the European context, of creative domestic productions and European co-productions in order to uphold European cultural identity and to guarantee pluralism in terms of means of expression<sup>2</sup>.

This provision is also to be understood in reference to the work of the first European Ministerial Conference on Mass Media Policy (Vienna, December 1986), at which the ministers decided “to take appropriate measures so that television programme services comprise a reasonable proportion of audiovisual works, in particular fiction works, of European origin”.

It is clear that Article 10’s scope is intended to facilitate freedom of expression and the exchange of ideas, for the purpose of consolidating a collective European awareness. This measure is welcome: yes, it guarantees freedom of reception for European channels within Europe, but requires in exchange that there be significant European content.

To my knowledge, the Council of Europe has not attempted to evaluate the effectiveness of this provision. This is doubtless explained by the fact that the ECTT’s aim is not to regulate the Parties’ broadcasting activities *per se*, nor to harmonise the Parties’ laws on broadcasting activities<sup>3</sup>.

In this respect, the Convention leaves a wide margin to the Parties for the implementation of its provisions. However, it is possible to assess whether this majority proportion has been implemented by referring to the relevant provisions of the “Television without Frontiers” Directive.

Article 4 of the European Union Directive of 3 October 1989 (89/552/CEE) deals with exactly the same question as Article 10 of the Convention. Indeed, Article 4.1 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, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria”*.

4. The Directive requires that implementation of Article 4 be monitored, as set out in Article 4.3; the Commission carries out regular assessments on the basis of data provided

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<sup>2</sup> See the Explanatory Report to the ECTT, paragraph 144.

<sup>3</sup> See the Explanatory Report to the revised ECTT, paragraph 39

by the member States. Article 4 reproduces the content of Article 10 of the ECTT almost word for word<sup>4</sup>.

Accordingly, the Commission's monitoring provides relevant information, at least for those countries in the European Union and the European Economic Area. However, we should bear in mind that this monitoring does not extend to all the State Parties to the ECTT.

The Commission's most recent report<sup>5</sup> shows that, with rare exceptions, the obligations imposed by the Directive with regard to broadcasting (a majority transmission-time quota and the introduction of a threshold on the basis of transmission time in 1988) are fulfilled by the European Union member States.

The weighted average for transmission of European works by television channels varies between 53.3% and 81.7% (reference figures for 1997-1998).

Portugal is the only country where transmission time for European productions fails to meet the quota (43%).

In Germany, all of the long-term channels transmitted about 70% of European productions in 1998.

In Spain, both the public reference channels and the commercial channels transmitted 53.3% of European productions in 1998.

In the United Kingdom, the public and commercial channels transmitted 68.2% of European productions in 1998.

In France, the five reference channels transmitted 69.2% of European productions in 1998.

The so-called "small" countries also complied with the rules of Article 4 of the Television without Frontiers Directive.

In Ireland, the two reference channels transmitted 81.7% of European productions in 1998. The same is true for Greece, Denmark and Belgium, where European productions as defined by the Directive represent a very high proportion of programming. As we have already noted, Portugal is the only exception to this situation, with 43% of European productions.

Overall, the Commission's fourth Communication also noted that the proportion of European programmes on most channels increased in 1998 compared to the previous period.

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<sup>4</sup> For the links between the ECTT and the Directive on "Television without Frontiers", see a Communication Policy for Tomorrow, a document prepared for the 6th European Ministerial Conference on Mass Media Policy, Krakow, 15-16 June 2000 (MCM 2000/3 pp. 21-23).

<sup>5</sup> Fourth Communication from the Commission to the Council and the European Parliament on the application of articles 4 and 5 of Directive 89/552/EEC "Television without frontiers" for the period 1997-8 (COM(2000)442 final) of 17.07.2000).

Here, we should add that domestic fiction programmes now achieve the highest audience figures in the major broadcasting markets (France, Spain, Germany, the United Kingdom).

The large proportion of channels that have fulfilled the obligation to broadcast a majority of European productions illustrates the relatively reasonable character of such an obligation.

Admittedly, the Commission's Communication clearly refers to channels that have not been able to fulfil this objective of broadcasting a majority of European productions.

According to the Commission, the channels which fail to meet the target can be classed in two categories:

Firstly, channels that are new or are being re-organised. According to the Commission, channels in these circumstances "choose inexpensive programmes that are available immediately, and these tend to be non-European".

The second category is special-interest channels. According to the Commission, "faced with financial constraints, European production has difficulty in developing works of a specialist nature, the costs involved often being higher than those for similar works produced by non-member countries"<sup>6</sup>.

It is necessary to identify why certain channels cannot fulfil the obligation to broadcast a majority of European productions. We believe that the first explanation, linked to the appearance on the market of new broadcasting channels, is fairly convincing.

In the absence of a balanced market, the emerging channel will buy its programmes from the most financially attractive catalogues. Then, depending on how its audience develops, it will confirm its programming and gradually transmit increasingly European content that will meet the public's tastes and satisfy its advertisers. This development model does not seem unrealistic.

However, we are slightly more reserved about the reasons put forward by the Commission to explain the failure of special interest channels, since this particular type of "service" generally offers a reduced choice of audiovisual products (e.g. cinema or sports events).

Canal+, a single leader group for paid access to cinema and sports events on European television, shows considerable variations depending on the countries concerned.

In Belgium, France and Spain, Canal+ exceeds the broadcasting quota without difficulty (Canal+ France: 62.1%; Canal + Spain: 52.5%; Canal+ Belgium: 55.7%). In Italy, the results for Telepiu, which is owned by the same group, vary considerably for each of the three transmitted services.

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<sup>6</sup> Fourth Communication from the Commission to the Council and the European Parliament on the application of articles 4 and 5 of Directive 89/552/EEC "Television without frontiers" for the period 1997-8 (COM(2000)442 final) of 17.07.2000, as above. p. 8.

On the other hand, there is a disturbing lack of European productions on the channels previously owned by Filmnet (which merged with Canal+ at the time the Commission drew up its report), especially in Sweden and the Netherlands (24% of European productions in 1998 for the two Canal+ channels in the Netherlands, and 21% and 22% for the Swedish channels). It should be noted that these channels came under Canal+ ownership in mid-1997.

It would be interesting to examine the statistics for European productions on these channels in 1999 and 2000. In any event, the argument given (lack of relevant European content) seems improbable when we compare the position on Canal+'s channels in Spain, Italy, France and Belgium, which have managed to satisfy the requirements for domestic and European content.

Equally, the "costs" argument should be examined more closely. The Commission, acting as an interpreter for the member States, notes that while the specialised channels experience difficulties in obtaining European programmes, this is due to the fact that the costs for the latter are higher than those in third countries.

As regards cinematographic production, it is clear that there is an adequate supply of European films available each year, and the tariff practices for transferring film rights do not seem excessive (suffice to compare the overall acquisition costs of European films to the costs for American film or sporting rights).

The European Union member States (and the broadcasters whom they represent) would be well-advised to provide the EU authorities with better information about possible difficulties with regard to tariffs. For their part, the eligible parties are extremely interested in examining this very issue more closely.

In addition, when it comes to "documentary" special interest channels, it is appropriate to note that Europe is the leading international producer and supplier of documentaries. The argument that catalogues are unavailable should not be used with regard to this kind of production. In this respect, it should be noted that the special interest channels are beginning to accept a production rationale, which is essential if they are to ensure the originality and identity they need in order to widen their audience.

5. The broadcasting quotas can be achieved in practice. This is because the concept of "European works" put forward by the ECTT (and the parallel Directive) is very wide.

The definition used in Article 10 excludes news, sports events, games, advertising and teletext. Consequently, Article 10 of the Convention includes the following types of programme under "European work": cinema films, dramas and television services, animated films and documentaries (so-called "stock" programmes), as well as "flow" programmes, such as talk shows, studio productions and variety programmes.

This high level of flexibility in defining European content explains how the channels have succeeded in meeting the quota for European productions without difficulty.

It goes without saying that the quotas' flexibility is contested by the professional organisations representing producers and authors. This was made clear recently at European Commission hearings on the revision of the "Television without Frontiers"

Directive. These bodies requested that the range be reduced to “stock” programmes and that “flow” programmes be excluded. In this way, the channels’ efforts would be focused on cinematographic works, television dramas, documentaries and animated films.

If the obligation set out in Article 10 were to concern only so-called “stock” programmes, this would have two cumulative effects:

The first would be economic. Concentrating exclusively on promoting “stock” programmes as a means of meeting the European programmes quota would result in increased investment in this type of product. It is generally accepted that it is more expensive to produce cinematographic works and television dramas than to fund talk shows or variety programmes.

On the other hand, however, “stock” programmes may be used as an income-generating asset, particularly through re-broadcasting or multiple sales to other broadcasting networks.

“Flow” programmes are generally news-related, and are no longer relevant after the first broadcast. This is a key economic difference.

The other effect would be cultural. “Stock” programmes, especially but not exclusively, “works” in their true sense (such as cinematographic films) place greater emphasis on the presence of European creation in the audiovisual sector and increase the cultural value of the programmes in circulation.

It is probable that the major Parties to the ECTT already meet the quota for European productions on the basis of “stock” programmes<sup>7</sup>.

The calculation would be easy, but there is no doubt that France, Germany or the United Kingdom are fully capable of meeting this obligation on account of their expertise, particularly with regard to producing television dramas, TV series and/or cinematographic films<sup>8</sup>.

The question is not so clear-cut for the other countries, especially the small countries which have no significant local production industry.

This is not the time or place to decide on the constituent elements in the quota for European productions, but the question has been clearly posed and deserves consideration.

6. Overall, the broadcasting quotas represent an economic tool that has invigorated programme production in Europe while promoting cultural diversity.

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<sup>7</sup> Equally, in legal terms, certain countries have a stricter definition of the content subject to Article 4 of the TVWF Directive: these are Germany, Belgium (the French Community), France and Italy.

<sup>8</sup> The European Audiovisual Observatory’s Eurofiction report confirms the overall stability of fiction programming on European TV channels, and emphasises that domestic fiction predominates during peak viewing times. The study covers Germany, Spain, France, Italy and the United Kingdom.

This method is not unique to Europe. In the United States, two methods were used in the past to promote programme making (at a time, the 1970s, when the programme-making industry (the studios) were in crisis):

- the fin-syc rules (the Network Syndication Interest Rule and the Network Financial Interest Rule) were intended to generate a demand for programmes on the part of the networks<sup>9</sup>.
- the “Prime Time Access Rule” (PTAR) led local networks to produce specific content, which opened the way for the development of a specific audiovisual industry devoted to game shows<sup>10</sup>.

7. A similar paradigm is at work in Europe. By obliging broadcasters to use European material, the Convention and Directive force broadcasters to confront the need to promote European production, which now includes the entire range of products (cinema, TV dramas, documentaries, animated films).

The broad definition of European works enables broadcasters to draw on the large range of European products, while creating an impetus for programme production in Europe.

In particular, two categories of audiovisual product have spread throughout Europe: animated films and documentaries.

- Due to their target audience and the ease with which they can be dubbed, cartoons are undoubtedly a shining example of the effectiveness of transmission quotas at European level, since the market has been created from scratch; these productions are now shown on TV as well as on cinema screens.
- by definition, documentaries are sometimes less rooted in national cultures (e.g. nature documentaries) and are now common on Europe’s screens.

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<sup>9</sup> These rules limited the networks’ rights to syndicate programmes, to own the series that they transmitted or to have a financial stake in their “syndication” (in other words, their re-broadcasting: thus, the term “rerun rules”, sometimes used for these regulations). They prohibited the vertical concentration that had enabled television channels to refuse to broadcast a programme in which they had no financial interest after its first showing (this annual syndication market represented \$5.7 billion in 1990, and double that by 1995). An FCC investigation in 1970 showed that over the previous five years, the channels had stakes in 93% of broadcast programmes, and identified them as monopsonies (monopsony powers) in terms of purchasing prime-time programmes. The agreements (“consent decrees”) signed with the Justice Ministry, by NBC in 1978 and CBS and ABC in 1980, limited the channels to production of no more than ten half-hours per week.

<sup>10</sup> As of 1 October 1972, the Prime Time Access Rule (PTAC) prohibited networks from controlling more than three of the four hours of prime time (7-11 pm) on stations in the 50 main markets. This has led to the development of local television, local advertising, independent stations and especially non-network production. By preventing the networks from re-broadcasting series between 7 and 8 pm (the so-called “access slot”, since it determines access to prime time), this rule lies behind the success of businesses such as King World Production Inc. (Wheel of Fortune, etc).

We should note that these rules have been abolished since the 1990s, leading to vertical mergers between producers, broadcasters and ... the Internet. The American authorities now seem to prefer to organise the media market via the right to competition. The vertical mergers that have taken place (such as AOL Time Warner) are resulting in the creation of international mega-consortiums, as the effect of these mergers extends beyond the American market.

Europe is not currently in a position to form companies of a comparable size. National statutory and regulatory measures are intended to promote the existence of domestic channels in a competitive environment, by including such criteria as cultural diversity and social cohesion. Such provisions are absent from the US media regulations.



8. It is possible to perceive two stages in the use that can be made of obligations to broadcast a majority of European productions:

During the first stage, these obligations are truly the foundation stone of audiovisual sector regulation, since they have a market-maker role, creating - initially artificial - solvent demand for films and programmes. This broadcaster demand will generate, or rather expand, supply.

At the second stage, once supply has become organised and has grown, a change can be observed in the way broadcasting quotas serve as a means of regulation. They lose their structuring role and become mere safety nets against attempts at aggressive penetration of our markets (the "bumper stocks" dear to proponents of imbalance theory).

Bearing in mind that broadcasting quotas serve a dual purpose (market-making and a safety net once European programmes reach maturity, i.e. constitute the majority of programmes broadcast by the channels), we consider it essential to retain this means of regulating the European broadcasting industry.

9. Although the purpose served by these quotas is obvious, they do have one weakness. Domestic productions preponderate and in some countries account for 80% or more of broadcasters' programme budgets and monopolise audience shares. Non-domestic European productions' market share can be seen to vary considerably, and in certain countries is very small.

European fiction represents 9.5% of imported fiction programmes for the entire group of countries under consideration (13.7% if European co-productions are included). The highest scores are obtained in the smaller countries: 15.5% in Belgium (21.7% including co-productions); 21.3% in the Netherlands (26% including co-productions) and 16.5% in France (24.4% including co-productions). The United Kingdom leads the field in terms of direct exports to the other EU member States. It comes first everywhere (except in Belgium, for language reasons).

We therefore think that it would be a good thing to increase the quota share reserved for European productions, that is to say to reinforce the measures guaranteeing more broadcasting time for non-domestic European programmes.

Thought might be given to establishing a specific quota for European content in each programme category (a given percentage for films, another for fiction, and another for documentaries, taking account of the special characteristics of these programme categories). Some countries have already introduced such obligations in their domestic law (France imposes a quota share of 20% of non-domestic European productions in the overall 60% compulsory European content, and the Netherlands has also adopted specific measures). This would therefore be a matter of improving on the European preference in programming; the objectives would be both political (cultural pluralism) and economic (improved circulation of programmes and recouping of their cost).

10. It should nonetheless be said that the flexibility allowed by Article 10 when defining the European productions base ("stock" and "flow" programmes), which leaves both member States and broadcasters considerable discretion as to how they apply the European content requirement, can have some truly undesirable consequences.

A number of member States impose much stricter requirements than are inherent in Article 10. In that case those countries' broadcasters find themselves at a not insignificant competitive disadvantage compared with broadcasters based in member States that take a far more flexible view of European content quotas.

Without disregard for the general principle of freedom of expression, broadcasters should be required to comply with the rules of the base market in which they actually operate. This base market could be defined as the market from which they derive most of their income.

This would naturally concern only those broadcasters seeking to relocate as a means of evading more stringent rules.

#### 11. The “new media”

It goes without saying that the European Convention on Transfrontier Television was devised at a time when the audiovisual scene was dominated by hertzian channels, which could also be received via satellite; when the Convention was being drafted, satellite packages, and even convergence and the Internet, were virtually unheard of.

Satellite packages (or platforms) consist of a range of specialist programmes, with the premium offer consisting of films shown on an exclusive basis and live sport.

Satellite packages would appear to have developed fast in markets where there was a significant stockpile of domestic and European programmes (the French and UK markets, for example), guaranteeing a steady, varied, diversified supply of programmes. It is difficult to develop satellite packages without “stock” programmes (in particular in the areas of fiction, documentaries and films). Needless to say, a package which consisted solely of American programmes would not fully satisfy viewers, and, as we all know, it is the viewer who pays for the programmes offer. By definition, a package entails variety, a diversity of programmes.

This therefore means that the quotas have had another beneficial effect in terms of the emergence of satellite packages, since satellite TV has turned to advantage the existing stock of programmes and the established production capacity.

Satellite packages, which currently constitute the major market apart from the mainstream free-to-air channels, do not in fact pose any significant threat to free, non-specialist television.

They can rather be perceived as a complementary product, a means of offering viewers films on an exclusive basis and extending live sports coverage (mainstream channels cannot, by definition, focus solely on sport or films).

The two markets must therefore not be treated as entirely distinct. It is more a matter of understanding how they fit together.

12. In contrast, the emergence of the Internet raises many important questions.

In the United States and Europe, there has been much enthusiasm about the possibility of using the Internet to deliver films (and music) on demand.

I will come back to this medium later, but I want to comment in passing on another challenge - the most immediate and doubtless the most complex - that posed by the development of terrestrial digital television.

13. Terrestrial digital television could result in a six-fold increase in the available frequencies and, consequently, in broadcasting services.

In some countries (the UK, Sweden, Spain) governments and broadcasters have already launched terrestrial digital TV, while others (France) are getting ready to do so. The resulting diversification of services (and of the ensuing offer) appears to be a far more significant phenomenon than emergence of the Internet. The development of terrestrial digital TV is a considerable challenge. It has immediate implications, whereas, for the moment, it is difficult to predict how the Internet-based market will develop.

In countries that are large in size, terrestrial digital TV will help to modernise the current mainstream hertzian television offer. The challenge will be combining it with an existing or future satellite TV offer and finding the necessary funding, as terrestrial digital is costly to develop (it is not so much the digital broadcasting technology that is expensive, as the creation of additional services and programmes).

My first impression is that growth in new services linked to terrestrial digital TV will be impossible without increased investment in the domestic and European programmes offer.

14. As regards development of downloading from the Internet, it should be noted that little progress has been made so far for reasons of access (creation of broadband networks), protection of intellectual property<sup>11</sup> and chronology<sup>12</sup>.

In my opinion, the problems posed by delivery of films over the web relate more to the specific economics of the film industry than to technological feasibility.

I have a number of suggestions concerning the regulation of content on the Internet. The opponents of quotas happily predict that, with the development of these new interactive media allowing customised supply, it will no longer be possible to impose programming quotas.

Another theory holds that the web itself will spontaneously engender a supply of pluralist, diversified content (making any attempt to regulate content, the offer or content production pointless)<sup>13</sup>.

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<sup>11</sup> In this respect, it will be recalled that BMG has purchased NAPSTER and VIVENDI – MP3, thus bringing the “free” delivery of music (in violation of intellectual property) to an end.

<sup>12</sup> It will be recalled that, at present, as regards cinematographic works, revenues are generated by their exploitation in cinemas, their sale to pay channels and free-to-air channels, and the exploitation is done on a country-by-country basis. Any exploitation on the Internet would require first that the exploitation on the different media and all the territories be completed.

With regard to the preservation of a spontaneous, pluralist offer, the lessons that can be drawn from the MP3 music piracy experience are not very encouraging; 80% of the music pirated was (is) Top 50 hits, which means that, in the final analysis, tens of millions of consumers are interested only in a very limited number of pieces of music.

Lastly, although they have purchased the MP3 and Napster sites, the phonographic industry groups remain very cautious about the feasibility of digital provision of music over the Internet<sup>14</sup>.

Rupert Murdoch himself believes that in the United States, downloading, via the Internet will not become a fact of life until 2010, and in the rest of the world not until 2050<sup>15</sup>. The Internet's development is not as pressing a problem as some people maintain.

Other American media corporations concur with this point of view, which explains why they are still investing heavily in hertzian and satellite broadcasting.

The President of MCA has stated that the traditional media industry in no way regards the Internet as a rival<sup>16</sup>.

There is reason to believe that content will find its own place on the web, in the context of the Internet's controlled development as an alternative to other media.

That does not mean that thought must not be given to ways and means of ensuring the availability of an optimum range of European content on the Internet, whenever it becomes a leading medium, supplementing or replacing (the outcome is not yet clear) the other mass media.

15. Two suggestions can be made with the aim of bringing the Internet's development into line with the thinking underlying the European Convention on Transfrontier Television, and Article 10 in particular.

Should the Internet result in the emergence of a real market for content, it would not be counter-productive to impose a tax on consumption of programmes via the web. The revenue from this tax would be invested in content production in the receiving country.

From a technical standpoint, the arrangements proposed by the European Commission to make services consumed in the EU but provided by suppliers based outside Europe subject to VAT show that it is possible to tax services supplied over the web for the benefit of the country where the end-user is located<sup>17</sup>.

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<sup>13</sup> In this case, regulation only concerns respect for public order (prohibition of or restrictions to pornographic, racist or other content).

<sup>14</sup> The studios have gathered within two groups with a view to developing music on the Internet.

<sup>15</sup> Mentioned by Noam Chomsky, Robert W Mc Chesney, "Propaganda, media and democracy" 2000, p.126.

<sup>16</sup> Ibidem, p. 217

<sup>17</sup> Proposal for a Council Directive amending Directive 77/388/EC, COM (2000) 349 FINAL – 7-6.2000

Financing the production of domestic content through such a tax would be a means of avoiding a deepening digital divide (a phenomenon which has already been deplored as regards individuals' access to the Internet) between rich countries (i.e. those with many Internet content providers) and “poor” countries. The latter would then have a means of funding domestic content.

A decision along these lines would clearly be consistent with the aim of promoting diversity of production and guaranteeing pluralist expression. A number of experts have recommended such an approach<sup>18</sup>.

Another possibility for Internet regulation could concern access itself.

It is highly likely that protected content will be charged for (subscription to music sites for example) and will be accessible via a portal. It is entirely feasible to envisage requiring portal operators to guarantee access to national content by programming their search engines to give priority to sites with domestic or European content.

It can be observed that in its communication on “Principles and guidelines for the Community's audiovisual policy in the digital age” the European Commission also drew attention to this question with regard to EPGs (Electronic Programme Guides) and APIs (Application Programme Interfaces), noting that “the design and operation of such EPGs can influence both the presentation and availability of audiovisual content”<sup>19</sup>. EPGs therefore raise important questions with regard to pluralism, cultural diversity and other public-interest objectives. Similarly, the Application Programme Interface (API) plays an important role, as it is the API which decides what EPG may be used with a decoder or a digital television set.

The current debate on digital television should be extended to means of guaranteeing access to diversified content via the Internet in the context of increased use of the web for commercial purposes.

Although a majority of companies active in the Internet services sector previously insisted that self-regulation and the lack of supervision by the public authorities should predominate, a genuine reversal of the industry's attitude can currently be observed. Terrorists' use of the web is now leading States to seek the best possible means of enhancing security and controlling web users, and this goes to show (gainsaying arguments to the contrary) that it is indeed possible to supervise and regulate the web. What is feasible for reasons of public security should also be possible with a view to sustaining pluralism and programme diversity.

16. I wish to conclude by broaching two last subjects: first, the link between subsidies for programme and film production and industry regulation.

The Council of Europe has made a huge effort to promote film production in Europe. Eurimages, the European support fund established in 1988, currently has 25 member

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<sup>18</sup> cf. Ph. Quéau “La régulation mondiale de la société de l’information ».

<sup>19</sup> See, in this respect, the Commission’s Communication on “Principles and guidelines for the Community’s audiovisual policy in the digital age”(COM(1999)657), p. 16.

States. To date it has provided a total of FRF 1.2 billion in financing for the coproduction of over 700 audiovisual works.

For its part, the European Union has renewed the Media Plus programme, earmarking 400 million euros for development, distribution and vocational training in the audiovisual sector over the next five years.

At the same time, many States Parties to the Convention have their own funding and support systems for programme production.

This backing can be perceived as an essential counterpart to regulation, with a view to promoting diversity of content pursuant to Article 10 of the Convention. Support and regulation make it possible to guarantee a supply of domestic and European content for the small screen.

It must not be overlooked that the industry is supply-driven. Unlike standard consumer goods, which are produced in response to specific consumer demand, audiovisual products and services are consumed only because they succeed in winning over the consumer.

Yet, the existence of these subsidies must not conceal the fact that regulation remains the mainstay of the organisation of the audiovisual sector as a public asset. Subsidies, therefore, cannot be substituted for regulation, nor can they be the sole public policy instrument in this area.

17. That leaves one last point - compatibility of Article 10 of the European Convention on Transfrontier Television with the rules of the WTO General Agreement on Trade in Services (GATS).

A memorandum by the Council of Europe secretariat (Directorate General of Human Rights) examines how the cultural diversity objectives pursued in the European Convention can be reconciled with the relevant provisions of the GATS.

Article 10 establishes a European preference by requiring that channels reserve a majority share of broadcasting time for European content. This is inconsistent with the most-favoured-nation (MFN) rule applicable under the GATS.

Nor is Article 10 compatible with the principle of market access (Article XVI of the GATS), which requires Parties to the Agreement to open their domestic market to all service providers in all WTO member States.

An exemption from the most-favoured-nation clause has been instituted to safeguard Article 10 of the European Convention on Transfrontier Television.

The European Union has also adopted a number of exemptions from the MFN rule, and no commitment has been entered into with regard to the liberalisation of the audiovisual sector.

The present scope of Article 10 would appear to be safeguarded. Vigilance is nonetheless required with regard to the negotiations in progress on the subject of e-commerce.

The WTO is currently working on what is generically referred to as “electronic commerce”; its concept of e-commerce entails a horizontal approach, mixing both hardware and software (the container and the content).

The European Union is against this approach. Its position is to insist that services available over the Internet should be clearly identified (audiovisual, educational, and so on) and be treated in the same way as under the GATS rules (with emphasis on a bottom-up approach).

Clearly, should the Parties to the European Convention envisage taking positive action in future along the lines described above - either taxation of web services with a view to reinvesting in domestic/European content or promotion of preferential access to domestic and European content - such measures would also have to be possible under any WTO agreement on electronic commerce.

### **Conclusion**

It must be said that the Council of Europe broke new ground in the eighties with its efforts to safeguard and promote programme diversity, thereby establishing a tangible framework for pluralism. At that time, awareness of threats to cultural diversity and pluralism was far less widespread.

Tragic recent events would tend to confirm that geopolitics cannot disregard the need for recognition of cultural identities and diversity. The electronic media take on considerable new importance in this respect.

After being perceived in a libertarian light, the Internet is losing some of its originality. It should ultimately become a commercial provider of certain services recognised as being of a special, specific nature on account of their non-merchandise aspects: I am talking about audiovisual services.

There should hence continue to be a need to create a suitable environment for this special category of services, in particular through regulation. Although regulation requires positive action at national level, it is clear that the Council of Europe also has a role to play in contributing to the emergence of a European environment, as the Convention on Transfrontier Television succeeded in doing over ten years ago.