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# Audiovisual Media Services without Frontiers

**Implementing  
the Rules**



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**Audiovisual Media Services without Frontiers**  
**Implementing the Rules**

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# **Audiovisual Media Services without Frontiers**

## **Implementing the Rules**

Published by the European Audiovisual Observatory

So far broadcasting regulation covers the wider Europe through two independent but synchronised legal instruments, namely the “Television without Frontiers” (TVwF) Directive and the European Convention on Transfrontier Television (ECTT). In their combination, these two legal instruments deal with almost all cross-border broadcasts within, into or from wider Europe, thus addressing EU Member States, parties to the ECTT and/or Third Countries as the case may be. As a result of the synchronisation, many different constellations of transborder television can be judged by almost identical rules.

The European Commission proposal for the modernisation of the TVwF Directive – regardless of the precise final formulation it is given – is likely to stir up this harmonised approach to regulation, at least until such time as the ECTT follows suit. Whereas the Steering Committee on the Media and New Communication Services (CDMC) of the Council of Europe has decided that the Convention should be “brought into line” with the new directive, it remains to be seen whether – or to what extent – the ECTT will undergo a mirror-like revision. During such a transition period, some aspects of the current proposal to revise the TVwF Directive could give rise to regulatory divergence, or at least raise some significant questions. These include the scope with regard to services covered, ancillary rules for jurisdiction, advertising, product placement, the independence of regulatory authorities and the role of co-regulation.

Working from the premise that after a revision of the TVwF Directive the rules of the two leading European instruments on broadcasting will be once more re-aligned, this publication seeks to explore the interplay between the Directive and the Convention. It will focus on monitoring and implementation issues that already gave rise to discussions in the past. The revision of the Directive matters only insofar as it may mitigate or intensify existing problems. To be clear, this publication will not deal with the concrete points that might set the two frameworks apart (points, which in any event, only become concrete after the finalisation of the revision of the Directive) until re-alignment takes place.

**Part I of this IRIS Special** gives a brief introduction to the history of the parallel regulation of television broadcasting provided for by the European Community and the Council of Europe. In particular, it addresses the legal implications for the EU Member States for being at the same time a party to the ECTT and obliged to respect the TVwF Directive. Looking into past experience, it deduces potential needs for additional arrangements to accommodate “double membership” after the revision of the Directive. It asks what an interim (until the Convention would be adapted) solution could look like. It examines the practical effects of the different solutions for the handling of transfrontier services targeting Europe from third countries.

As **Part II of this IRIS Special** confirms, any regulation is only as good as its results when applied. The European Platform for Regulatory Authorities (EPRA) has provided a forum for exchanging experiences with the application and enforcement of both the TVwF Directive and the ECTT. The discussions held at EPRA meetings revealed that in general organising the co-operation between regulatory authorities and

more specifically monitoring compliance with the existing rules pose significant challenges, for which the European framework provides only limited guidance.

Various aspects have shown the need for a more structured organisation of the co-operation between regulatory authorities but also between regulatory authorities and the European Commission and the Member States: The *Al Manar* case underlined the demand for a co-ordinated handling of third countries that do not come under European regulation but whose broadcasts target European markets. Likewise, the idea of developing a European database on broadcasters' licenses was born out of the wish to exchange information in order to monitor compliance. Establishing a system of notification or approval of lists for major events is another long-running issue. These and other examples point to the need for practical arrangements between countries and/or regulatory authorities. They provoke a fresh look at the role of the European Commission and the Standing Committee of the Council of Europe as much as a clarification of the concrete obligations of Member States.

The widening of the scope of the TVwF Directive will necessarily have an impact on the co-ordination and co-operation issues because audiovisual media services will pose even more challenges concerning voluntary co-operation between regulatory authorities while the number of regulatory authorities involved will automatically increase.

Many of the proposed changes to the TVwF Directive arise out of general EC law and EU policies on commercial practices, competition and consumer protection, as opposed to human rights and cultural values. Therefore, **Part III and Part IV of this IRIS Special** examine, in turn, the predominantly commercial character of the proposed changes to the TVwF Directive, and the comparatively limited attention paid to civil, political and cultural rights. This is one area where the question of divergence between the TVwF Directive and the ECTT becomes potentially acute and where differences might become more pronounced after the envisaged revision. The emphasis for this exercise is – as stated before – the implementation and monitoring of the relevant provisions.

**Part III of this IRIS Special** recalls that advertising rules (qualitative and quantitative) have been a constant source of monitoring problems in cross-border relations. They become even more important with the growing number of broadcasters targeting exclusively the audience of third countries (i.e., countries other than that in which they are licensed). The question whether or not the direction of the proposed changes is likely to help overcome these problems is put forward.

Advertising rules have also been in conflict with regard to different transpositions of the European framework into national law. In this sense, an interesting aspect concerns the European Commission's Interpretative Communication on Advertising, which the proposed revision leaves intact to the extent that the underlying advertising rules will continue to apply. This raises the further question of the legal force of the Commission document. In other words what is legal relevance of the Commission's communication for the Directive and the Convention?

**Part IV of this IRIS Special** underlines that the monitoring of broadcasts from channels licensed outside the target country is a complex task with regard to upholding human rights and cultural values. Various problems in monitoring cross border broadcasts originate from different expectations and standards for cultural values

Does the revision of the TVwF Directive attach sufficient importance to a culture of human rights (broadly defined)? Is there a need for the ECTT to strengthen its provisions for safeguarding and promoting human rights? In substantive terms, should we now expect a definitive "parting of ways" of the two instruments? These and other questions are addressed.

**Part V of this IRIS Special** links the preceding parts together by reporting on a workshop, at which the above mentioned issues of "Implementing the Regulation of Transfrontier Audiovisual Media Services" were discussed. At the same time, Part V might be read as a stand-alone summary of current challenges to regulatory authorities and the regulated industry, challenges that could well persist and even become bigger, irrespective of how future versions of the TVwF Directive or the ECTT might look.

The **workshop**, on which this IRIS Special is based, was held on 8 April 2006 at the premises of the European Audiovisual Observatory in Strasbourg. The workshop was co-organised by the Observatory and its partner institutions, the Institute of European Media Law (EMR), Saarbrücken, and the Institute for Information Law (IViR), University of Amsterdam. Against the backdrop of the ongoing revision of the TVwF Directive as well as the relocation of the EPRA Secretariat to Strasbourg in January 2006, it seemed a natural choice to explore practical aspects of implementing broadcasting regulation. That this subject

matter continues to generate a demand for information is certainly borne out by the support that EPRA, the European Commission and the Council of Europe Media Division lent to the event. The Observatory is grateful for that support as much as it is for the knowledge, experience and enthusiasm that the workshop participants brought to the event. Once again, we would also like to express our thanks to the manifold contributions from our co-organisers that made the workshop both interesting and rewarding. As always, we are well aware of the fact that this publication owes its life last but not least to the good work of the translators and proofreaders.

Strasbourg, September 2006

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**Audiovisual Media Services  
without Frontiers  
Implementing the Rules**





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# Interplay Between Relevant European Legal Instruments

## *ECTT and TVwF Directive: Competition or Complementarity ?*

*Pierre Goerens*<sup>1</sup>

### Introduction

The European regulatory framework for television is formed by two European legal instruments:

- At the level of the European Union, the “Television without Frontiers” (TVwF) Directive coordinates the national rules and guarantees the free circulation of TV programme services.
- At the level of the Council of Europe, the European Convention on Transfrontier Television (ECTT) covers the same subject and governs the relationship of the Parties. Parties to the Convention include most, but not all, of the Member States of the European Union and additionally a number of non-EU members.

The relationship between the two legal instruments has been complex in the past, and with the switchover to the digital world, the revisions of both instruments raise a number of new delicate issues.

It is worthwhile to recall the past experiences and to analyse and try to understand the differences between the instruments in order to draw lessons for the ongoing revisions and for a harmonious implementation of the envisaged amendments.

### 1. European Regulation of Broadcasting: First Steps

The first efforts to harmonize European regulation of audiovisual media go back to the early 1980s, when the Council of Europe’s Steering Committee for the Mass-Media (CDMM)<sup>2</sup> prepared several recommendations, in particular one on Principles on Television Advertising<sup>3</sup> and another on the Use of Satellite Capacity for Television and Sound Radio.<sup>4</sup> These two recommendations were adopted by the Committee of Ministers of the Council of Europe in 1984. Both were driven by the emergence of satellite broadcasting, which was expected to facilitate the crossing of national borders by TV channels and sound radio.

In the same year the European Commission came up with its Green Paper on “Television without Frontiers”,<sup>5</sup> a huge document aimed at the realisation of a common market for television services within the European Economic Community. It is worth mentioning that preceding the release of the

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2) Since 2005 the CDMM has been renamed the “Steering Committee on the Media and New Communication Services” (CDMC).

3) Recommendation No R (84) 3 of 23 February 1984.

4) Recommendation No R (84) 22 of 7 December 1984.

5) COM (84) 300 Final of 14 June 1984.

Green Paper, the Commission had been invited by a resolution of the European Parliament<sup>6</sup> to tackle the issue. The Commission adopted a common market approach, identifying obstacles to the free circulation of services granted by the Treaty and proposing a legal instrument with the aim of coordinating national rules where necessary in order to ensure the free circulation of programmes. The Commission also stressed the political role which an enhanced exchange of information between Member States could play as a catalyst of European integration in general. Likewise the Commission underlined the benefits of transfrontier advertising more specifically for economic integration.

The Green Paper was not unanimously welcomed. Many actors did not agree with the general approach adopted by the Commission, and considered that broadcasting was essentially a cultural rather than an economic activity. In particular, the ideas of the Commission with regard to copyright triggered the opposition of rightsholders. The European Communities' competency for dealing with cultural issues was questioned.

The European Parliament, however, welcomed the Commission's initiative. And one year later the European Council of Heads of State and Governments welcomed the Commission's White Paper on the Internal Market,<sup>7</sup> a strategic document which was intended to revitalize the European integration process. A directive on the broadcasting sector was part of the political priorities listed in the White Paper. In 1986, the Commission finally tabled its proposal for a directive.<sup>8</sup>

The negative attitude of several EC Member States towards the Commission's Green Paper on Television without Frontiers and its subsequent proposal for a directive, as well as the reaction by several other countries brought new stimulus to the work of the Council of Europe. In December 1986, the 1<sup>st</sup> European Ministerial Conference on Mass Media Policy in Vienna decided to mandate the CDMM with the drafting of a Convention on transfrontier television. It was the kick off to a race between the two European organisations, between "Brussels"<sup>9</sup> and "Strasbourg". While all EC members were at the same time members of the Council of Europe, some of them were, however, among the strongest advocates for passing a legal instrument within the framework of the Council of Europe.

The reader should be aware that the composition of both organisations was different from that of today. At the end of 1986 the European Communities comprised 12 Member States, Portugal and Spain had just acceded in that year, Austria, Finland and Sweden were not yet members. The Council of Europe had 21 Member States; the non-EC members were Austria, Cyprus, Iceland, Liechtenstein, Malta, Norway, Sweden, Switzerland and Turkey. Hence the majority and all the biggest members of the Council of Europe (with the exception of Turkey) were also Member States of the EC. This imbalance did not, however, play in favour of the latter. Some of the EC members favoured Strasbourg and caused work in Brussels to slow down.

The organisations each had a different legal background and a different institutional framework. While at the Council of Europe the CDMM started to draft a convention from scratch, the EEC Council of Ministers and its working group dealt with the proposal of the Commission and the amendments proposed by the European Parliament.

Work on both instruments proved to be very hard. The discussions were paralleled by permanent interaction: ideas and drafting proposals were informally exchanged, experts attending both groups or coordinating national positions in their capitals carried the information from one committee to the other. However, not only in the wording, but also in the major areas of political concern, the instruments started to converge.

In March 1988, Austria convened an Informal Ministerial Conference specially dedicated to the Convention on Transfrontier Television, but it was finally at the second European Ministerial Conference in Stockholm in December 1988 that the breakthrough was achieved.

The Convention on Transfrontier Television could finally be adopted on 5 May 1989. Meanwhile the European Council had decided that the Directive should be aligned with the Convention whenever this could help to resolve the outstanding issues. On 3 October 1989, the Directive was also adopted. Member States had two years to transpose it into national law, i.e. until October 1991. The Convention entered into force only on 1 May 1993, when it had been ratified by 7 States.

6) Resolution on Broadcasting and Television in the European Community, OJ C87 of 5 April 1982.

7) Communication of the European Commission of 14 June 1985 (COM(87) 203 final).

8) OJ C179 of 17 July 1986.

9) The European Parliament also has its seat in Strasbourg, but at the time its opinion was consultative; the co-decision procedure was introduced later by the Single European Act (1986), Official Journal L 169 of 29 June 1987.

The process had been long and difficult, but it is fair to say that the parallel drafting had also very positive effects. It allowed non-EC Member States to participate in the process, and it also helped to overcome some major differences in the positions of EC Member States and the Commission.

## **2. Convention and Directive in 1989: Similarities and Differences**

In spite of the convergence between the instruments, a number of significant differences remained, partly because each instrument was based on completely different legal and institutional frameworks, and partly because the Directive had retained a number of provisions from the original Commission proposal and from amendments by the European Parliament, which had not been adopted by the Council of Europe.

### **2.1. Definitions**

Differences in the definitions contained in the Directive and in the Convention can become the cause of diverging interpretations and implementations. Different terms had been defined, and even when both legal instruments used identical terms, their definitions were not necessarily identical. Sometimes the definitions were not even intended to be the same. For example, in the Directive, sponsoring included promotion of the activities and products of the sponsor, while the Convention limited sponsoring to the promotion of the trademark of the sponsor, but excluded promotion of its products.

Those EC Member States that had also ratified the Convention had to find their way in order to comply with both legal instruments, which was certainly not always easy when definitions differed. It does not seem, however, that diverging definitions have been the origin of concrete problems in the application of one or the other instrument or have caused real conflicts between regulatory authorities or between regulatory authorities, on the one hand, and broadcasters, on the other. A certain tendency among regulators to accord to some of the provisions of the Convention the meaning of their counterpart in the Directive, and vice versa, may have helped to avoid conflicts.

### **2.2. Content of European Works**

Both instruments endorsed (and continue to do so) the provision that Member States/Parties ensure, where practicable and by appropriate means, that broadcasters under their jurisdiction reserve a majority of their transmission time for European works. The Convention did (and still does) not, however, include a commitment with regard to works of independent producers. Moreover, Parties to the Convention were (and are) not obliged to report on the application of this provision. In case of conflict between Parties, they could ask for an opinion of the Standing Committee, in which all Parties are represented, but they could not submit the issue to arbitration. Moreover, European works were defined more broadly and less precisely than in the Directive.

The provisions of the Convention seemed to be less binding than those of the Directive, which allowed the European Commission to use the biannual reports written by the Member States to put pressure on States whose broadcasters did not comply with the majority rule.

### **2.3. Advertising and Sponsoring**

In the field of advertising and sponsoring, both legal instruments adopted many identical rules. In particular with regard to the duration of advertising and with regard to advertising breaks, the very difficult compromise reached in the Council of Europe was finally copied into the Directive.

There is no evidence of diverging interpretations in areas where the texts are identical. It is interesting to note that the European Commission in its Interpretative Communication on certain aspects of television advertising in the Directive, adopted in April 2004, refers several times to the Explanatory Report of the Convention or to an opinion of the Standing Committee, when explaining how to interpret some of the provisions of the Directive on advertising, sponsorship or teleshopping.<sup>10</sup>

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10) Commission interpretative Communication of 23 April 2004 on certain Aspects of the Provisions on televised Advertising in the "Television without Frontiers" Directive (C (2004)1450).

But some rules also differed or featured in only one of the two legal instruments. In particular, Article 16 of the Convention, which states that advertisements that are specifically directed to the public of one single Party other than the transmitting Party should not circumvent the advertising rules in the receiving Party, did not have its counterpart in the Directive. Such a provision would not have been compatible with the idea of an internal market, based on the principle of the application of the law of the country of origin.

#### **2.4. Freedom of Reception and Retransmission**

Article 2.2 (Article 2a of the amended) TVwF Directive envisages a safeguard clause in the case of problems linked to protection of minors and human dignity, areas in which diverging views between Member States are always possible due to cultural or historical differences. Under the control of the Commission, measures may be taken by a receiving State to prevent reception of a channel under the jurisdiction of another Member State. Article 24 of the Convention goes further and leaves to the receiving parties, as a normal means of procedure, with some exceptions, the right to forbid retransmission of programmes transmitted from another Party in case of an alleged violation of the Convention. But the application of these provisions has not caused any major conflicts between national authorities.

#### **2.5. Other Areas**

A substantial number of other differences existed. The Convention had several provisions which did not exist in the Directive, for example, on fair presentation of current affairs programmes, on transparent information about the broadcaster, on access of the public to major events, etc. But most of these differences did not cause problems to those EC Members which had also ratified the Convention: they could largely comply with both legal instruments by transposing into national law the combination of the rules of the Directive and the Convention. Moreover, most of those rules of the Convention which did not have their counterpart in the Directive did not in practice impose a heavy burden on the broadcasters of the Parties to the Convention, because they were either easy to comply with (transparency, fair presentation of current affairs), or more of the nature of a best effort clause (access to major events).

Finally, before coming to what is probably the only difference between the two instruments with true potential for conflict, we will have to consider a more procedural provision of the Convention, i.e. the disconnecting clause in Article 27 of the Convention.

### **3. Disconnecting Clause**

Article 27.1. of the Convention reads as follows: "In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned."

This paragraph is of course of great help to EC Members in all cases where the rules of the instruments are not identical. It allows them not to apply in their mutual relations provisions of the Convention which might be incompatible with EC law, like the rule on advertisements directed to a single Party, the possibility of suspension of retransmission in case of alleged violations or the arbitration procedure.

It also in theory permits EC Members to stick to the rules of the Directive when the rules of the Convention are slightly stricter. However, Article 27 paragraph 1 of the Convention applies only to relations between EC Members, and not to their relations with Parties to the Convention which are not EC Members.

Despite the flexibility provided for by the disconnecting clause, it is questionable to what extent Article 27.1. can really mitigate problems that may arise if different standards are required by the Convention and the Directive respectively.

Depending on their internal legal system, some EC Member States could possibly apply stricter rules only to TV broadcasts which are received in a Party to the Convention outside of the EC, for example by inserting in their national law a general obligation to comply with the Convention. In this case stricter rules of the Convention would not apply to TV channels only received within the EU by virtue of the disconnecting clause.

## 4. Jurisdiction under the 1989 Instruments

The main area where differences between the two legal instruments caused serious problems was jurisdiction.

Article 5, paragraph 2 of the Convention determined the “Transmitting Party” based on technical criteria. In the case of terrestrial transmission, this was the Party in which the initial transmission was taking place. In the case of satellite transmission, the following hierarchy of criteria was used to determine the transmitting Party: 1. up-link, 2. satellite capacity, 3. seat of the broadcaster.

By contrast, the Directive was not explicit about the Member State that would have jurisdiction over a given TV channel. It only referred to the Member State competent for the broadcaster. The Commission argued that under community law, a broadcaster came under the jurisdiction of the Member State in which it was established. Some Member States were reluctant to share that view, until it was confirmed by the Court of Justice of the European Communities in the case *Commission v. UK*.<sup>11</sup>

Moreover, according to the 1989 Directive, if the broadcaster was not under the competence of a Member State, but used either a frequency, or a satellite capacity or an up-link facility of a Member State, the latter had to make sure that the broadcast complied with the applicable national (and EC) rules.

These fundamental differences in the jurisdiction criteria had the potential to create major problems at least for those EC Members which had a satellite system used by foreign TV channels. In the case of a satellite channel, if the up-link is in a State different to the seat of the broadcaster, both instruments could designate different countries for jurisdiction. This could lead to positive (two countries compete for competency) or negative (no country claims competency) conflicts of jurisdiction.

It is clear however that, at least in the analogue world, in most cases the uplink was located in the State where the broadcaster was established. But even then conflicts could arise. For example, if the broadcaster was established and had its uplink in a Party (A) which was not an EC Member, but used a satellite system of another Party (B) which was an EC member, the country of establishment (A) would, of course, be a third country under EC law. The jurisdiction criteria of the Directive would then have pointed to the Member State (B) whose satellite was used, whereas the Convention would have pointed to the Party of the uplink (A). The channel would be under double jurisdiction by two Parties to the Convention, Party A applying the Convention and Party B applying the Directive.

## 5. Amendments 1997/98

In July 1995, the European Commission proposed<sup>12</sup> a modification to the 1989 Directive, which led to the adoption of a new Directive on 30 July 1997.

Major changes were the introduction of precise criteria for the determination of the competent Member State, the new rules on the exercise of exclusive rights for major events, some changes in the field of advertising and teleshopping and the creation of a Contact Committee.

The Standing Committee created by the Convention, which had among its tasks to propose amendments to the Convention, came – after long discussions – to the conclusion that it would be best to align wherever possible the wording of the Convention to that of the modified Directive.

Once again a lot of work was done in parallel by both institutions, but it was no longer a competition. Discussions and thinking within the Council of Europe were of great benefit to the European Commission, to the Council of the EU (the European Communities had by then become a European Union) and to the European Parliament. But this time the texts were largely drafted within the framework of the EU and taken over by the Standing Committee. The Protocol amending the Convention was adopted on 1 October 1998, one year after the adoption of the Amending Directive. And because all Parties had to ratify the Protocol before it could enter into force, it took until 1 March 2002 before the Convention was finally amended. The deadline for EU Member States to transpose the Directive into national law was set for 30 January 1999. Between that date and the entry into force of the Protocol amending the Convention, there was a transition period of more than three years.

11) Judgment of the Court of Justice of the European Communities of 10 September 1996 in Case C-222/94, *Commission of the European Communities supported by the French Republic v. United Kingdom of Great Britain and Northern Ireland*.

12) OJ No C185, 19 July 1995.

This long transition period caused some problems for EU Member States which had to implement the new Directive while the Convention was still unchanged. During this period, the disconnecting clause of Article 27.1 was of little help.

International law requires all Parties to the Convention, including those who are EU Members, to adhere to the standards of the Convention even though they might be free not to apply the Convention in their relationship with other EU Members. Parties to the Convention will normally fulfil their obligation by bringing their national rules into compliance with the provisions of the Convention.

EU Member States are likewise required to transpose the Directive into national law by a certain date. After that date national rules must be compatible with those of the Directive.

To the extent that one supranational legal instrument, for example the Convention, sets higher standards than the other legal instrument, i.e. the Directive, the legislator will have to pick one of the two standards for its national law and might thus come into conflict with the other standard, the one it did not choose.

In other words, in reality countries provide for a single set of national rules (e.g. one broadcasting act or one media law) in order to regulate the issues addressed by the Convention and the Directive. And they don't build in alternative approaches depending on what countries might be concerned by a situation of transfrontier broadcast. However, without a choice for regulatory authorities between alternative national rules the disconnecting clause is of limited use.

But fortunately, as a final result of the overall revision process, the instruments are now largely aligned. Only a few differences of lesser importance remain. Those differences are not of a kind to cause problems to EU Members which are also Parties to the Convention.

One should not forget in this context that the political geography of Europe, and in particular the membership of both institutions involved in the regulation of transborder television, had fundamentally changed since the adoption of the original versions of the Directive and the Convention. Sweden, Finland and Austria had joined the EU, the EFTA countries Norway, Iceland and Liechtenstein had also joined the internal market, while Central and Eastern European countries had become members of the Council of Europe. Ten new members were ready to accede to the EU.

## 6. Institutional Differences

The remaining differences were mainly linked to institutional reasons: The Directive forms part of European Community law. It is secondary legislation within the framework of the EC Treaty. It has to be read in the light of the case law of the Court of Justice of the European Communities, which is responsible for the interpretation of the Directive. The European Commission plays an active role in ensuring that Member States comply with the Directive. Finally the Contact Committee established by the modified Directive is mainly a forum for exchange of views between Member States and the Commission.

By contrast, the Convention exists on its own. Decisions concerning the interpretation of and compliance with the Convention are taken by the Standing Committee established by the Convention. Subsequently, disputes may be settled through an arbitration procedure envisaged in the Convention. The European Convention on Human Rights may provide a background, but not a framework for the Convention.

The example of diverging interpretations of the text by a transmitting State, on the one hand, and by a receiving state, on the other, may serve to illustrate how these institutional differences can have a major impact on the functioning of both instruments. Under the Directive, the European Commission may in these cases play its general role as guardian of the EC Treaty. It is the role of the Commission to make sure that all Member States comply with European Community law, be they on the transmitting or the receiving end. Moreover, the Commission as well as national courts may bring the case before the Court of Justice of the European Communities.

Some Articles of the Directive explicitly envisage a procedure whereby the European Commission has to approve a measure taken by a Member State:

Under Article 2a, Member States are allowed to take measures against television broadcasts coming from another EU Member State that infringe provisions on the protection of minors or on the protection of human dignity. The European Commission has to take a decision on whether the measures



are compatible with Community law. If it decides that they are not, the Member State has to put an end to its measures.

Under Article 3a, Member States may adopt a list of major events which cannot be broadcast on an exclusive basis in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events on free television. These national lists are also binding for the broadcasters of other Member States, but only after the European Commission has verified that the measures are compatible with European Community law and has published them in the Official Journal.

Under the Convention, the task of monitoring and ensuring compliance will be for the Standing Committee, which has neither the means of enforcement and manpower nor the authority of the European Commission. Unresolved matters can be settled in an arbitration procedure, which is rarely used.

## 7. Jurisdiction Again

With the modification of the Directive and the entry into force of the Amending Protocol to the Convention, jurisdiction criteria have finally been aligned. One could have hoped that this would also have solved all jurisdictional problems. But unfortunately this is still not completely the case. Even with exactly the same criteria, conflicts of competence can still arise.

The following example may illustrate the problem:

Let us assume that State A is an EU Member and a Convention Party, State B is an EU Member but not a Convention Party and State C is not an EU Member, but is a Party to the Convention.

*First scenario:* The broadcaster is established in State B, but uses a satellite capacity of State A:

According to the Directive, State B would have jurisdiction.

According to the Convention, the broadcaster is established in a non-Party (because State B has not adopted the Convention). Therefore the subsidiary criteria of Article 5, paragraph 4 of the Convention would determine the competent State. Following these criteria, State A would have jurisdiction, because it is a Party and its satellite capacity is used. But because State A is an EU Member, the Directive prevents it from assuming jurisdiction. According to the prevailing rule of the Directive, Member State B has jurisdiction. The Convention cannot be applied.

This problem of a negative conflict can arise as long as not all Members of the EU have ratified the Convention. The problem is mitigated, however, by the fact that the rules of the Directive and of the Convention are largely identical. By ensuring compliance with the Directive, State B will also broadly ensure compliance with the Convention, even if it is not itself a Party to the Convention.

*Second scenario:* The broadcaster is established in State C, but uses a satellite capacity of State A:

According to the Convention, State C would have jurisdiction. According to the Directive, the broadcaster is established in a third country because State C is not a member of the EU. Therefore the subsidiary criteria of Article 2, paragraph 4 TVwF Directive would determine the competent State. Following these criteria, State A would have jurisdiction. Because State C applies the Convention and State A the Directive, the channel is under double jurisdiction (positive conflict). State A is obliged to exercise jurisdiction under the Directive, but even so it does not have the right to exercise such jurisdiction under the Convention.

This situation could even occur if all EU Member States had ratified the Convention.

In practical terms arrangements in order to avoid jurisdictional conflicts are possible. In the second example, one could imagine that the channel be mainly controlled by the country of establishment (State C), and that the EU Member State (State A) will normally not have to intervene because compliance with the Convention (and thus the standards the Convention shares with the TVwF Directive) is already ensured.

In some cases this pragmatic approach may however not solve the problem. For instance, if the channel established in State C broadcasts audiovisual works in a language of an EU Member State,<sup>13</sup>

<sup>13</sup>) Recital (29) of the 1997 Directive (97/36/EC) envisages that channels broadcasting entirely in a language other than those of the Member States should not be covered by the provisions of articles (4) and (5).

State A, having jurisdiction under the TVwF Directive, would need to comply with the reporting obligation on the proportion of European works contained in the Directive, notwithstanding the fact that State C is the country of establishment and alone has jurisdiction under the Convention.

The solution can then only reside in a broad interpretation of the disconnecting clause contained in Article 27.1 of the Convention. According to this interpretation, EU Member States, even if they are party to the Convention, shall apply Community rules and not the Convention unless the Community law does not govern the particular subject concerned.

We have to conclude that the alignment of the jurisdiction criteria was certainly helpful, but did not completely clarify the situation. But an appropriate interpretation of Article 27.1 of the Convention can solve the legal problem. Politically, such a solution may not be entirely satisfactory to non EU Member States, but they should consider that the concrete cases where these problems arise are not frequent and that compliance with the Convention is more or less ensured anyway.

The suggested interpretation of Article 27.1. would on the other hand have the merit of allowing countries which provide satellite capacity for hundreds of channels all over Europe and which are therefore most likely to enter into jurisdiction conflicts, such as France with Eutelsat or Luxembourg with ASTRA, to stay or become a Party to the Convention.

## **8. The Proposed Directive on Audiovisual Media Services**

On 13 December 2005 the European Commission adopted its proposal for a new directive on audiovisual media services.

This long-expected proposal had been preceded by very lengthy consultations, beginning in 2001 with several independent studies, which were then followed by a written public consultation, a communication by the Commission, several thematic focus groups and a further consultation on the results of these groups, several seminars and Informal Ministerial Conferences organised by the successive Presidencies, including in the final stage a seminar under the Luxembourg Presidency and the Audiovisual Conference in Liverpool under British Presidency.

Parallel work was, of course, done again in the Council of Europe. These in-depth discussions are presented in some detail in Karol Jakubowicz's contribution to this publication.

For both institutions – the European Union and the Council of Europe – the main subject of discussion was the scope of the instrument. While the Standing Committee considered already at an early stage the necessity of an extension of the scope of the Convention to other audiovisual services besides traditional television broadcasting, the Commission left this question open for a long time. Only at the end of the consultation phase did it become apparent that the Commission would propose a two layer approach, with a light regulation for so-called non-linear services, and slightly liberalised rules for linear services (that is, in particular, the classical television programmes).

Regardless of whether European content, advertising, protection of minors and of human dignity, access to major events or jurisdiction was at stake, through their members/parties both institutions were able to take part in, and benefit from, all consultations and discussions. Therefore, it is not by chance that the ideas on how to revise the respective legal instruments developed by each institution show a high degree of convergence.

But let us come back to the proposed new Directive and its main features. According to the European Commission's proposal:

- Provisions on content of European works and works of independent European producers would not be changed substantially.
- Advertising rules would be simplified and liberalised: product placement would be allowed in principle and regulated; advertising time would be limited on an hourly, but no longer on a daily basis; rules on advertising breaks would be simplified by the introduction of a general rule allowing one interruption for each tranche of 35 minutes (which results in relaxed rules for films but stricter rules for news and children programmes).
- A new rule would introduce the right to access to short news reports on major events.

- Jurisdiction criteria would be completed by a clause allowing the receiving States to take measures against abusive delocalisation of broadcasters targeting their public. Additionally, the criteria for determining the competent Member State in the case of satellite broadcasters established in third countries would be reversed, the State of uplink having priority over the State of the satellite capacity.

The main innovation, however, would be to widen the scope of certain minimum standards to non linear services. Most of these rules derive from existing provisions of the TVwF Directive.

## 9. Transition Problems After the Adoption of a New Directive

I have explained above how the adoption of the 1997 Directive caused a number of problems for the Parties to the Convention, whether they were EU Members or not, during the long transition period until the Amending Protocol finally entered into force in 2002.

Would these problems arise again if the new Directive on Audiovisual Media Services were to be adopted, and, if so, how could these problems best be met?

There is no doubt that the legal situation is quite similar to the one existing after the first modification of the TVwF Directive and before the alignment of the Convention. Again, an amending protocol to the Convention would have to be drafted, then all Parties to the Convention would need to accept this protocol before it could finally enter into force. In the meantime, any differences in the rules or definitions might be the source of divergent interpretations and might cause problems for Parties or between Parties.

Some lessons can, however, be drawn from the first transition period in order to avoid as far as possible any future distortions.

First of all, it would be wise to align quickly the provisions of the Convention with those of the new Directive to the utmost extent possible. Furthermore, the Standing Committee should finalise the revision of the Convention very quickly in order to shorten the transition period. A lot of preparatory work can be done even before the final adoption of a new directive.

25 Members of the Council of Europe are taking part in the decision process within the EU, three accession States are also associated with the procedures, and for three EFTA States the Directive applies anyway. Other Parties to the Convention will be able to participate in the discussions through the work of the Standing Committee. Even Council of Europe Members which have not ratified the Convention have an observer status and can therefore express their views in the presence of experts from all EU Member States and from the European Commission. The arguments and ideas of all Council of Europe Members can be taken into account by the EU institutions before adopting the new Directive.

If the intention of the Standing Committee were to regulate additional subjects under the Convention that are not treated by the Directive one might consider including these provisions in an additional protocol rather than in the amending protocol. This would allow for avoiding any unnecessary complications and delays that might follow from the proposal of a wider scope. Additionally, it would permit those States which would have problems with an extended scope to accept as a first step only the Amending Protocol.

EU Member States which are also Party to the Convention, could be encouraged to accept the Amending Protocol simultaneously with the transposition of the new Directive into national law.

The possibility already envisaged in the first Amending Protocol of proceeding by so-called “negative ratification” could also help to accelerate entry into force. Article 35.2 of the first Amending Protocol stipulates that the Protocol shall enter into force two years after the date on which it has been opened for acceptance, unless a Party has notified its objection to the entry into force. In other words, no act of explicit acceptance of the Protocol would be necessary; the amended Convention would become automatically binding for all Parties to the Convention by tacit agreement. It should be recalled, however, that negative ratification is not always a legal possibility for all Parties. In 2000, for example, the Protocol could not enter into force because France had objected. But those Parties whose internal legal system excludes tacit acceptance of an amending protocol do have the option to explicitly accept it by the end of the two-year period. Based on a mix of positive and negative acceptance, the protocol could then enter into force.

If all Parties support an amending Protocol, the transition period between the date fixed for implementation of the Directive and the date of entry into force of the Protocol could be relatively short.

## 10. Transition Period: Possible Problems and Solutions

But even if the transition period were to be short, it might be worth while to look at the main changes which we can expect based on the Commission's proposal for the new Directive and to examine what problems could arise for EU Member States which are also Parties to the Convention, before the entry into force of the Protocol.

First of all, it seems that a change of the scope of the Directive, embracing also non-linear services, would in itself not create major problems. EU Member States would simply regulate non-linear services earlier than other Parties to the Convention.

Things might, however, become more difficult when it comes to liberalisation of advertising rules.

When they transpose the Directive into their national law, most EU Member States will "prefer" to adopt the more liberal new rules, even while the Amending Protocol to the Convention might not yet be in force. If the Protocol were to become open for signature, EU Member States could adopt it in parallel to the transposition of the Directive. In that case, EU Member States could in fact apply the Protocol even before its entry into force.

If, on the other hand, some of the advertising rules of the Directive were to be stricter, EU Member States would apply these stricter rules and this would not raise any legal problems. Economically speaking, EU Member States might then have a competitive disadvantage during the transition period against Parties to the Convention which are not EU members and which could continue to apply the less strict rules. Such disadvantage would however be limited in time. Anyway, based on the proposal of the Commission, it can be expected that, overall, the new rules of the Directive on advertising will be more liberal than the present provisions of the Directive and the Convention.

What about possible changes with regard to jurisdiction?

First of all the new clause proposed by the Commission on prevention of abuse or fraudulent conduct would not create any problem with regard to the transition period. Article 24*bis* of the present Convention already contains a clause of this type.

The proposed change in the hierarchy of the subsidiary jurisdiction criteria in Article 2 paragraph 4 of the Directive could, however, become an issue, because the competent country might change in some cases under the revised Directive and then differ from the country competent under the Convention. But as we saw above, some problems exist anyway in the area of jurisdiction, especially when the broadcaster is established outside the EU, and the proposed change would not fundamentally alter the situation in this regard, neither during the transition period nor after it.

## 11. Final comments

The European Convention on Transfrontier Television and the "Television without Frontiers" Directive were adopted in the same year, 1989.

Since then both instruments have coexisted very well, their content and application have continuously converged, and discussions on their adaptation to take account of technical and social change have included and benefited all countries involved.

Aligning the rules of the two instruments has proved to be positive and should be maintained in the future. This means that the Convention should be modified as soon as possible after the adoption of a new Directive. Its wording should match that of the Directive wherever feasible.

Of course some differences will always be inevitable because of the different legal and institutional frameworks of the European Union, on one hand, and of the Council of Europe, on the other.

Even after the enlargement of the European Union to 25 and more members, the Convention remains important because of its larger geographical coverage. Most of the Members of the Council of Europe

which are not EU Member States are young democracies, in which the free reception of TV programmes from other European countries can help to guarantee freedom of expression.

Experience has proved that Parties to the Convention which are not EU Member States can nevertheless participate actively in the shaping of European regulation, even if in the end the EC Directive is first adopted and the Convention is the following suit.

Since both instruments envisage, by and large, the same rules, there is little subject for conflict but much possibility for cooperation.

Ideally all Member States of the EU and of the Council of Europe should ratify the Convention, in order to provide for homogenous European regulation of audiovisual media.



# Co-ordination and Co-operation between Regulatory Authorities in the Field of Broadcasting

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## Introduction

This contribution to the workshop on *Implementing the Regulation of Transfrontier Audiovisual Media Services* will explore some aspects of co-ordination and co-operation between regulatory authorities in the field of broadcasting. After a few introductory words on the early beginnings of formalised co-operation between broadcasting regulators, the presentation will highlight the diversity of the current forms of collaboration before proceeding with its content-related aspects, which will be illustrated in the light of the main fields co-ordinated by the Directive and the Convention, i.e. jurisdiction, events of major importance for society, advertising and the protection of minors. The paper will conclude with a few remarks on the nature of the current co-operation between fellow regulators across Europe.

While the following pages will make reference to a wide range of networks, fora and initiatives whose aim it is to foster co-operation between broadcast regulators, the experience gathered within the European Platform of Regulatory Authorities (EPRA) will obviously act as the Ariadne's thread throughout.

## 1. Early Beginnings of Co-operation between Regulatory Authorities

Improving co-operation between existing broadcasting regulatory authorities in Europe was from the start the belief and *raison d'être* of EPRA. The main idea of the founders behind this initiative launched in 1995 in Malta was that while they considered that there was no need for a "super regulator", i.e. a European broadcasting supranational regulator, an issue that was rather topical at the time, they believed that more co-operation between regulatory authorities was badly needed. Despite the fact that since 1989, a European regulatory framework had been established with the EC "Television without Frontiers" Directive and the Council of Europe Convention on Transfrontier Television (ECTT), there was no formalised co-operation between broadcasting regulators in Europe. Conferences, working groups and committees dedicated to broadcasting regulation were either aimed at academia, Member States, the industry or a mix of all these. That is where the creation of EPRA filled the gap. Today, EPRA provides regulators with an open platform for discussions on a wide variety of relevant topics.

On this occasion, it would only be fair to pay tribute to the Council of Europe in general and the Media Division in particular, which was very instrumental in the creation of EPRA. The Media Section programme of co-operation and assistance for Central and Eastern European countries in the media field brought together many Western experts from regulatory Authorities. Their missions for the Council of Europe and the obvious need of Central and Eastern European countries for support and advice in establishing viable dual broadcasting systems convinced them of the necessity to establish

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not only some kind of closer network among themselves, but also to build up such a network between already existing and future broadcasting regulators in West and East.<sup>3</sup>

In general, this need for reinforced co-operation between regulators also emerged from what was felt to be common challenges facing all regulatory authorities, namely the explosion in the number of television channels, the issue of the mid- to long-term impact of technological convergence on broadcasting regulation and the structure of national regulatory authorities, and also the increasing internationalisation of the sector as shown by the presence of global media players.

## 2. The Diversity of Forms of Co-operation between Regulators in Europe

Before starting with the concrete issues at stake for co-operation and co-ordination between European regulators, let us embark on a brief excursion of the variety of forms of co-operation between regulatory authorities.

Since the creation of EPRA in 1995, many new initiatives have emerged. The recent multiplication of these forums illustrates a clear need for reinforced co-operation between regulators. Co-operation between fellow broadcasting regulators in Europe is characterised by its diversity; in terms of scope and aims. There are also great differences concerning size, composition and formality. Some of these initiatives consist in the organisation of regular meetings and do not have their own infrastructure or staffing.

With regard to scope, one can for instance distinguish between bilateral and regional or supranational networks and fora for regulators.

There are many bi-lateral examples of co-operation. Regular study visits are organised at the initiative of regulators. The exchange of staff, often with a special focus on the implementation of monitoring systems, also occasionally takes place. Some regulators, such as the Polish KRRiT for instance, have a very proactive policy with regard to contacts with fellow regulators from Eastern and Western Europe.

Networks of supranational co-operation between regulators from a specific geographic area are also quite popular. The most well known of these is probably the *Mediterranean Network of Regulatory Authorities*,<sup>4</sup> which was established in 1997 in Barcelona on the initiative of the French *Conseil supérieur de l'audiovisuel* (CSA) and the *Catalan Consell de l'Audiovisual de Catalunya* (CAC) in order to reinforce cultural and historical links between mediterranean countries and identify common challenges against the backdrop of globalisation. At the most recent meeting in 2005 delegates attended from these authorities plus representatives from Jordan, Egypt and the Lebanon<sup>5</sup> illustrating the growing interest in co-operation in this region.

The regulatory authorities in the Nordic countries, i.e. Iceland, Denmark, Finland, Norway and Sweden, have also established supranational co-operation through regular meetings.

A platform of regulatory authorities in the countries from Eastern Europe convened a few times some years ago but has ceased its activities for the moment as its members considered that other existing platforms for discussion catered sufficiently for their interests.

The aims pursued are also very diverse. The common denominator of these networks is to promote the exchange of information and experiences in the field of broadcasting regulation; their main activity is usually the organisation of yearly meetings between members.

A few initiatives specifically aim at the development of expertise and professionalism, often by means of study visits and staff exchange. The European Commission and the Council of Europe have developed a number of support schemes that may apply to broadcast regulators. Of particular interest are the so-called "twinning programmes", or "twinning light" supported by the European Commission under the PHARE Programme,<sup>6</sup> which offer assistance to candidate countries during their preparation

3) For more information about the early history of EPRA, see the EPRA 10th Anniversary documentation, available on the EPRA website: <http://www.epra.org/content/english/press/back.html>

4) For more information, see the newly launched Internet website of the network available in Arabic, French and English. The English version is available at: <http://www.rirm.org/en/noflash>

5) See press releases of the French CSA: [http://www.csa.fr/actualite/interventions\\_detail.php?id=28356&chap=265](http://www.csa.fr/actualite/interventions_detail.php?id=28356&chap=265)

6) <http://ec.europa.eu/comm/enlargement/pas/phare/index.htm>



for EU accession. Some very recent examples of twinning programmes include that of the Broadcasting Council of Latvia with the German regional regulator *Landesanstalt für Kommunikation* Baden-Württemberg (LFK), and that of the *Regulatorna agencija za komunikacije* (Communication Regulatory Agency – CRA) from Bosnia and Herzegovina with the Italian *Autorità per le Garanzie nelle Comunicazioni* (AGCOM). The Media Division of the Council of Europe has also developed many initiatives in this area. As an example, a representative of the *Commissariaat voor de Media*, the Dutch regulatory authority, recently went to provide assistance to the Broadcasting Council of “the former Yugoslav Republic of Macedonia” to draft bylaws concerning the issuing of broadcasting licences.<sup>7</sup>

Some networks pursue very specific objectives, such as the newcomer, The Broadcasting Regulation & Cultural Diversity network (BRCD).<sup>8</sup> This network, which came about during the International Forum of Cultures in Barcelona in 2004 and targets broadcasting regulators, and promotes cultural diversity in the media by means of regulation. Membership of the BRCD is open to all broadcasting regulatory authorities, governments, universities, broadcasters, companies in the broadcasting sector, as well as experts in the field.

A few (rather isolated) initiatives go beyond the aim of co-operation and foster real co-ordination between their members. In Germany, where the *Länder* and not the federation are in charge of audiovisual matters, a network of the *Land*-level authorities (DLM/ALM) was established in order to foster co-operation and also to develop common policies between regional bodies. DTT was recently launched in Germany on the basis of an agreement between the authorities of various States. Such a federal arrangement does not exist, at least formally, in Belgium despite the country’s division into different communities with autonomous media regulation and regulators; and the possible creation of a similar structure will certainly be an issue in Spain, once more regions have established independent regulatory authorities (there are only three at the moment<sup>9</sup>).

Last but not least, at the European level, some traditional discussion fora aimed at Member States but also often including regulators, such as the Contact Committee of the TVwF Directive, the Standing Committee for Transfrontier Television (T-TT) or the Steering Committee on the Media and New Communication Services (CDMC) have recently been supplemented by the High Level Group of Regulatory Authorities, which brings together the Member States’ regulatory bodies and the European Commission. It aims at reinforcing cooperation between regulatory authorities so as to ensure the consistent application of the EC regulatory framework.

### **3. The Co-operation between Regulatory Authorities in the Fields Coordinated by the TVwF Directive and the ECTT**

Fellow regulators quickly understood that a formalised exchange of information within a platform of co-operation that only consisted of the presentation of national country reports would be of little interest.

Additionally, considering the colourful variety of the respective national media landscapes and the great differences between regulators in terms of size, remit and structure, the discussions - at least during EPRA meetings - very naturally focused on the common regulatory instruments at the European level, i.e. the EC “Television without Frontiers” Directive and the Council of Europe European Convention on Transfrontier Television.

#### **3.1. The Issue of Jurisdiction over Broadcasters: A Challenge for Co-operation**

The issue of jurisdiction over broadcasters as enshrined in Article 2 of the TVwF Directive and Article 5 of the ECTT was, from the very beginning, one of the most recurrent issues during meetings between regulators.<sup>10</sup> Not surprisingly, of the different workshops (co-)organised by the European Audiovisual Observatory, it was the one examining jurisdictional matters, in which EPRA as such participated.<sup>11</sup>

7) See website of the Media Division: [http://www.coe.int/T/E/human\\_rights/media/](http://www.coe.int/T/E/human_rights/media/)

8) The English version is available at [http://www.brcd.net/cac\\_brcd/AppPHP/index.php](http://www.brcd.net/cac_brcd/AppPHP/index.php)

9) I.e. the recently created *Consejo Audiovisual de Andalucía*, the *Consejo Audiovisual de Navarra*, and the *Consell de l'Audiovisual de Catalunya*.

10) On this topic, see Background documents EPRA/2000/10, EPRA/1997/08, available on the EPRA website: <http://www.epra.org/content/english/press/back.html>

11) IRIS Special 2002, Jurisdiction over Broadcasters in Europe, see [http://www.obs.coe.int/oea\\_publ/iris\\_special/2002.html](http://www.obs.coe.int/oea_publ/iris_special/2002.html)

The complexity of the legal provisions dealing with jurisdiction and the transnational character of the topic may account only in part for its importance to broadcast regulators. Within EPRA, discussions have mostly focused on the interpretation of the complex legal provisions of Art. 2 of the TVwF Directive and - to a lesser degree - of Art. 5 of the ECTT. Particular emphasis was laid on the interpretation of the establishment criteria in practice. The issue of the divergence between the TVwF Directive and the ECTT (before its review and the entry into force of the Amending Protocol) with regard to the jurisdiction criterion for satellite broadcasters, i.e. the place where the uplink was situated vs. the place of establishment, has also been a focal point of discussions in the past. It is worth mentioning at this point that such a divergence in jurisdiction criteria between the two instruments is likely to happen again in future because of the proposed change in the hierarchy of the ancillary criteria in Article 2, para 4. (a) (b) in the new draft Audiovisual Media Services Directive. But although EPRA may have been instrumental in identifying some concrete problems of application, which were either addressed by the 1997 review or might be addressed by the next revision, its main contribution to the issue consists in its continuous efforts to improve co-operation between regulators regarding jurisdiction.

Many European regulators were (and still are) directly involved with the issue of jurisdiction over broadcasters. Some well-known examples in the past involved, for instance, at some point or the other the following countries and authorities:

- Belgium (CSA): e.g. on the matter of French advertising windows;
- Luxembourg and the Netherlands (on the matter of RTL4 and RTL5);<sup>12</sup>
- Switzerland (BAKOM): on the matter of French and German advertising windows;
- Poland (KRRiT): e.g. on the matter of Polish channels licensed in the UK;
- Sweden, Norway: e.g. TV3 licensed in the UK;<sup>13</sup>
- Spain and the UK over religious broadcasters;
- France (CSA) and Luxembourg over RTL9.

As can be seen from the above-mentioned cases, the concerns at the core of the problems of jurisdiction are also very varied: advertising in general; advertising targeted at children e.g. for Sweden; advertising and programme windows for "smaller" countries such as Belgium and Switzerland;<sup>14</sup> religious broadcasting and pornographic programmes. In the latter case though, Art 2a(2) of the Directive allows under certain conditions, and via a specific procedure with the Commission, an exception to the country of origin principle. The UK made use of this possibility a few times; the last time in December 2004 in the case of Extasi TV.<sup>15</sup>

The issue of jurisdiction over broadcasters also has many facets. It is not only legally difficult but indeed very sensitive. It also includes many cultural and economic factors. Even if it is widely accepted from a legalistic point of view, it cannot be denied that the application of the country of origin principle and the criterion of establishment may have drastic consequences on the media landscape of the countries of reception.

As an example, advertising windows targetting a particular audience other than that of the transmitting party may create distortions in competition between broadcasters and affect the advertising market of countries with a small media landscape. This danger has been recognised by Article 16 ECTT. This provision, which does not have its counterpart in the system established by the Directive, aims, under certain conditions, at preventing broadcasters from circumventing the rules governing television advertising in the country (party to the Convention) in which the audience is targetted. It has been remarked that the principle of free circulation of broadcasting has sometimes been stretched to its limits by broadcasters who try to pick and choose the best conditions for themselves (the so-called practice of "forum shopping"). It is therefore not surprising that communication and co-operation between regulatory authorities as a method for avoiding potential conflicts of jurisdiction has been a subject of many heated debates in the past. There have been some dramatic exchanges between EPRA members at times.

12) See Wilfred Steenbruggen, NL – Dutch Regulator Cannot Claim Jurisdiction over RTL4 and RTL5, IRIS 2003-8: 12, available in IRIS Merlin at: <http://merlin.obs.coe.int/iris/2003/8/article24.en.html>

13) See Anna Mansson, SE – TV Channel Kanal 5 Registered in the UK Ought to Belong under Swedish Jurisdiction, IRIS 2005-5: 20, available in IRIS Merlin at: <http://merlin.obs.coe.int/iris/2005/5/article92.en.html>

14) On advertising windows, see working paper EPRA/2002/04 by the CSA of the French speaking Community of Belgium, available on the EPRA website: <http://www.epra.org/content/english/press/back.html>

15) See Fifth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, [http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0049en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0049en01.pdf)

The main issue of the debate and the principal cause for frustration of some authorities was not the legal interpretation of jurisdiction criteria but rather the lack of co-operation between authorities in this regard. More often than not, communication over such cases involved Member States rather than regulatory authorities. Some regulators regretted that some of their counterparts would grant licences to broadcasters targetting their countries without even informing them, a fact that they would only discover afterwards. That is why in 1997 EPRA members, on the initiative of the Swedish Broadcasting Commission, supported the idea of a very informal “code of conduct” or rather guidelines of good behaviour between regulators. However, these informal guidelines met with a limited success in practice.

Another concrete problem has often been raised in relation to the supervision of programmes and the organisation of the exchange of information needed to monitor compliance. When a broadcast is exclusively targeted at the Member State of reception and is not broadcast in the language of the Member State where it is established, supervision may be rendered difficult. Some colleagues have attempted to solve this problem by means of a pragmatic approach. On several occasions, the Swedish Broadcasting Commission and the Norwegian Mass Media Authority undertook a survey of how the TV3 programmes targeted at Norway and Sweden complied with some of the rules in the Directive. Meetings were then held with the UK regulator (at the time the ITC) in London.

A complete new dimension to the problem of jurisdiction recently surfaced with the now famous – or rather infamous – Al Manar case.<sup>16</sup> The concern regarding non-European satellite channels broadcasting programmes inciting hatred in Europe has revived the topic of jurisdiction and shown that co-operation between regulators in this regard could be further developed. The issue of hate broadcasts was first raised at the EPRA meeting in Istanbul in October 2004 during which the French CSA gave a presentation on Al Manar and similar cases. There was a follow-up at the next meeting in Sarajevo where a brief overview on reported cases was presented. On these two occasions, the complex nature of the issues at stake was emphasized. First of all, hate broadcasts have to be identified and monitored (which may prove difficult because of linguistic issues: see the developments supra on the organisation of the exchange of information needed to monitor compliance), then jurisdiction over such broadcasts has to be determined (this is also not an easy task as the satellite operators do not always know exactly which satellite channels they broadcast due to subcontracting agreements), and finally, where necessary, effective sanctions (ranging from warnings to the withdrawal of the licence or the suspension of broadcasts) have to be imposed by the competent authorities.

EPRA members agree on the importance of a strong and effective co-operation between regulators on jurisdiction. Two concrete suggestions have been made that would facilitate the handling of jurisdictional questions:

- 1.) Identification of the person responsible for jurisdictional matters within each of the regulatory authorities;
- 2.) Development of a database listing broadcasters which were granted a licence in Europe.

EPRA members further emphasise that co-operation and contact with third countries is also particularly relevant and that the ban on channels containing hate speech should only be taken as the last step once all other legal measures available have been unsuccessful. In this regard, co-operation between regulators within the Mediterranean Network of Regulators seems like a promising avenue.

The High Level group of regulators, which convened in Brussels under the aegis of the Commission, came up with similar suggestions.<sup>17</sup>

In any event the Al Manar case illustrated that the co-operation between regulators on these issues, though capable of improvement, worked well. Owing to the co-ordination between the French, the Dutch and the Spanish authorities, the programmes of Al Manar can no longer be received in Europe on television channels.

16) See for example, Amélie Blocman, FR – CSA Serves another Formal Notice on Eutelsat, IRIS 2005-3: 11, available in IRIS Merlin at: <http://merlin.obs.coe.int/iris/2005/3/article19.en.html> ; Rosa Hamming, NL – Satellite Broadcasts Disseminating Hatred Blocked, IRIS 2006-3:17, available in IRIS Merlin at: <http://merlin.obs.coe.int/iris/2006/3/article30.en.html>

17) It was suggested to exchange information, via national contact points, on which channels are authorised in the respective jurisdictions; to create and develop a central database of broadcasters or interconnect the existing databases on channel authorisation; to set up a restricted internet forum to discuss problematic cases. For more information, see: [http://ec.europa.eu/comm/avpolicy/docs/library/legal/conclusions\\_regulateurs/conclusions\\_regulateurs\\_fin\\_en.pdf](http://ec.europa.eu/comm/avpolicy/docs/library/legal/conclusions_regulateurs/conclusions_regulateurs_fin_en.pdf)

### 3.2. Lists of Events of Major Importance for Society: A Promising but Underdeveloped Area for Co-operation between Regulators

The right to take measures in order to secure general access to events of major importance for society, as enshrined in Article 3a TVwF Directive and Article 9bis ECTT, has been discussed several times among broadcast regulators. This subject was extremely topical at one point, corresponding with the actual drawing up of the first lists of major events by the EU Member States.

Many questions and concerns were raised as to the transfrontier aspect of the issue and the implementation of the mutual recognition system.

For instance:

- What measures must countries take in order to protect the lists of other countries?
- How is responsibility for securing access shared between the transmitting country and the receiving country (or countries)?
- What sort of co-operation is desirable between the authorities in the different countries?

When the first case of disagreement over how Article 3a (3) should be applied in practice that concerned two different countries, namely the UK and Denmark (“TV Danmark Case”<sup>18</sup>) reached the English courts, it looked as if the topic of major events would recur frequently at EPRA meetings and at the European Commission’s Contact Committee.

Indeed this case highlighted the need for close contact between the competent regulatory bodies in the different Member States in applying Article 3a (3) TVwF Directive, since responsibility is divided between the State whose event is being broadcast and the State where the broadcaster is established.

In the TV Danmark case the Danish rules applied in so far as they determined the events to be protected, the minimum population coverage which had to be achieved, the kind of coverage protected (i.e., live or deferred coverage), and the meaning of “free” television. However, because TV Danmark was established in the UK, the ITC, operating under the regulatory system of the UK, decided whether or not to allow the broadcast to go ahead.<sup>19</sup>

In order to improve co-operation, EPRA members suggested that a list be drawn up of the regulatory authorities and contact details of the entity responsible for enforcing Article 3a (3) in each country, and even to convene a meeting of representatives once a year to discuss these issues.

However, rather unexpectedly, there has since been much less interest in this issue (perhaps reflecting less concern over it). No other transfrontier case was reported. The number of national lists of events (at least those that went through the notification procedure prescribed by article 3a (2) TVwF Directive<sup>20</sup>) did not increase much over the years (with Denmark even withdrawing its list) which may account for the declining interest in this issue.

So far, co-operation between regulators in the implementation of the mutual recognition system has remained rather theoretical.

### 3.3. Protection of Minors: The Importance of Cultural Diversity

The protection of minors is also a most recurrent topic during meetings between broadcast regulators in Europe. This is of course not surprising, as it is one of the core missions of regulatory authorities.

Most of the discussions focus on the description and comparison of national rating systems such as the French *signalétique* or the Dutch classification system *Kijkwijzer* introduced by the NICAM. More

18) See House of Lords judgment, Regina v. Independent Television Commission ex parte TV Danmark 1 Ltd, 25 July 2001 [2001] UKHL 42 <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd010725/dan-1.htm>

19) At the end of a lengthy legal battle, the House of Lords held that the rights of the public in one Member State to watch an event, which had been designated as being of major importance for society, should not be affected by whether the broadcaster was established in that Member State or another one.. In the House of Lords’ opinion, the result, which Art.3a(3) of the TVwF Directive required Member States to achieve, was to prevent broadcasters from exercising exclusive rights in such a way that a substantial proportion of the public in another Member State was deprived of the possibility of following a designated event. See House of Lords judgment, supra. However, by that time, the first match had already been broadcast on an exclusive basis by TV Danmark.

20) For the exact list, see: [http://ec.europa.eu/comm/avpolic/reg/tvwf/implementation/events\\_list/index\\_en.htm](http://ec.europa.eu/comm/avpolic/reg/tvwf/implementation/events_list/index_en.htm)

recently, the respective role of traditional, co- and self-regulation has also been a topic of growing interest for many authorities.<sup>21</sup> The need for more in-depth discussion on co- and self-regulation is bound to be reinforced if the proposals of the European Commission concerning the widening of the scope of the TVwF Directive are adopted.

The need for a uniform pan-European rating system was also debated on various occasions but the positions of regulatory authorities vary greatly on this controversial issue and no consensus could be reached.

The area of the protection of minors, though one of the fields co-ordinated by the Directive and the Convention, still leaves ample room for national implementation. There is no supranational definition of minors or of pornography. National and cultural differences still matter a lot. In Nordic countries, for example, nudity is not a subject for concern, whereas tolerance for violence is low. The reverse is true in the United Kingdom.<sup>22</sup> However, research tends to indicate that there is little to no uncertainty among the people responsible for minors arising from ratings heterogeneity between countries. Where confusion does exist, it stems from national sources, and is connected to the question of whether a given rating system applies across platforms.<sup>23</sup>

### 3.4. Advertising: Video Examples, New Techniques and Best Practices

Advertising is probably the most recurring topic during conferences between regulators; it is certainly the most popular at EPRA meetings.

It has been addressed from various perspectives, including sponsorship, teleshopping and surreptitious advertising. The emergence of new advertising techniques, such as virtual advertising and split-screen, has also been an issue of particular interest.

The reasons for this predominance of advertising on the agenda are manifold. Firstly, the remit of broadcast regulators in Europe is very different but they almost always have some kind of competence in the field of television advertising. Secondly, advertising provisions constitute a significant part of the TVwF Directive and its current review, as recently illustrated by the Commission's interpretative Communication on certain aspects of the provisions on televised advertising in the "Television without Frontiers" Directive.<sup>24</sup> Last but not least, the topic of advertising is particularly suitable to the format of big conferences because it can easily be illustrated by means of video examples.

However popular the topic might be, the search for a common denominator between broadcast regulators with regard to the current review of the TVwF Directive proves a challenging task. Even if simplification and clarification of rules is generally welcomed, opinions differ concerning the abolition or relaxation of the rules on advertising time limits and the rules concerning breaks, and how the market and viewer needs are to be balanced. Opinions also differ regarding the proposal to explicitly permit product placement and on how it can successfully be regulated.<sup>25</sup>

Here again, though advertising is co-ordinated by the Directive and the Convention, it still leaves room for national implementation, whereby national legislators are occasionally proving rather inventive.

In this particular area, co-operation mainly consists of raising concrete problems of implementation of the transfrontier legal framework. As an example, it was frequently mentioned that sponsorship and advertising were moving closer together and the identification of sponsorship and the implementation of differing rules was problematic. Informing counterparts of new developments and trends is also of great importance. Also, as broadcasters are very creative people with regard to circumventing the rules, regulators need to co-ordinate the relevant facts.

21) On the topic, see background document EPRA/2003/02 and the presentation of Sven Egil Omdal, former President of the Norwegian Press Council, available on the EPRA website: <http://www.epra.org/content/english/press/back.html>

22) For an overview of the different legislations, watersheds and rating practices, see the Olsberg study: [http://ec.europa.eu/comm/avpolic/doc/library/studies/finalised/studpdf/rating\\_final\\_report2.pdf](http://ec.europa.eu/comm/avpolic/doc/library/studies/finalised/studpdf/rating_final_report2.pdf)

23) See supra. Olsberg study.

24) [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0428\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0428(01):EN:HTML)

25) See Background paper, EPRA/2006/03, available on the EPRA website: <http://www.epra.org/content/english/press/back.html>

## Conclusion

In Europe, the level of co-operation and information exchange between regulatory authorities in the field of broadcasting has increased tremendously over the last ten years. The number of platforms and networks dedicated to the exchange of views on topics of media regulation clearly indicates this trend. The significant increase in email correspondence between European regulators and related requests for information over the years also illustrates this improved co-operation. It is a positive development that many regulatory authorities now ask their foreign colleagues for their experience before launching a national consultation on a specific subject.

A future challenge for co-operation between regulatory authorities may arise from the suggested broadening of the scope of the TVwF Directive and the ECTT (with its likely alignment). This will necessarily have an impact on co-operation issues, as audiovisual media services will pose even more challenges concerning voluntary co-operation between regulatory authorities while the number of bodies involved will automatically (and exponentially?) increase.

This being said, examples of co-ordination between regulatory authorities on specific topics are rare. This is indeed not the aim of EPRA, which is to remain exclusively an informal forum for exchange of experience and views in the field of broadcasting regulation. In any case, due to its large size and composition, it could hardly be an appropriate forum to discuss legal details of the application of the European regulatory framework. Nor is it its role to ensure the consistent application of the European regulatory framework.

But most of all, despite all the great achievements of the EC Directive and the Council of Europe Convention regarding the creation of a common language between broadcast regulators in Europe, national legal systems still have their say in the matter. The implementation of European rules at the national level gives some considerable leeway to the national legislator. In turn, this has a great impact on regulatory authorities whose core mission is to implement their national regulatory framework.







# Implementation and Monitoring

## *Upholding General Interest in View of Commercial Communications*

Alexander Scheuer<sup>1</sup>

### Introduction

#### Policy Objectives

1. Commercial communications<sup>2</sup> enjoy the right to freedom of expression as enshrined in Art. 10 (1) European Convention on Human Rights and Fundamental Freedoms (ECHR). Under Community Law, commercial communications as an activity is protected by the freedom to provide services (Art. 49, 50 Treaty on the European Community (EC)); restrictions to those may also be tested against the free-movement-of-goods' guarantee (Art. 28 EC).<sup>3</sup> Accordingly, restrictions to the exercise of these fundamental freedoms have to be justified. In this direction, a number of public policy objectives have been either formulated expressly (cf. Art. 10 (2) ECHR; Art. 11 European Convention on Transfrontier Television (ECTT)), or may be deduced from relevant case-law or the provisions included in the two relevant legal instruments, i.e. the "Television without Frontiers" Directive (TVwF Directive) and the ECTT.
2. A non-exhaustive general list of public policy goals in the present context would include:
  - protection of consumers/viewers;<sup>4</sup>
  - protection of public health;<sup>5</sup>
  - protection of minors;<sup>6</sup>
  - protection of fair competition;<sup>7</sup>
  - protection of the "European broadcasting model" (?)<sup>8</sup>/the national media order;<sup>9</sup>

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2) In the present contribution, the terms "advertising" and "advertisement" are used in a general manner as synonyms for commercial communications in their various forms; distinctions as to advertising, self-promotion, teleshopping, sponsoring, new forms of advertising etc. are made only where appropriate.

3) See Joined cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) vs. De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB*, [1997] ECR I-3843.

4) Art. 10(2) ECHR; Arts 10(1), (2), and (4), 17, 18, 18a TVwF Directive; Arts 11(2), 12, 13 ECTT; ECJ, Case C-245/01, *RTL Television/NLM*, ECR [2003] I-12489, Rec. 64; Case C-288/89, *Collectieve Antennevoorziening Gouda*, ECR [1991] I-4007, Rec. 27; Case C-6/98, *ARD/ProSieben*, ECR [1998] I-7599, Rec. 50.

5) Art. 10(2) ECHR; Arts 12 lit. d), 13, 14, 15, 16 TVwF Directive; Art. 15 ECTT.

6) Arts 11(5), 15, 16 TVwF Directive; Arts 7(2), 11(3), (4), 15(2)(a) ECTT.

7) Recitals 3 and 17 TVwF Directive (1989).

8) In the first place, such a model may be characterised by the so-called "dualistic broadcasting order", i.e. the simultaneous presence of public service and of commercial broadcasting. In addition, it is (still) widely accepted that the audiovisual sector is specific in that it reflects not only a mere economic activity but has also social, cultural and democratic implications; cf. Rec. 4 TVwF Directive (1997); the Protocol on the System of Public Broadcasting in the Member States, annexed to the Treaty of Amsterdam; Rec. 3, 29, 43 Commission proposal for a "Audiovisual Media Service Directive", COM (2005) 646 final, of 13 December 2005.

9) ECJ, Case C-23/93, *TV 10*, ECR [1994] I-4795, Rec. 18. The case concerned possible measures by the receiving Member State against a broadcaster who allegedly established itself in another Member State to evade the (more restrictive) provisions which would have applied to its activity in the first Member State. The Court took the freedom to provide services (Art. 49 EC) as the yardstick against which to assess this Member State's measures. For more information, particularly as to the impact of Art. 10 ECHR on the justification of the measures put forward by the first Member State, see S. Nikoltchev, *Right of intervention to address abuses of the fundamental freedoms - The role of the case-law*, in: *Institute of European Media Law (ed.), Regulating the New Media Landscape*, EMR series of books vol. 35 (forthcoming).

- protection of freedom of expression in the audiovisual sector of the various components (cultural policy aimed at safeguarding pluralism);<sup>10</sup>
- protection of authors/works;<sup>11</sup>
- protection of specific broadcasts/audiences;<sup>12</sup>
- protection of editorial independence.<sup>13</sup>

We shall come back to examples of incorporations – in specific provisions – of these goals.

3. Before the entry into force of the ECTT and the TVwF Directive, national media (and general advertising) legislation already had established several conditions which applied to the broadcasting of advertisements. In the language of Community law, such restrictions – where they varied among Member States – could effectively hamper the development of the Common Market in (television broadcasting) services because they had been invoked by national authorities in order to prevent the free circulation of transmissions coming from broadcasters established in other Member States. The Court of Justice of the European Communities (ECJ), in principle, accepted the underlying general interest objectives (“imperative grounds of public interest”, “requirements relating to the general interest”, “pressing needs ...” – many variants exist) of those restrictions, as long as they did not merely serve to protect economic interests. Under this condition they could justify limits imposed on TV services of non-domestic broadcasters.<sup>14</sup>
4. Therefore, one of the main goals of the Community legislator was to harmonise (“coordinate”) the national rules in those fields – to the extent necessary in order to achieve an Internal Market for television services. This was meant to ensure that the laws of all Member States would take proper account of the general interest objectives by introducing a minimum level of protection. Based on the introduction of the country-of-origin principle (Art. 2 TVwF Directive), the general approach towards the provision of services was also applied to television broadcasts, i.e. the idea that in principle a service legally rendered in one Member State should be capable of being offered throughout the entire Community (“mutual recognition”). This approach was equally adopted for the formulation of other provisions like the protection of minors against harmful programmes, European quota rules and the right of reply.
5. The idea of mutual recognition, perceived by many as being mainly an economic approach, did not, however important, play such a prominent role with regard to the efforts made at the Council of Europe. When formulating the Convention, the emphasis, apparently, was laid on the idea of freedom of expression and the free flow of information. Nevertheless, the genesis of the two instruments clearly shows that the solving of the debate on advertising regulation was crucial for the final “Go!”.

### Enactment and Revision

6. The provisions of the ECTT (Arts 11-18) and the TVwF Directive (Arts 11-21) in their original versions showed no major discrepancies. The same appears to hold true for the subsequent amendments, in particular given that in view of the 1998 Protocol the Contracting Parties mainly sought to ensure parallelism – to the greatest possible extent – between the Convention and the amended Directive.
7. Of course, it is important to refer to Arts 16 and Art. 24 (and 24bis) ECTT which for different reasons have had no (direct) equivalence in the TVwF Directive (see *infra*).

### The Issue of Transfrontier Advertising in general

8. Transfrontier advertising has also been an issue for the EEC. According to the first proposal submitted by the Commission, the advertising provisions were divided into two distinct parts, i.e. those for internal broadcasts and those for cross-border broadcasts. The only provision on

10) Art. 10(1)(3), (2) ECHR; Art. 19 TVwF Directive (1989), Rec. 44 TVwF Directive (1997); ECJ, Case C-368/95, *Familiapress*, ECR (1997) I-3689, Rec. 26; Case C-23/93, *TV 10*, ECR [1994] I-4795; Case C-288/89, *Collectieve Antennevoorziening Gouda*, ECR [1991] I-4007.

11) Arts 11(1), (3), 17 TVwF Directive; Arts 14 ECTT.

12) Art. 11(2), (3), (5) TVwF Directive 14(2) to 4 ECTT.

13) Art. 17 TVwF Directive; Art. 11(5), 18(3) ECTT.

14) In addition, the general conditions for limiting services have to be observed, namely that the restrictions are (i) non-discriminatory, (ii) adequate, necessary and proportionate, and (iii) the “interest is not safeguarded by the provisions to which the provider of the services is subject in the State of his establishment”.

transfrontier advertising (Art. 14) stipulated that Member States should accept reception and transmission of advertising in cross-border broadcasts if the proportion of transmission time devoted to it does not exceed 15 % of the broadcast, receivable each day by the public in those Member States. Article 1(2) of said proposal explicitly named this provision as an exception to the principle not to restrict reception and transmission of cross-border broadcasts in the receiving state.

9. This is a reminder to a certain extent of Art. 16 of the Council of Europe's Convention on Transfrontier Television which stipulates that, in principle, cross-border broadcasts mainly intended for reception in ("specifically and with some frequency directed to") other contracting parties than the one where the broadcast originates have to respect the existing advertising regulation of the receiving state. Obviously, one difference lies in the fact that the Commission's proposal was intended to harmonise the rules relating to transfrontier broadcasting as regards the permissible amount of advertising in order to ensure that a receiving Member State could not invoke pressing needs of general interest to restrict free retransmission. The Convention, in turn, aims at preventing situations in which the existing requirements for advertising in the country of reception that guarantee a certain level of protection are circumvented by way of transmitting from a country other than the one targeted at by advertisements. A second difference can be found in the comparatively broader scope of the ECTT provision.
10. That being said, for present purposes it is important to recall that the Directive of 1989 contained a particular provision according to which Member States were free to adopt stricter rules for broadcasters under their jurisdiction concerning the daily and hourly amount of advertising and the maximum daily transmission time for teleshopping (that is, the rules laid down in Article 18 TVvF Directive). The said provision (Art. 19 of the former Directive) aimed at ensuring a balance between the demand for advertising space and general interest objectives in this field.<sup>15</sup>

With regard to its context, it was argued in the Green Paper that rules which only apply to a domestic broadcaster tend to pose less of a problem for foreign broadcasters as the receiving Member State's jurisdiction would not be relevant to the latter and, thus, the activities of non-national broadcasters would neither be covered nor, consequently, negatively affected.

11. It was pointed out that a Directive would aim at achieving the minimum of harmonized rules absolutely necessary and that it had to be carefully examined where this minimum lies and to what extent the Member States could be allowed to take national options in the form of applying stricter rules. It was considered that, in practice, such national rules would be predictably those which restricted advertising by domestic broadcasters more severely when compared with the minimum standard of harmonization. Furthermore, the possibility was discussed of imposing stricter rules on public service broadcasters. Also, the ECJ's arguments in the *Debaue* judgement<sup>16</sup> were mentioned according to which national rules governing the broadcasting of television advertising on the national territory in a more restrictive manner might be justified in the general interest. The phrase "public interest" re-appeared also in the final version of the 1989 Directive.
12. Finally, it should be stressed that the issue of transfrontier advertising has been a recurring topic for many years at the EC level. This applies, in particular to the case-law of the ECJ (which is closely linked to jurisdiction) before the Directive was amended in 1997, but also (later on) to the political debate (e.g. Dublin Ministerial Conference, March 2004) on perceived competitive disadvantages of broadcasters in "smaller" countries that are (exclusively) targeted by (advertising) broadcasts from "bigger" neighbouring markets pertaining to the same language area. For the Parties of the ECTT, and especially their relations with other contracting Parties that are at the same time EU Member State, advertising broadcasts directed to a non-EU Member State party have also given rise to debate (e.g. France/Germany – Switzerland<sup>17</sup>).

15) Article 19 initially included in Directive 89/552/EEC was later entirely replaced with another stipulation, on channels exclusively devoted to teleshopping, by the Amending Directive 97/36/EC. However, see. Rec. 44 which recalls these standards.

16) Case 52/79, [1980] ECR, page 833.

17) Cf. Sidler, O., CH – Foreign Advertising Window Unwelcome, IRIS 2001-9:7, available at <http://merlin.obs.coe.int/iris/2001/9/article13.en.html>, and Scheuer, A., MMR 3/2005, S. XXIV.

## Implementation, Monitoring/Application and Enforcement

### Implementation

13. First of all, we should recall, primarily in the context of the TVwF Directive, the so-called “3 golden rules of mutual trust”:

- Member States respect other Member States’ regulatory decisions (“principle of mutual recognition”, Art. 2a TVwF Directive; Art. 4 ECTT); this rule is acceptable due to the prior agreement on minimum standards;
- Member States do not apply different or preferential treatment to broadcasters under their jurisdiction that exclusively target audiences in other Member States (“principle of loyalty”, Art. 10 EC, Art. 2(1) and 3(2) TVwF Directive; Art. 5 ECTT);
- Concerning the substantive provisions, Member States’ legislation should be construed in such a way as to subject every service that is a television broadcast within the meaning of the Directive to the conditions agreed upon. Furthermore, the procedures foreseen should be used in a constructive manner.

It follows from the rules “of mutual trust”, that implementing the Directive’s provisions is not restricted to the mere transposition of its substance into national law. In addition, there has to be an “application-friendly climate”. This includes, for example, guaranteeing that the remit and competencies of regulatory authorities have to be suited to ensure a proper implementation and enforcement (at least) of the standards of the TVwF Directive. Explicitly modelled as an additional instrument to safeguard the respect of these minimum rules, the Directive also envisages the introduction of guarantees into national law that allow “directly affected third parties” to address the competent authorities in case of alleged infringements; national jurisprudence should absolutely be in line with this exigency. In -supplementing this, mention may also be made of Directive 98/27/EC<sup>18</sup> and Regulation (EC) No. 2006/2004.<sup>19</sup>

14. In contrast to the control mechanisms called for by the TVwF Directive, the ECTT lacks enforcement mechanisms. Therefore the ECTT’s provisions are construed in another way and they put the emphasis on questions concerning the actual application of the Convention. Where the TVwF Directive offers the Commission or Member State the possibility to initiate infringement proceedings, the ECTT implements procedural rules for mutual information and cooperation, conciliation and arbitration between the contracting parties. In this vein, the establishment of the Standing Committee is highly relevant, not least because it has been entrusted with monitoring the application of the Convention. It is empowered to issue recommendations concerning the application of the Convention and to assess questions related to its interpretation (e.g. Opinions Nos 4, 6, 7, 8 (1995-1997); Recommendation (1997)1; Opinion No. 9 (2002)). However, the existence of the Contact Committee under Art. 23a TVwF Directive and the mechanisms envisaged in Art. 2a and Art. 3a TVwF Directive go somewhat in the same direction.

15. Some examples may serve to illustrate the aforementioned: The ECJ has had to decide, mainly in preliminary proceedings, on a number of issues with regard to Articles 11 and 18 TVwF Directive or other cases related to television advertising. The Standing Committee, on its turn, dealt with “infomercials”, “virtual advertising” and “split-screen advertising”. Judging from the pertinent information that has been made available to the public, the Contact Committee has not produced such “output”.

Infringement proceedings initiated by the Commission that concerned mainly the transposition of the Directive into national law in some cases incidentally shed some light on the interpretation of the Directive. In others, especially when the dispute was not limited to the “mere” textual comparison between the TVwF Directive and the corresponding national legislation, but focused rather on the actual application of the rules, this was not necessarily the case. In 2004, the Commission, in view of emerging new technologies and new forms of advertising established in

18) Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests, OJ L 166, 11 June 1998.

19) Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)Text with EEA relevance, OJ L 364, 9 December 2004, p. 1–11.

several countries, came up with an Interpretative Communication.<sup>20</sup> It could be argued that the motivation for the release of the Communication was also the delay in the process of the TVwF Directive's revision. To the extent that part of the rules contained therein appear to go beyond the mere interpretation of existing rules, this might raise the question of whether the Communication is the appropriate instrument in light of the balance of institutional responsibilities among EU organs.

### Monitoring/Application and Enforcement

16. Advertising rules (qualitative and quantitative) have been a constant source for monitoring problems in both the domestic arena and in cross-border relations. Interestingly, as far as advertising content was concerned, the Commission in its first proposal formulated the idea that advertising should be subject to mandatory assessment before the broadcasting takes place – that approach, however, was not followed. After the enactment of Directive 89/552/EEC, reportedly not much effort was spent on controlling – despite the stipulations made in Articles 2 (1), 3 (2), and 21 (see Recitals 17 et seq. and Art. 3 TVwF Directive as amended by Dir. 97/36/EC).
17. For the present purposes, the issue of monitoring should be subdivided into: (i) monitoring the practice of broadcasters targeting the *domestic audience*; (ii) monitoring the practice of broadcasters targeting exclusively or to a significant extent (Art. 16 ECTT: “specifically and with some frequency”, Art. 24bis ECTT: “wholly or principally”) a *non-domestic audience*;<sup>21</sup> and (iii) monitoring a broadcaster established in another country by the *receiving state*. In addition, the topic could also comprise (iv) the control exercised by the Commission on the practice of broadcasting regulation in Member States.

In all of the above scenarios, interesting questions may arise. Nevertheless, in particular in the case of (iii) a fundamental difference between the TVwF Directive and the ECTT should be recalled: according to the current stage of applicable rules, the TVwF Directive neither -envisages a provision comparable to Art. 16 ECTT (which concerns advertising and teleshopping directed specifically at a single Party), nor does it provide for a mechanism similar to Art. 24bis ECTT (which addresses alleged abuses of rights). In contrast, Art. 2a TVwF Directive and Art. 24 ECTT (which both deal with alleged violations) show some similarities.

### Practical Issues

#### *Reactions by the Receiving Country*

18. When comparing Art. 24 ECTT and Art. 2a TVwF Directive it should be first noted that the application of the former is not restricted by reference to a specific provision. It is thus much broader in scope, and especially addresses rules on advertising. Art. 24 ECTT does also not depend on violations of a “manifest, serious and grave nature”. Art. 2a TVwF Directive is concerned (only) with the violation of rules on the protection of minors and human dignity/incitement to hatred.
19. A second comparison may be made between Art. 24bis ECTT and the proposed new Art. 2 (7)-(10) Audiovisual Media Service Directive (AVMSD). First of all, the background of the provisions differs: Art. 24bis ECTT has to be read with respect to Art. 10 ECHR, in particular the conditions foreseen for any intervention in the exercise of the right to freedom of expression, and, ultimately, the freedom to receive information. This is what Art. 4 ECTT explicitly refers to. At the EC level, the freedom of establishment (Arts 43, 48 EC) and the freedom to provide services (Arts 49, 50 EC) are the primary focus. Looking at the jurisprudence of the ECJ, it is difficult to imagine that the Court would deviate from its principle according to which the making use of a fundamental freedom in the Internal Market may hardly ever be subjected to the scrutiny of Member States.<sup>22</sup> However, in very specific circumstances – and only in those – the Court seems to accept that the receiving Member State is allowed to apply its rules to a broadcaster established in another Member State. This requirement would be satisfied where, pursuant to an assessment of the individual case, it is manifest that the directly applicable fundamental freedoms are only invoked in order to circumvent

20) Commission Interpretative Communication of 23 April 2004 on certain Aspects of the Provisions on televised Advertising in the “Television without Frontiers” Directive (C (2004)1450).

21) Cf. Müllig, J. P., DE – LPR Alleges Breach of Alcohol Advertising Rules in SAT.1 Swiss Advertising Window, IRIS 2002-10: 7 available at: <http://merlin.obs.coe.int/iris/2002/10/article10.en.html>

22) See the judgments in ECJ, C-212/97, Centros, [1999] ECR I-1459; Case C-23/93, TV 10, [1994] ECR I-4795; C-56/96, VT4, [1997] ECR I-3143; C-14/96, Paul Denuit, [1997] ECR I-2785.

the application of national rules of the (original host and/or target) Member State for whose audience the broadcast is intended.<sup>23</sup> In recent judgments, one may observe, the Court has even attempted to avoid the notion of “abuse”!

20. It is doubtful that the derogation clauses in Art. 2 (7)-(10) AVMSD would add much to the current situation. Of course, instead of the ECJ the Commission -could act as umpire and decide (“in first instance”) whether the action of the receiving Member State has been lawful or not. In any event, it seems important to take into consideration the benefits that a clear distinction between the question of determining who has jurisdiction over a given broadcaster (RTL4 and RTL5 cases, for instance) and the question of whether a broadcaster’s activity constitutes an abuse of its economic freedoms or approaches fraudulent conduct (Art. 2 (7)), would bring about. The structure of the new procedural rules, which reflect the ECJ’s jurisdiction, are helpful in this regard. When assessing the legitimacy of any such measure, their justification by “imperative requirements relating to the general interest”/pressing needs of public policy objectives as well as the actual design and extent of such measures, however, remain to be cross-checked against Art. 10 ECHR/Art. 11 EU-Charter.
21. Concerning measures: how can one actually prohibit the reception by satellite or via the Internet of television programmes from abroad? Whose general interest would be protected – that of the viewers? And, would this be compatible with Art. 10 ECHR? And in which cases? Would it be necessary for the Member State which takes the action to demonstrate that the infringement relates to a public policy objective and that this objective is not exclusively designed to protect the interest of a competitor? How does one distinguish then between fair competition interest and economic interests? Would the protection of works qualify as a relevant general interest in case of an advertisement block not being announced in accordance with the more detailed rules of the receiving Member State?
22. How is a measure implemented in practice? In other words, could a receiving Member State, for instance in order to prevent alleged violations of the advertising rules to continue, decree a ban on contracts to be concluded with this broadcaster? Or could the Member State even freeze the broadcaster’s bank accounts or those of the media agency selling airtime for the non-domestic broadcaster to advertisers or companies established in the receiving country? For cable retransmission it may be argued that this may pose less of a problem.<sup>24</sup>
23. Unsurprisingly, Art. 16 ECTT was brought into the debate on the legitimacy of transfrontier advertising when the relationship between contracting parties was concerned. Sometimes Article 16 was invoked in cases where the party of transmission is a Member State of the EU (Art. 27 ECTT). By the way, what is the relationship between Art. 16 and Art. 24bis ECTT. Is Art. 16 more specific because it only covers advertising and teleshopping spots? Is it more general because its application does not assume that an abuse is established? If Art. 16 is applied according to the procedure in Art. 24, what about the procedure envisaged by Art. 24bis? It is open to debate whether the explanatory report offers much information in this respect.<sup>25</sup>

#### *Reactions by the Country of Transmission*

24. In this sub-section, three examples of problems of actual enforcement and monitoring shall be looked at. They are more generally related to the application of the advertising rules of both instruments but one of them is connected to the Interpretative Communication. Without prejudice to the foregoing, in some circumstances those illustrative cases may also be relevant in the context of measures taken by the receiving country.

#### **Example No. 1 – Children’s Programmes**

25. The first example concerns programmes which address young audiences and are composed, unlike a feature film, of several different items. This may relate to different cartoon-style short-films broadcast one after the other but announced in one time slot under a common heading, “Tintin and his best friends” for instance. One could also imagine a programme which is more of a

23) For further legal and practical questions involved see Advocate General Lenz in TV 10, Case C-23/93, [1994] ECR I-4795.

24) Cf. IRIS 2001-9: 7.

25) See: “334. While Article 16 deals with the circumvention of *the Convention’s rules* on advertising and tele-shopping (...)” – is this true?; or: “335. Furthermore, for the application of Article 16 it suffices that the advertising and tele-shopping programmes of a broadcaster established in a transmitting Party are targeted specifically to an audience in another Party (...), while under Article 24bis, the programme service or services concerned must be wholly or principally directed to the territory of a Party other than that where the broadcaster has established itself.” – is this mutually exclusive in its entirety?

magazine-style, comprising quizzes, games, short-films, interviews etc., framed by two presenters. None of the elements would reach 20 minutes. Altogether the scheduled duration could be (a) 35 minutes, or (b) 25 minutes.

- The first question here is what is a “programme”?
- The second question relates to the understanding of the notion of a “children’s programme” and of the meaning of Art. 11 (5) (3) TVwF Directive or Art. 14 (5) (3) ECTT respectively.
- The third question concerns the interpretation of “autonomous parts”.

26. We shall assume that both examples constitute children’s programmes. If one considers each of the different cartoons to be a programme in its own right, advertising will be inserted between the programmes except for the rather unlikely cases where the scheduled duration of one item would be equal or more than 30 minutes. The calculation would have to include the advertising broadcast during its showing. If one does not consider the items as genuine programmes or looks at the case of a magazine-style programme, it has to be clarified whether each short film of the broadcasts constitutes an autonomous part. Provided this is the case, the advertising would again be inserted between the parts as well as during the umbrella programme. If one does consider the different short films shown in one sequence to be one programme item, and provided the duration is above 30 minutes (alt. (a)), the twenty-minute-rule would apply. This means that advertising would be permitted during the programme, however, the frequency may be lower. There are only two instances in which no interruption would be allowed, i.e. where the scheduled duration is less than 30 minutes (alt. (b)), or where one assumes that the (somewhat artificial) integration of different items into one “programme” only serves to circumvent the provision of a minimum duration of 30 minutes. – So, what shall be done?
27. One solution would be to apply the *in dubio pro libertate*-doctrine (ARD/ProSieben) with the argument that the provision is not clear and, therefore, the less restrictive interpretation should prevail. Another solution could consist of making reference to the underlying public policy objectives and to establish that the purpose of paragraph (5) of Article 11 TVwF Directive and 14 ECCT respectively lies in the protection of more vulnerable audiences. Probably, even balancing different policy objectives could become necessary, e.g. less frequent interruptions on the one side *versus* shorter breaks on the other.

Notwithstanding the potential for different interpretations, is there a common understanding at the national level and/or at the national and supra-national level as to how this case should be dealt with? If not, how would such agreements best be reached?

### Example No. 2 – Virtual Advertising

28. The ECJ has held that the TVwF Directive would not be applicable to the hoarding in a stadium. More precisely, it has argued that the transmission of the “advertising messages” contained on such boards would not fulfil the definition of advertising in Art. 1 lit. c TVwF Directive because the broadcaster would have no influence on their positioning and content. This is because the underlying agreements are made between the owner of the stadium/organiser of the event and the media agencies/advertisers/sponsors of the event.
29. Is it possible to draw a conclusion in the opposite direction stating that whenever the broadcaster has control over the inclusion of virtual advertising, and provided the other conditions for advertising are fulfilled, this new form of commercial communication is to be considered television advertising? Presumed the answer is affirmative, which rules apply? In the Interpretative Communication that the Commission issued in 2004, the topic is dealt with under the heading “virtual sponsorship”. The texts of related recitals<sup>26</sup> speak of “virtual advertising” and concludes that such advertising may be legitimate provided it can be considered “sponsorship” according to the meaning of the Directive. Then after the enumeration of several conditions, the recitals state that Arts 1 and 17 TVwF Directive have to be respected. – It is at least confusing that advertising all of a sudden becomes sponsorship. Would it be an over-interpretation if one thinks that the purpose of this “linguistic exercise” is to avoid the application of the rules on advertising (insertion and duration) on new forms of advertising? On the other hand, is there any disadvantage connected with the exclusion of virtual advertising from those rules?

26) See Recitals 66 to 69 of the Communication. Given that the concepts of “advertising” and “sponsorship” as defined in Art. 1 TVwF Directive seem to work on the basis of mutual exclusivity (compare, for instance, Recitals 55 and 56 of the Communication), the Commission’s approach towards „virtual advertising” or „virtual sponsorship” appears not to be entirely clear.

30. The answer to this question, too, will depend on the public policy objectives involved and, probably, their weighing.

### Example No. 3 – Splitting-up of Audiovisual Works into Two Parts

31. In this case, we shall look at the practice of broadcasters to artificially split-up a movie into two separate parts. These parts may be broadcast either on the same day or on different days.

In the first case (i.e. broadcast on the same day), broadcasters insert between the parts other items such as short news flashes, the presentation of insignificantly commented trailers of new cinema films, weather forecasts etc.. Then, they broadcast advertising and other forms of commercial communications. Adjacent to this first advertising block, the same happens to take place, i.e. the introduction of other programme items followed by advertising, before the restart of the (second part of the film). Additional advertisements may even be shown between different short items.

*Prima facie*, the insertion of advertising after the end of the first part and before the next item (news flash), would be in line with Art. 11(1) TVwF Directive. It has even been argued in this context that Art. 11 would not apply to the interruption of one programme by another programme. Nevertheless, some observations should be made:

Firstly, it is difficult to argue that the two parts of a film really are different programmes, because this would necessitate that each part is a genuine programme.

Secondly, it may be said that the film (*programme*) is still ongoing in the meaning of Art. 11 (2) TVwF Directive (*during* programmes). Therefore, the conditions established in Art. 11 (2)-(5) would have to be respected.

It seems clear that one cannot consider the separate parts of the film as autonomous parts – they lack the necessary “partial completeness”, i.e. the quality of being an item which could also stand alone (“autonomous”). Is there still an audiovisual work at hand? Presumably yes, which means that Art. 11 (3) would apply. But what does this mean; in other words, do you calculate the scheduled duration of the entire film or do you assess each part in its own right? What about the twenty-minute-rule? Assuming the programme is still ongoing, any insertion of advertisements following the short items during the (film) break could hardly respect the rule. After all, I have some sympathy for those who, irrespective of the above-mentioned questions, simply state that there is a circumvention at stake.

## Future Changes to the Regulatory Framework – the Proposal for an “AVMSD”

### Preface

32. The Commission proposal of 13 December 2005 will bring about several amendments to the existing provisions on traditional television broadcasting and some new minimum rules that shall also apply to non-linear services, i.e. in essence: VoD. Particularly with regard to the deregulation envisaged for television advertising rules, there has been criticism that this proposal was mainly motivated for reasons of economics, that it was aimed at enabling commercial broadcasters to maintain or even enhance their position on the media (advertising) markets.
33. I will present a number of short examples in order to explore whether or not general interest objectives pertinent to the regulation of audiovisual commercial communications were taken into consideration.

### Examples

#### *Qualitative Standards*

### Example No. 4 – Product Placement

34. Product placement, which runs the risk of being confused with surreptitious advertising, shall be subjected to a number of conditions, though in principle it will be allowed (Art. 3h AVMSD). The relevant requirements of general interest include in particular the protection of consumers (against



being misled about the nature of the content at hand), the safeguarding of editorial independence, and the protection of specific programmes. The first objective is dealt with by requiring that the viewer be informed through a clear identification of the product placement at the start of the programme. The second element is taken into account by establishing a prohibition on influencing the content in such a way as to affect the responsibility and editorial independence of the media service provider. The third aspect is addressed by establishing a ban on certain types/genres of programmes.

#### **Example No. 5 – Advertising Breaks during Programmes**

35. Art. 11 (1), as amended by the AVMSD, would envisage that as a rule advertising and teleshopping spots may be inserted during programmes. Here, the relation of the general rule vs. the exception so far contained in the TVwF Directive would be abolished. In view of the general interest of the “protection of viewers against excessive advertising”, “protection of minors”, and “protection of editorial independence”, this new approach will have to be tested.

#### **Example No. 6 – Interaction with other Legal Instruments**

36. By repealing a number of provisions applying to “linear services” and at the same time transferring the majority of the previous rules to the general part of the new Directive, the related conditions imposed on commercial communications would also become applicable to non-linear services. However, some categories of restrictions on advertising for certain products will not be imposed on non-linear services by the new Directive. Instead, reference has, for example, been made to the Tobacco Advertising Directive, the Code on Human Medicines, the Distance Selling Directive, etc.. If we take into account that these directives only occasionally provide for specific rules on electronic media, how can it be secured that the public policy objectives, which were formerly considered important for the sector of television broadcasting, will also be pursued (where appropriate) with regard to non-linear services?

#### **Example No. 7 – Teleshopping Directed at Minors**

37. Under the current Art. 16 (2) TVwF Directive, teleshopping directed at minors has to adhere to certain content requirements envisaged in Art. 16 (1) TVwF Directive. In addition, teleshopping “shall not exhort minors to contract for the sale or rental of goods and services”. This stipulation will be abolished. Therefore, recourse must be made to the Distance Selling and the Unfair Business Practices Directives<sup>27</sup> in order to establish the future level of protection.

#### *Quantitative Standards*

#### **Example No. 8 – Advertising Breaks during Programmes**

38. It is further proposed that Art. 18(1) TVwF Directive should be reformulated. The new provision would stipulate that short forms of advertising like spots, may last a maximum of 20 per cent of time within one hour. Is this an invitation to broadcast longer advertisements and telepromotions, because the latter would not be subject to the rule? At least one may observe that this is not a very obvious manner to secure the general interest of not confronting the viewer with excessive advertising.

#### **Example No. 9 – Advertising Frequency during Specific Programmes**

39. Art. 11 (2), in its new proposed wording, on the one hand, reduces by 10 minutes the minimum duration that television films and cinematographic works must have before advertising may be inserted. On the other hand, it increases by 5 minutes the necessary length of other programmes like news or children’s programmes. As a consequence of the 35 minutes-rule, will films become shorter or will they be more often cut-down? In the latter case, if we assume that it would not be tolerated to shorten a cinematographic work of 90 minutes by 20 minutes, would this have any impact on the preservation of the audiovisual heritage in view of the danger that “older” (and mostly longer) films then will be shown less frequently?

<sup>27</sup>) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance, OJ L 144 , 4 June 1997 pp 19–27; Directive 2005/29/EC of the European Parliament and of the Council on unfair commercial practices, available at: <http://merlin.obs.coe.int/redirect.php?id=9665>

## **Rules on Regulatory Authorities and Cooperation Requirements – Conclusion?**

40. In addition to the already existing Article 2a and 3a TVwF Directive proceedings, another procedure aimed at clarifying the compatibility of national measures (intended to be taken in accordance with public policy objectives) with EC law is proposed in the new Art. 2 (7)-(10). Is this proliferation of procedures probably too much? What lessons could be learnt from the ECTT with regard to different routes being available for dispute settlement?

Lastly, Art. 23b (2) shall be mentioned. It aims at improving the preconditions for an adequate implementation of the Directive.

What is the conclusion to the observations made? The paper started with the right of freedom of expression and the freedom to provide services, and finished mainly with general interest considerations. It may be held that given the margin of appreciation attributed to the European and national legislators, a redefinition of standards seems possible provided that a certain level of protection is maintained – but is this also desirable in all cases?





# Implementation and Monitoring

## *Upholding Human Rights and Cultural Values<sup>1</sup>*

*Karol Jakubowicz<sup>2</sup>*

### Introduction

There is no need to labour the point that national and international media policy and regulation are always a reflection of the macro-structural circumstances which form the backdrop for particular normative or legislative efforts. As both the European Convention on Transfrontier Television and the “Television without Frontiers” Directive are being revised, insufficient attention is being paid, in my view, to the broader context (going far beyond technological change which is the immediate reason for the revision). They clearly require a change in the approach adopted so far. If we stick to the politically-correct orthodoxy now prevalent in the debate, we will most likely fail to rise to the profound challenges facing the international community today.

As noted by Carlsson,<sup>3</sup> “In the decades immediately following the Second World War, the media debate was mainly a protracted trench battle in the Cold War, where the West rallied around the principle of ‘free flow of information’ and the Eastern bloc reiterated the need for state control (...) the situation changed with the addition of a North-South dimension in the 1970s. Besides the opening of a new front, the focus of the dispute was broadened to include flows of other media products besides news, flows which were assuming increasing importance in international relations”.

International policy-making in the communications field can thus be seen in terms of a conflict between different sets of contrasting values. Winseck and Cuthbert<sup>4</sup> present it as a struggle between “limited” and “communicative” democracy, with the former clearly in the lead. Venturelli<sup>5</sup> perceives it as a conflict between liberal internationalism and cultural and information rights, again with the former much more capable of influencing the actual policies being pursued. Put differently, this could be seen as a “globalization vs. anti-globalization” conflict. In the media sector, we are witness to a “free flow vs. cultural diversity” battle.

These different values are reflected in three broad and distinct basic arguments in the globalisation debate concerning the audiovisual sector and the broader field of cultural industries:

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1) Written in a personal capacity for presentation at a workshop on “Implementing the Regulation of Transfrontier Audiovisual Media Services”, organised by: the European Audiovisual Observatory, the Institute for Information Law (IViR), University of Amsterdam, and the Institute of European Media Law (EMR), Strasbourg, 8 April 2006.

2) Karol Jakubowicz, PhD, chairs the CDMC of the Council of Europe and is Director of the Strategy and Analysis Department of the Polish National Council of Broadcasting (Krajowa Rada Radiofonii i Telewizji – KRRIT).

3) Carlsson, Ulla (2003) The Rise and Fall of NWICO. From a Vision of International Regulation to a Reality of Multilevel Governance. *Nordicom* 24(2), pages 31-67 (31).

4) Winseck, D., and Cuthbert M. (1997). From Communication to Democratic Norms. Reflections on the Normative Dimensions of International Communication Policy. *Gazette*, 59(1), pages 1-20.

5) Venturelli, S. (1998) Cultural Rights and World Trade Agreements in the Information Society. *Gazette* 60(1), pages 47-76.

1. One favours complete liberalisation of trade in audiovisual goods and the inclusion of audiovisual in the services negotiations, in which case the audiovisual sector would not be treated as being any different than trade in any other kind of commodity or service. This position is generally rejected by European countries, which are predominantly (especially members of the European Union where this is the official common policy) in favour of the second argument.
2. According to the second argument the audiovisual field holds a special position because of its cultural value and should therefore be granted a privileged status and an exemption from total liberalisation (which, if applied to the audiovisual sector, would preclude measures in support of audiovisual industries, i.e. subventions). The second argument is linked to the wish to avoid “Americanisation” or “globalisation” of culture and the loss of European national/regional cultural values.
3. There is also a third position which goes beyond the protection of the audiovisual field and centres on the issue of cultural diversity, which is defined to include all forms of artistic and cultural expression including popular culture, traditional knowledge and practices and linguistic diversity. It is reflected in such international documents as the Council of Europe’s “Declaration of the Committee of Ministers on cultural diversity,” the UNESCO’s “Universal Declaration on Cultural Diversity” or “Convention on the protection and promotion of the diversity of cultural expressions”.

A battlefield for these different orientations is provided by international organizations. On the one hand, there is the WTO<sup>6</sup> and the OECD; on the other, primarily UNESCO. The World Summit on the Information Society became yet another arena for this running conflict.<sup>7</sup>

Today, media policy and regulation are powerfully affected, and made much more complex than in the past, by globalisation, the development of new communication technologies, convergence, as well as by an evolution of media policy orientations, reflecting a process of axiological and ideological change. As noted by McQuail,<sup>8</sup> after the “public service” phase of media policy evolution, which reached its apex in the 1970s, internationalization, digitalization and convergence ushered in a “new paradigm” of media policy. It is oriented more towards economic goals than towards social and political welfare, concentrating primarily on such issues as continuation of commercial competition and technological innovation, openness and transparency of ownership and control, maximum access for all and choice for consumers. This phase is marked by deregulation and removal of as many constraints on the operation of the media market as possible. This is accompanied by a revision of communications policy, giving rise to a new regulatory model, based on recognizing limitations of government and policy-making, while competition and self-regulation are promoted. Media quality is assessed less in terms of notions of culture and participation, and more in terms of individual opportunities and needs satisfaction. Economic mechanisms are increasingly relied upon, since they are considered, by proponents of this approach, as “best suited to the combined tasks of creating equal opportunities for actors and allocating scarce (information and communication) resources in a neutral, transparent and non-paternalist manner”.<sup>9</sup>

Another way to describe this change of policy orientation is to say that while in the former phase regulation was perceived to be in the public interest, in the latter public interest is expected to be served by regulation primarily designed to promote private interests, with market forces seen as the best way of serving public purposes. Pauwels and Loisen<sup>10</sup> may therefore be right in pointing out that the new world information order, once being developed within the culturally-oriented UNESCO, may now actually take shape within the economically-oriented WTO.

6) For its impact on audiovisual policy see Pauwels, Caroline & Loisen, Jan (2003) “The WTO and the Audiovisual Sector. Economic Free Trade vs. Cultural Horse Trading?”. *European Journal of Communication*, 18(3), pages 291-313; Freedman, Des (2005) “GATS and the audiovisual sector. An update. *Global Media and Communication*. 1(1), pages 124-128.

7) O Siochru, Sean (2004) “Will the Real WSIS Please Stand Up? The Historic Encounter of the ‘Information Society’ and the ‘Communication Society’”. *Gazette* 66(3-4), pages 203-244; Drossou, Olga, Jensen, Heike (2005) (Eds.) *Visions in Process II. The World Summit on the Information Society. Geneva 2003 – Tunis 2005*. Berlin: Heinrich Böll Foundation; Padovani, Claudia (2005) *Debating communication imbalances from the MacBride Report to the World Summit on the Information Society: an analysis of a changing discourse*. *Global Media and Communication* 1(3), pages 316-338; Padovani, Claudia, Kaarle Nordenstreng (2005) “From NWICO to WSIS: another world information and communication order?” *Global Media and Communication* 1(3), pages 264-272.

8) McQuail, Denis (2000) *McQuail’s Mass Communication Theory*, pages 208-209. London: Sage Publications.

9) Van Cuilenburg, J. (2000). *Media and Open Societies. An Introduction*. In J. van Cuilenburg, and R. van der Wurff (Eds.). *Media and Open Societies. Cultural, Economic and Policy Foundations for Media Openness and Diversity in East and West* (pages 1-10), page 2, Amsterdam: Het Sinhuis.

10) *Ibidem*, page 309.

Why, it could be asked, should we be concerned with all of that when considering revision of the European Convention on Transfrontier Television and the TVwF Directive? The answer to that, I believe, is that the assumptions underlying their adoption in 1989, which were unchanged during their first revision in 1997-1998, now need to be re-examined to see whether they are still valid 25-30 years later. If the world around us has changed, then those assumptions may also require some reorientation.

The 7<sup>th</sup> European Ministerial Conference on Mass Media Policy<sup>11</sup> noted in its *Political Declaration*<sup>12</sup> the profound changes which affect societies today, notably:

- increasing international tensions and a rising tide of terrorism which pose a direct threat to peace and social stability and to the values of democratic societies;
- globalisation of economies and means of communication, migration and increasing interaction between cultures, the individualisation of ways of living and the resulting transformation of social relations;
- technological changes which fundamentally influence patterns of social communication and the media.

The Conference pointed out that these changes may have profound long-term consequences for nation-states and cultural and national identities, social cohesion, the framework of human rights and democracy and international relations.

There are also other indications of historic change, indeed of a real paradigm shift, taking place. As Ryszard Kapuściński,<sup>13</sup> a Polish journalist-turned-writer points out, after the political decolonization of the 1950s, and the (failed) economic decolonization of later years:

“At the end of the 20<sup>th</sup> century we entered the third phase – that of cultural decolonization, as Third World countries rediscover their own identities and roots [...] Over the past 500 years Europe has ruled the world, not only in political and economic terms, but also from a cultural and legal point of view. Almost the entire contemporary world has been shaped by Europe, in a European way. Full decolonization will also entail the dethronement of Europe after half a millennium of its rule in the world”.

The consequences of this state of affairs are plain for all to see. They contribute, first of all, to rising international tensions, the “globalization of radical Islam”,<sup>14</sup> terrorism and the war on terrorism.

At the same time, a resurgence of nationalism is apparent:

“Around the world, the constraints of law and general moral decency that once restrained nationalism seem to have been eroded. In Israel, the public mood has shifted further towards aggressive action; across Europe, advocates of immigration and multiculturalism are under attack; in many former Soviet republics and in eastern Europe, nationalist demagogues hold sway; in Japan, a revived rhetoric of national assertiveness is taking hold”.<sup>15</sup>

It can hardly be an accident, therefore, that John Ralston Saul announced in his book of the same title “The Collapse of Globalism and the Rebirth of Nationalism”.

Let us, for a moment, look at increasingly multicultural societies. Most have pursued assimilationist policies vis-à-vis the immigrant communities, but some sought to find the answer to the presence of large foreign communities with a policy of “multiculturalism”, designed to create a situation in which ethnic communities live peacefully side by side, even celebrating each other’s cultural traditions. The UK and The Netherlands used to be the leaders in this respect.

This vision replaced the older “melting-pot” image of assimilation, in which new arrivals simply vanish into the dominant national culture they find. Instead of the old “melting pot”, there was talk of the “salad bowl” – a healthy mixture of contrasts. In this situation, representatives of ethnic

11) Kyiv, Ukraine, 10-11 March 2005.

12) Available at:

<http://wcd.coe.int/ViewDoc.jsp?id=846101&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

13) Kapuściński, Ryszard (2005) “Detronizacja Europy”. *Gazeta Wyborcza*, 6-7 August, pages 17-18.

14) Ruthven, Malise (2001), *Cultural schizophrenia*. 27 September 2001, available at:

[http://www.opendemocracy.net/conflict-islamicworld/article\\_103.jsp](http://www.opendemocracy.net/conflict-islamicworld/article_103.jsp)

15) Halliday, Fred (2004), *The crisis of universalism: America and radical Islam after 9/11*.

<http://www.opendemocracy.net/debates/article-3-77-2092.jsp>

minorities and persons of colour gained significant status, representation and recognition in journalism, business and the halls of government.

That did not, however, prevent the ghettoization of minority communities arising from lack of equal economic opportunity. What seriously exacerbates the situation is that because of rising tensions and other factors, this “ghettoization” is now turning in the UK, for example, into “voluntary apartheid” and “separate development” of increasingly numerous ethnic groups.<sup>16</sup>

Saul<sup>17</sup> views the kind of change implied by such developments as so profound that, he says, “we are transiting one of those moments that separate more driven or coherent eras. It is like being in a vacuum, except that this is a chaotic vacuum, one filled with dense disorder and contradictory tendencies. Think of it as a storm between two weather fronts. Or think of those moments in fast-moving sports, like soccer or hockey, when a team loses its momentum and there is furious, disordered activity until one side finds the pattern and the energy to give it control”.

Saul is scathing about the “fearful priests” propagating the mythology of globalism and engaged in the systematic repression and disparagement of everything else, or different. For them “constitutional reform to advance or deepen citizenship is worse than unnecessary – it’s little better than a return to ‘class’, trade-union tyranny, even socialism, plus a guaranteed lessening of international competitiveness”.<sup>18</sup>

A very similar verdict to that of Saul as regards the interregnum we find ourselves in has been delivered by Immanuel Wallerstein who has gone so far as to herald “The End of the World as We Know It”, in a 1999 book of the same title. Despite the date when the book was published, Wallerstein does not merely see a *fin de siècle*; rather, he sees a *fin d’époque*: like Kapuściński, he says we are coming to the end of half a millennium when the world-system as we have known it developed and flourished. And because we have lost faith in progress and the future has become unpredictable, we are gripped by hysteria: “Lack of a vision of the future is a source of destructive anxiety ... All around we see rising anger, aggression, divisions and class, ethnic and religious divisions ... Hysterical, irrational reactions – usually exaggerated – are typical manifestations of fear. The world cannot imagine the future, so it is getting hysterical”.<sup>19</sup>

This analysis may seem too simplistic. But without getting into any socio-psychological analysis, we know that when faced with the unpredictable, the uncertain and the uncontrollable, individuals, groups and nations look for what security they can find. One source of security is culture and identity. This may not fully be appreciated by nations whose nationhood and identity never faced the threat of annihilation. The usual division between “big” and “small” countries (which can be noticed so often in the international debate on media and cultural issues) may be interpreted in precisely this light. “Small” countries or nations have a much more acute sense of the fragility and vulnerability of their existence and identity and are therefore more determined to protect them.

As Fukuyama puts it, “culture remains an irreducible component of human societies ... you cannot understand development and politics without a reference to cultural values”. Fukuyama goes on: “The final aspect of the modernisation process concerns the area of culture. Everybody wants economic development, and economic development tends to promote democratic political institutions. But at the end of the modernisation process, nobody wants cultural uniformity; in fact, issues of cultural identity come back with a vengeance ... We live for the particular shared historical traditions, religious values, and other aspects of shared memory that constitutes the common life”.<sup>20</sup>

All this is as good an explanation as any for why the French and the Dutch rejected the EU Constitutional Treaty. There could be any number of explanations, but this shows that if part of the European project has been to transcend the nation-state, then in that respect the project has so far failed. One needs only to follow the fascinating voting patterns during the Eurovision Song Contest to realize this:

16) Goldston, James A. (2005) “Multiculturalism is not the culprit”, International Herald Tribune, 30 August 2005.

17) Saul, John Ralston (2005) Collapse of Globalism and the Reinvention of the World, <http://www.penguin.ca/nf/Book/BookDisplay/0,,9780670063673,00.html?sym=EXC>

18) Cited after Tom Nairn (2006) “Ending the big ‘ism’”, <http://www.opendemocracy.net/debates/article.jsp?id=6&debateId=27&articleId=3220>

19) Wallerstein, Immanuel (2006) “Na rozstaju dziejów” (At the Crossroads of History). In conversation with Jacek Zakowski. *Polityka*, 25 March 2006.

20) Fukuyama, Francis, (2006) After the “end of history”. [http://www.opendemocracy.net/democracy-fukuyama/revisited\\_3496.jsp](http://www.opendemocracy.net/democracy-fukuyama/revisited_3496.jsp)



“The rules of the Eurovision state that participant countries cannot award votes to their own entries. In theory, this principle should allow for the elimination of nationalistic considerations in the voting procedure ... In practice, however, strong and clearly noticeable regional voting collusion has developed over 50 years, reinforcing the view that at least a substantial part of the 400 million Europeans who annually watch the show engage in voting behaviour along the lines of kinship and cultural and political affinity. This is a problem: it not only contradicts the entire principle of equal access and Pan-Europeanism, but it may lead to instances of defensive nationalism ... studies invariably highlight the alignment of voting trends along the following regional “blocks”: the Nordic/Baltic, Slavic, South East European, Western, and Mediterranean, ... The conclusion is that regional European identity is prevalent and overtakes Pan-European collective images.

Another significant factor highlighted by voting research in terms of collective identity is the large amount of public votes awarded by countries with large European immigrant populations to their “home” nations, i.e. Germany to Turkey, the UK to Ireland, Spain to Romania, Switzerland to the Balkan countries, France to Portugal, etc ... Combined with the regional voting, this “homeland” scoring trend becomes a further expression of the current state of European collective identity: an abstract concept easily challenged by alternative competing nationalist and regional identities.”<sup>21</sup>

What is the conclusion to be drawn from all this? Should we go back in time and reinvent borders, or promote nationalism (as if it needed additional promotion)? By no means. It is possible to find a way ahead, but for that purpose we need to renounce the destructive and counterproductive thesis that devotion to national or ethnic identity is a threat to international integration.

Schlesinger<sup>22</sup> notes that collective identities are constituted in action and as continually reconstituted in line with both an internal dynamic and external balances of forces. One should be aware of the temporal dimension through which the complex process of reconstituting traditions and activating collective memories occurs. Also, Ang<sup>23</sup> makes the point that:

“what counts as part of a national identity is often a site of intense struggle between a plurality of cultural groupings and interests inside a nation and therefore national identity is, just like popular identities in Latin America and elsewhere, fundamentally a dynamic, conflictive, unstable and impure phenomenon”.

Thus there is room in individual, collective, national, regional and “European” identities for a variety of elements, representing all these levels of identity formation and articulation. Promotion of “European identity” cannot – and indeed does not need to – obliterate the fundamental core of national or ethnic identity – or that identity will, as Fukuyama puts it, come back with a vengeance. One might say it already has. The challenge therefore is to find the right balance in response to the trends very sketchily presented above. That in turn requires finding a new balance in international media regulation between cultural and economic objectives. Failure to understand and respond to new circumstances, and continued insistence on the promotion of “European” culture and identity at the expense (or so it is perceived in many quarters) of national ones, may exacerbate existing, and growing, problems with European integration instead of alleviating them. A sophisticated and nuanced approach would be – to put it in a very oversimplified way – to find a way to promote patriotism (Saul calls it “rational” or “positive” nationalism) without fomenting “negative” nationalism. The European Convention on Human Rights does not cover cultural rights, but the International Covenant on Economic, Social and Cultural Rights, not to mention UNESCO documents, certainly does, and one can hardly imagine a more basic right than that to one’s identity – however hard it might be to put it into practice.

Participation in a process of integration requires a sense of security in one’s individual, ethnic and national identity, as a foundation for the ability to engage with other peoples and nations on a basis of equality. This could be seen as the background to the debate developing within the TVwF Directive revision process on the question of jurisdiction and the contribution of non-linear services to promoting the production of and access to European works. During an informal Ministerial meeting on

21) Torres, Gonzalo (2006) “Pan-European, Regional and National Identity in the Eurovision Song Contest”. Unpublished manuscript, page 7.

22) Schlesinger, P. (1991) “Media, the Political Order and National Identity”, *Media, Culture and Society* 13(3), pages 297-308.

23) Ang, I. (1990): “Culture and Communication: Towards an Ethnographic Critique of Media Consumption in the Transnational Media System”, *European Journal of Communication*, 5(2-3), pages 237-260 (252).

this topic in Dublin on 3 March 2004, several Member States voiced their concerns regarding their inability to regulate broadcast services that are primarily targeted at their countries (that is to say, broadcast services that primarily target a Member State, but derive from a broadcaster established in another Member State, are not subject to regulation by the target-country). This concern was again raised by Member States during an exchange of views on the review of the Directive held in the Council on 27 May 2004. Then, during the May 2005 Culture Council, Belgium, Austria, the Czech Republic, Estonia, Ireland, Latvia, Lithuania, The Netherlands, Poland, Slovenia and Sweden (supported on the day by Malta and Portugal) placed on the agenda a document calling on Commissioner Reding to specifically address this issue. Following that, in December 2005, a group of 13 Member States sent a follow-up letter to Commissioner Reding, together with a note on “Application of National Rules to Broadcasting Services”, specifying that their core objective was that the “revised Television Without Frontiers Directive should ensure that each ‘broadcasting service’ (television channel) is subject to only one set of national rules and that the national rules applying are those of the Member State that is *primarily targeted* by the broadcasting service. Therefore, the emphasis of the revised Directive must shift from that of applying rules to ‘broadcasters’ and instead focus on applying rules to ‘broadcasting services’”. Those EU Member States would wish that more respect be accorded to their own policy, and that they would not have to renounce any ability to shape the television offer available to their citizens.

It will be interesting to see how this debate is resolved.

The 7<sup>th</sup> European Ministerial Conference on Mass Media Policy, noting the profound changes which affect societies today, was concerned to promote, *inter alia* by means of audiovisual and media policies, the positive impact which some of these changes may have, through means of communication, on the progress of European societies and the personal development of individuals living on their territory. The concern was expressed, notably as regards the protection and promotion of human rights, the free circulation of information, ideas and opinions, pluralism and diversity of information, access to knowledge and culture, as well as mutual understanding, which should be promoted by intercultural and inter-religious dialogue.

In Resolution No. 2 “Cultural diversity and media pluralism in times of globalization”,<sup>24</sup> the conference agreed “to recognise, preserve and promote cultural diversity as a common heritage of humanity and stressing the importance of cultural diversity for the realisation of fundamental rights and freedoms enshrined in the European Convention on Human Rights”.

Let us hope that the revision of the European Convention on Transfrontier Television will serve to promote these goals.

## 1. The Convention and the Directive

The Council of Europe’s European Convention on Transfrontier Television and the European Communities’ TVwF Directive represent an effort to create and maintain a “European audiovisual area”. They also constitute an interesting study in inter-organizational cooperation (and rivalry).

As Bernd Möwes<sup>25</sup> (2000) has written, the Council of Europe tried in the 1980s to bring about a very rapid voluntary harmonisation of the various European legal systems with a range of recommendations on television advertising, the use of satellite capacities and copyright questions. This approach soon proved inadequate, however. On the initiative of the First European Ministerial Conference on Mass Media Policy, held in Vienna in 1986, the Council of Europe drew up the European Convention on Transfrontier Television (1989), a binding instrument under international law.

Drawing up this Convention, which to some extent broke new ground, legally-speaking, was extremely difficult initially and could only be completed following two Ministerial Conferences (Vienna in April 1988 and Stockholm in November 1988). These difficulties were largely due to the fact that the European Commission simultaneously presented a proposal for a Directive to co-ordinate certain broadcasting laws on television activities in the Member States.

24) “Cultural diversity and media pluralism in times of globalization”, 10-11 Mars 2005, available at [http://www.coe.int/t/e/human\\_rights/media/4\\_documentary\\_resources/MCM\(2005\)005\\_en.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/4_documentary_resources/MCM(2005)005_en.asp#TopOfPage)  
 25) Möwes, Bernd (2000) “Historical document on the activities and achievements of the CDMM”. MCM (2000) 3.

The two legal instruments displayed clear differences in their fundamental philosophy. In one, emphasis was placed on the social, cultural and political function of broadcasting, while the other was geared more to the economic needs of the market, though some of those provisions also had clear cultural implications.

Nevertheless, there were and still are clear parallels and similarities between the two instruments. The Convention is intended to foster freedom of information and aims to minimise barriers to the transmission of television programmes in the States Parties. It lays down minimum rules for the protection of minors, advertising, sponsorship and the right of reply, strives to promote the production and transmission of programmes with European content and establishes essential programming principles. Furthermore, it fixes criteria for establishing the legal responsibility of the States Parties for television programmes.

The tables were turned when the Directive was amended in 1997. The Standing Committee on Transfrontier Television waited for that process to be over before it began work on amending the Convention. The Protocol amending the European Convention on Transfrontier Television (ECTT) was adopted in 1998. As a result, close alignment between the two instruments was maintained.

The current process of revising both instruments represents a new twist. Both organizations launched a process of review of those instruments practically simultaneously. The Standing Committee launched an extensive review of the Convention in order to contribute to the European debate on the impact of technological and market changes in the broadcasting sector on the regulation of broadcasting, and, if necessary, to develop specific proposals for revising the ECTT. At times the plot thickened, but there has also been considerable interchange of ideas between the Council of Europe and the EU along the way, with both organizations arriving at similar conclusions as to how to handle the process of revision.

In July 2003, the Standing Committee (SC) adopted a formal work plan for the review of the ECTT. The plan covered four groups of questions concerning:

- a. *the right to information and cultural objectives*: access to major events, short reports, cultural objectives, media pluralism, right of reply (Articles 8, 9, 9bis, 10 and 10bis),
- b. *the protection of minors and respect for human dignity* (Article 7),
- c. *advertising, teleshopping and sponsorship*, including general rules on advertising and sponsorship, new advertising techniques and advertising of “harmful” products (Articles 11 to 18ter),
- d. *the scope of the Convention, jurisdiction, freedom of reception and retransmission and the duties of the Parties of the Convention* (Articles 3, 4, 5 and 6).

It was also decided that work on each group of questions should be based on:

- a. *the background paper* prepared by the Secretariat recalling the work carried out so far on each question either by the SC or by the Steering Committee on the Mass Media (CDMM) and its sub-groups, and the results of this work (Recommendations, Opinions, Declarations, etc.),
- b. *a reflection paper* to be prepared by one or two delegations on each of the above questions (these papers were prepared by, respectively: a. – France; b. Germany; c. Austria; d. Poland);
- c. *occasional presentations* by representatives of the industry, depending on the needs expressed by the Standing Committee.

The objective of this procedure was, as already noted, to contribute to the European debate on the impact of technological and market changes in the broadcasting sector on the regulation of broadcasting, and, if necessary, to develop specific proposals for revising the ECTT.

While this procedure was in full swing, a new set of dilemmas needed to be resolved by the Standing Committee and indeed the Steering Committee on the Media and New Communication Services (CDMC, which has replaced the CDMM) as a whole. The reason for this was a suggestion made by the European Commission that with the enlargement of the European Union, the added value of the Convention could no longer be seen primarily in a larger geographical scope of the Convention compared to the Directive. Therefore, it was argued, added value could be achieved if the Convention would address issues that are in the remit of the Council of Europe, but are not regulated by the European Union. The core competencies of the Council of Europe relate to notions like “democracy” “human rights” and “rule of law”.

It was suggested, therefore, that a number of issues consistent with those competencies could be identified for future audiovisual regulation:

- The role of public service broadcasting for a democratic society
- Media pluralism and television
- The role of independent regulatory authorities.

The Standing Committee and the CDMC were thus faced with the following theoretical options:

1. developing an *entirely new Convention*, covering human rights and freedom of expression issues;
2. *modernising the ECTT to maintain close alignment with the new Directive*;
3. *modernising the ECTT* in close alignment with the new TVwF Directive, and possibly *adding some new issues*;
4. *terminating the ECTT as no longer needed*, given that many States Parties to the Convention have acceded to the European Union.

There was no support for **option 4**. Scrapping the Convention would leave a huge hole in the body of standards developed by the Council of Europe. **Option 2** was not seen as sufficient. **Option 1** was given serious consideration, but – for reasons explained below – could not be accepted. What remained, therefore, was **option 3**.

Concerning **option 1**, it had, to some extent, already been considered and, to all intents and purposes, rejected in October 2004. That was when the Standing Committee considered proposals submitted by the Secretariat for new human rights-related issues to be introduced into the Convention. Those were:

- A ban on discrimination on the basis of race, sex and nationality;
- A ban on introducing linguistic provisions (such as a ban on rebroadcasting of programme services in foreign languages) curtailing the freedom of transfrontier television;
- A ban on advertising, teleshopping and sponsoring of particular goods or services (lotteries, weapons, sexual services);
- A ban on political advertising
- Media pluralism;
- Issues related to the Convention itself:
  - Independence of regulatory authorities;
  - Enhancing the stature and powers of the Standing Committee;
  - Introducing monitoring of the observance of the Convention.

However, those proposals were not accepted. Some members of the Standing Committee felt that such new provisions were not needed. Others pointed out that they touched on issues (such as political advertising, media pluralism and the status of regulatory authorities) which are best regulated at national, rather than international, level.

An additional technical difficulty was that in order to avoid placing EU Member States that are at the same time States Parties to the Convention under conflicting regulatory regimes, the new Convention would need to avoid regulating *any* issues covered by EC legislation.

Thus, when considering the outside suggestion that some of the very same issues form the basis of a new Convention, the conclusion was that the three human-rights related issues listed above are kept under active review by the CDMC and its subordinate bodies and are already covered by existing Council of Europe non-binding legal instruments. The standards set out in those instruments continue to be under review and could well be further developed in the future. The general feeling was that, having regard to past discussions, it would, as in other international organizations, be difficult to obtain support among Council of Europe Member States for a binding instrument addressing those issues.

Moreover, it was noted that the revised ECTT had been ratified by 31 countries, 18 of which are European Union Member States, 2 belong to the European Economic Area, and one that is not a Member State of the Council of Europe. The states in respect of which the ECTT *alone* applies are Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Moldova, Romania, San Marino, Switzerland, “the former Yugoslav Republic of Macedonia” and Turkey, as well as one Council of Europe observer state, The Holy See. As regards the other States Parties to the ECTT, the Convention only applies in respect of their relations with States not bound by the TVwF Directive.

Both the Standing Committee and the CDMC came to the conclusion that the 11 countries to which the ECTT alone applies *do* provide significant added value in terms of the European audiovisual area and should not be disregarded in decisions concerning the future of the Convention. The added value of the Convention vis-à-vis the Directive *does* continue to reside in its territorial scope. The fact that

the ECTT has extended the European audiovisual area to countries where the TVwF Directive does not apply was seen as an achievement to build upon by extending the Convention to still more countries – a goal to be pursued with determination, also with regard to non-Member States, in particular those in the Mediterranean area.

Thus, as already stated, the decision of the Standing Committee and the CDMC was in favour of **option 3**: when revised, the Convention should be brought into line with the new EC Directive on audiovisual media services currently under preparation (the former “Television without Frontiers” Directive), while leaving open the possibility of also including certain questions falling within the Council of Europe human rights remit.

The intention is to launch and complete the process of revising the Convention as expeditiously as possible, so as to reduce the time-lag between the adoption of the new Directive and the new Convention. In this way, EU Member States which are also States Parties to the Convention will not face the difficulty of operating under two legal regimes. In any case, however, any difficulties in this regard will be eased by Article 27 (*Other international agreements or arrangements*) which reads: “In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned”. Of course, until the Convention is amended, it will apply in relations between EU Member States and Parties to the Convention that are outside the EU.

## 2. Could Scope be the Area of Difference between the Directive and the Convention?

The question of “scope” – understood in terms of the services that would be covered by the revised instruments – has been the major challenge in the review exercise in the two organizations. For a time, it seemed as if this would also be the main distinction between the two instruments, given that the new Directive was meant to regulate “audiovisual content services”, while work on reviewing the Convention proceeded from the assumption that it would continue to regulate *media content*, not just any content.

The danger of potential significant divergence between the two instruments has been eliminated, however. The draft new Directive is, after all, to be called the Audiovisual Media Services Directive. Work on both instruments is likely to face the same problem of clearly defining non-linear services and delimiting them in such a way that regulation will pertain to media services, not to all imaginable non-linear audiovisual services.

Let us remember, however, that option 3 calls for “modernising the ECTT in close alignment with the new TVwF Directive, and *possibly adding some new issues*”. These new issues, if they are indeed added, could be the difference between the new Convention and the new Directive. If the work of the Standing Committee is any guide in this regard, then it must be noted that after a series of technical opinions regarding the interpretation of particular provisions, its latest two documents,<sup>26</sup> the 2002 “Statement on human dignity and the fundamental rights of others” and the 2004 “Recommendation on the Protection of Minors from Pornographic Programmes” could be seen as indicating a growing concern with developments in television programming.

However, this does not fundamentally set the Council of Europe apart from the EU, where there is also growing concern in this area, as evidenced by the Commission’s proposal for a recommendation on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and online information services industry.<sup>27</sup>

Perhaps, then, the area where the Convention can stand on its own is its provisions designed to pursue cultural objectives?

Interestingly, the legal difference between the Directive and the Convention makes that unlikely. Let us remember, after all, that the Convention regulates “transfrontier” television, whereas the Directive must be transposed into national law and regulate “all” television. Strictly speaking, therefore, States Parties to the Convention could theoretically have two legal regimes: one for

26) “Statement (2002)1 on Human Dignity and the Fundamental Rights of Others”, 12-13 September 2002; “Recommendation on the Protection of Minors from Pornographic Programmes”, 11-12 October 2004; both available at [http://www.coe.int/t/e/human\\_rights/media/2\\_transfrontier\\_television/TTT\(2006\)012\\_en.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/2_transfrontier_television/TTT(2006)012_en.asp#TopOfPage).

27) COM 2004/341 and COM 2006/31.

“national” television services and the other for “transfrontier” television services. In reality, of course, this is not the case. Still, there are limits to using a convention regulating transfrontier television for the purpose of advancing the resolution of the cultural issues outlined above. In reality, the Directive would, legally speaking, be better suited to this, given its subsequent application in national law.

Nevertheless, a range of ideas have been advanced on how to enhance the cultural impact of the Convention.

This concerns the cultural obligations laid down in Article 10 as well as the question of jurisdiction.

Concerning Article 10, these ideas concern *inter alia*:

#### **Article 10 paragraph 1**

- Redefining the works taken into account for calculation of the transmission time quotas, so as to include only stock productions and exclude flow productions;
- Introducing a quota of prime time transmission of European works;
- Extending obligations regarding support for production to the new services, particularly video-on-demand services?

#### **Article 10 paragraph 3**

- Introduction of an independent production quota.

Other ideas cover measures conducive to the circulation of works in Europe and potentially incentives to encourage co-productions, as well as the introduction of monitoring of the application of Article 10 of the ECTT. Yet another idea concerns the potential extension of Article 10*bis*, so as to distinguish clearly between the question of diversity of content and that of media concentration, each concerned with the very general concept of media pluralism?

Another area where new ideas have been proposed concerns jurisdiction, the general objective being to promote ways of preventing abuse of rights granted by the Convention in the form of jurisdiction-shopping, and greater respect for stricter or more detailed provisions introduced by States Parties to the Convention.

### **3. Conclusion**

We are still at the beginning of the process of revising the TVwF Directive and the ECTT. Predicting the final outcome is far from easy. So many issues remain to be resolved in the area of material scope that efforts to think outside the box and move into uncharted areas may be stymied by the sheer magnitude of fundamental problems to be solved. Nevertheless, there is already a clear determination to go beyond the politically correct in the area of jurisdiction. Cultural objectives are another area where innovative solutions are needed.

Unless we find an answer to these historic challenges, they will overtake us and change our lives in unexpected, and not necessarily propitious, ways. In addition to economic strategy, Europe also needs a cultural and societal strategy to cope with momentous change.

It has been argued here that revision of the Convention offers limited scope for this. If the Council of Europe really wants to tackle these cultural issues, it will need to develop its own version of the Convention on the protection and promotion of diversity of cultural expressions, laying down operational and practical ways of putting at least some of its principles into practice.

Will we, however, have the courage to boldly go where no-one has gone before?







# Workshop Report

Tarlach McGonagle<sup>1</sup>

## Session I

### Introduction

The histories of the two main instruments regulating the European audiovisual sector – the ECTT and the TVwF Directive – are intertwined and to a large extent, so too are their destinies. Different ideological, institutional and general political dynamics have shaped the drafting and amendment processes in the past and will continue to do so in the future. Pierre Goerens' paper, "Interplay Between Relevant European Legal Instruments: ECTT and TVwF Directive – Competition or Complementarity?", documents the genesis of both instruments; charts their evolution throughout the 1990s, and offers a prognosis for their likely future development, as triggered by the proposed revision of the TVwF Directive. The discussion that followed this paper drew on the paper's various focuses and also overlapped to some extent with the discussion that followed Karol Jakubowicz's paper, "Implementation and Monitoring: Upholding Human Rights and Cultural Values" (Session IV, *infra*).

### 1. Relationship between ECTT and TVwF Directive

In the heat of comparative discussion, the differences between the ECTT and the TVwF Directive often appear more salient than their similarities. Nevertheless, this should not be allowed to unduly diminish the sense of overall congruence between their broader objectives. Whereas the TVwF Directive is primarily grounded in economic rationales that are central to the advancement of the EU's Internal Market, the ECTT has traditionally been associated with the defining human rights and cultural objectives of the Council of Europe. But to characterise the two instruments as being exclusively concerned with their respective core objectives would be remiss; in reality, both instruments are considerably more complex and incorporate certain objectives and perspectives that might be more readily associated with the other instrument.<sup>2</sup> They defy neat and simplistic categorisation. Against this background, it could be argued that any approach seeking to bring Internal Market objectives within the exclusive purview of the TVwF Directive and the goal of safeguarding human rights and cultural values within that of the ECTT hardly seems practicable. The two instruments have a certain sense of shared purpose.

In terms of the likely future interplay between the two instruments, great emphasis ought to be placed on the relevance of Article 27, ECTT – the so-called "disconnecting clause" of the Convention. Article 27 is formally entitled "Other international agreements or arrangements" and its first paragraph is of particular importance in this connection. It reads:

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2) For example, Article 3a of the existing TVwF Directive (events of major importance for society) and Article 3b of the proposed new Directive (right to short reporting) are essentially about the right to information and would be difficult to justify purely in terms of Internal Market rationales.

In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

Further elucidation of this paragraph is provided by the Explanatory Report to the ECTT, which states that since the paragraph “governs exclusively the internal relations between the Parties members of the European Community”, it is “without prejudice to the application of this Convention between those Parties and Parties which are not members of the European Community.”<sup>3</sup> It would therefore sanction EU Member States which are also parties to the ECTT to apply any new or amended rules introduced by the pending revision of the TVwF Directive in their relations with other States that are similarly bound by the Directive. Even if any new rules were to prove stricter than those currently contained in the ECTT, EU Member States would not be in breach of their obligations under the ECTT if they were to apply the new rules along the lines envisaged by Article 27, ECTT.

It is worth noting that three Council of Europe Conventions that were adopted and opened for signature by States in 2005<sup>4</sup> employ a newly-formulated disconnecting clause which sets out *de minimis* rules for each convention, while leaving the door open for the application of more stringent EU regulations in and among States Parties to those conventions which are also EU Member States. The clause, which is worded identically in each of the three conventions,<sup>5</sup> reads:

Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

A cautionary chord could perhaps usefully be struck concerning the further development of the ECTT in respect of its provisions that are not aligned with equivalent provisions of the TVwF Directive. The non-alignment of provisions dealing with identical or contiguous notions could lead to definitional divergence and conceptual and practical confusion across the European audiovisual area. Such a situation could arise, for example, if EU Member States were to apply the rules elaborated in the proposed new Directive in their relations with each other, but the rules set out in the ECTT in their relations with non-EU Member States. Furthermore, the ECTT rules would continue to be applied between States Parties to the ECTT which are not EU Member States.

The differences between the ECTT and the existing Directive, such as they are, have yet to give rise to serious interpretive discrepancies in practice, insofar as their respective “softer” provisions are concerned. The same claim can hardly be made in respect of their harder, more concrete provisions, including those setting out the rules governing advertising in its various forms. It is in respect of such provisions that the case for full alignment of the two instruments is most persuasive, due to the real economic repercussions that such rules have for broadcasters. Furthermore, in practice, it can prove very difficult for Member States to withstand economic pressure from broadcasters not to liberalise advertising rules actually decided upon in Brussels. From the perspective of market players, this aspect of the relationship between the two instruments and the financial implications that divergence between them may entail (especially if that divergence were to centre on the liberalisation of certain advertising rules, as is the case with the proposed new Directive) is crucial.

Currently, three EU Member States have not even signed the ECTT<sup>6</sup> and four more EU Member States have signed it, but not yet ratified it.<sup>7</sup> This state of affairs begs a number of questions. Why have the States concerned been reluctant to sign and/or ratify the ECTT? Given the broad alignment between the ECTT and the TVwF Directive, reluctance to accede to the ECTT seems somewhat anomalous. Would it be helpful in terms of regulatory consistency if those EU Member States and the EU itself were to ratify the ECTT? Would the EU have any vested interest in encouraging or even pressurising those States

3) Explanatory Report to the European Convention on Transfrontier Television (ETS No. 132) as amended by the provisions of the Protocol (ETS No. 171) which entered into force on 1 March 2002, para. 362.

4) Council of Europe Convention on the Prevention of Terrorism, CETS No. 196, 16 May 2005; Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005, and Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS No. 198, 16 May 2005.

5) Article 26(3), Convention on the Prevention of Terrorism; Article 40(3), Convention on Action against Trafficking in Human Beings; Article 52(3), Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism.

6) Belgium, Denmark and Ireland.

7) Greece, Luxembourg, the Netherlands and Sweden.

to sign and/or ratify the ECTT? What added value would it have for those States if they were to become fully-fledged Parties to the ECTT?

First of all, from the point of view of EU law, there is no legal impediment to the aforementioned Member States signing and/or ratifying the ECTT. The disconnecting clause provides sufficient safeguards that a State would continue to comply with its obligations under EU law in general and under the TVwF Directive in particular, even after becoming a Party to the ECTT.<sup>8</sup> Whether the EU could and would become a Party to the ECTT is a much less straightforward consideration as it would implicate the EU's external competences, the principle of Member State subsidiarity, etc.. One legal complication that would be likely to arise if the EU were to become a Party to the ECTT is that any revision of the Directive would have to be preceded by a revision of the ECTT. This is because Member States which are Parties to the ECTT would, in their role as Member States, first have to give the European Commission a mandate to negotiate the revision of the ECTT in order for it to be able to make a proposal for the revision of the Directive. Although the EU is generally supportive of the *de facto* role performed by the ECTT in expanding the territorial scope of the European audiovisual area, the existence of the disconnecting clause means that there would be little reason for it to pressurise its Members to accede to the ECTT where they have not already done so. By virtue of the disconnecting clause, any additional consequences of accession to the ECTT would have negligible (if any) impact on relations with other Member States.

## 2. Alignment of ECTT with TVwF Directive

If, as seems likely, the ECTT will ultimately be aligned with the proposed new Directive, there will be an inevitable gap between the entry into force of the new Directive and the ratification of the amended Convention by all Member States concerned. Once it has indeed been decided that alignment is the route to follow, a key objective will be to ensure that the lapse of time between the (processes leading to the) entry into force of both instruments is kept to a minimum. Logically, before the ECTT could possibly be aligned with the new Directive, the extent to which – and how – the new Directive would differ from its forerunner, would have to be patently clear. A lengthy political process lies ahead before the Directive can be adopted and lobbying campaigns from various interested parties are sure to straddle that process. Thus, until the details of the new Directive are set in stone, there seems little point in initiating any amendment process for the ECTT. To do so would be to aim at a moving target.

The interim period between the point at which the new Directive would be transposed into national law and the entry into force of the amended/aligned ECTT could be characterised by a degree of legal uncertainty. Depending on the time-span involved, it may not be necessary to repeal existing national legislation. If the situation persists for too long, then EU Member States bound by the new Directive may start to liberalise their advertising rules and hope the non-EU States Parties to the ECTT do not raise any objections. Such an interim period of legal uncertainty and reliance on political or informal solutions are not without precedent in the European audiovisual sector: in 1997-98, Germany and Switzerland found pragmatic ways to deal with relevant differences, which basically involved delaying the transposition of the Directive into national law for as long as possible. Such stalling tactics may prove more difficult to implement this time round due to the high level of pressure that is likely to be brought to bear by the industry in order to ensure that any financial benefits resulting from certain liberalised advertising rules will materialise sooner rather than later. In the end, this boils down to a political issue; it becomes a question of negotiating and compromising until a political solution is found.

The manner in which the ECTT would be aligned with the TVwF Directive could be largely determinative of the duration of the aforementioned interim period. Whereas an Amending Protocol would ordinarily require all States Parties to the original Convention to ratify it before it could enter into force, an Additional Protocol would only have to be ratified by a stipulated number of States. However, the mechanics of an Amending Protocol can also be less restrictive than as described above, as was demonstrated by the Protocol Amending the European Convention on Transfrontier Television.<sup>9</sup> Article 35 of that Protocol was a so-called tacit consent clause, designed to speed up the entry into force of the Amended Convention. Article 35 reads:

1. This Protocol shall enter into force on the first day of the month following the date on which the last of the Parties to the Convention has deposited its instrument of acceptance with the Secretary General of the Council of Europe.

8) Moreover, this was the formal position taken by the European Commission in response to a question from the Luxembourg delegation as to whether that country's possible accession to the ECTT would be in conflict with its obligations under EC law.

9) ETS No. 171, 1998 (entry into force: 2002).

2. However, this Protocol shall enter into force following the expiry of a period of two years after the date on which it has been opened to acceptance, unless a Party to the Convention has notified the Secretary General of the Council of Europe of an objection to its entry into force. The right to make an objection shall be reserved to those States or the European Community which expressed their consent to be bound by the Convention prior to the expiry of a period of three months after the opening for acceptance of this Protocol.
3. Should such an objection be notified, the Protocol shall enter into force on the first day of the month following the date on which the Party to the Convention which has notified the objection has deposited its instrument of acceptance with the Secretary General of the Council of Europe.
4. A Party to the Convention may, at any time, declare that it will apply the Protocol on a provisional basis.

Article 35 therefore sets out the presumption that Parties to the original Convention accept the terms of the Amending Protocol unless they expressly opt out of it. As such, the effectiveness of the tacit consent mechanism depends on the premise that no State will in fact notify an objection to its entry into force. Indeed, an objection by France delayed the entry into force of the Amending Protocol until 1 March 2002.

### 3. Added Value/Complementarity of the ECTT

It has already been pointed out that the ECTT and the TVwF Directive are broadly similar in character, but that each of them is distinctive in several important respects. Reference is frequently made to the heightened attention paid to human rights and cultural values in the ECTT. As the area of geographical application of the ECTT is wider than that of the TVwF Directive, its normative impact is also potentially wider. It serves to enlarge the European audiovisual public sphere. The added value of the ECTT, especially as regards the promotion of democratic politics, public discourse, media pluralism and cultural values, can therefore be felt beyond the borders of the EU (within which the TVwF Directive is the primary regulatory text for the audiovisual sector). States which aspire to EU membership – both in the past and in present times – tend to find the incorporation of the EU's *acquis* pertaining to the audiovisual sector a smoother process when they are already Parties to the ECTT. In that sense, adherence to the norms of the ECTT can play a preparatory or familiarising role for States seeking to join the EU. This represents a clear dove-tailing of the ECTT's added democratic value and its added geographical value. If it is decided that the ECTT should more or less follow the proposed revision of the TVwF Directive, then the latter should reflect more clearly that it is not simply an Internal Market instrument, but should more explicitly take broader public interests into account. Whether the standard-setting role played by the ECTT in the past will be affected by its alignment with the TVwF Directive will ultimately depend on the nature of the definitive changes to the Directive as well as the extent of the alignment opted for.

In the past, repeated attempts from within the Council of Europe to entrench a status of complementarity for the ECTT *vis-à-vis* the TVwF Directive, by playing to the Council of Europe's own strengths (e.g. media pluralism, the remit of public service broadcasting and the role of independent regulatory authorities),<sup>10</sup> never came to fruition. As a result of those previous experiences and the reluctance of States to cede any more of their national sovereignty to international (law-making) bodies, the ambition of the Council of Europe has been somewhat tempered this time round, as is explained in greater detail in Karol Jakubowicz's paper, *supra*.

Differing opinions exist on the extent to which the proposed new Directive is deregulatory in its overall character. Some views emphasise the proposed thrust to liberalise advertising regulations, which will have trickle-down effects at the national level, at least in respect of EU Member States, but also in all States Parties to the ECTT, if the Convention ultimately follows the same route as the new Directive. However, other views emphasise instead the introduction of additional obligations for a whole basic tier and of qualitative regulations that seek to reinforce consumer protection. Such views resist the qualification of the new Directive as "deregulatory" on the grounds that it glosses over the existence of discrete regulatory tendencies, even within the provisions dealing with advertising.

10) One suggested way of doing so would have been to upgrade relevant thematic standards already set out in Recommendations by the Committee of Ministers by incorporating them in a Convention.

## Session II

### Introduction

The general theme of this workshop, “Implementing the Regulation of Transfrontier Audiovisual Media Services”, as well as the specific focus of the paper by Joan Botella i Corral and Emmanuelle Machet,<sup>11</sup> invite further reflection on the important role of relevant (national) regulatory authorities in the implementation of European norms. As is borne out by their paper, cooperation between regulatory authorities is crucial to ensuring the effective and consistent application of European norms, without riding roughshod over sensitivities related to *couleur locale*. Such cooperation can be multi- or bi-lateral; systemic or *ad hoc*; institutionalised at the supra-national or national levels; legally- or otherwise-based, or even lacking formal basis at all. In short, numerous constellations of cooperation are possible and the principle of “horses for courses” applies: different forms of interactive strategies will pursue different aims, boast different strengths and register different successes.

### 1. Informal Practices

It is useful to enumerate a few of the real-life examples of such regulatory cooperation that tended to recur during the workshop discussions (without necessarily exhaustively evaluating their competing merits):

- Multilateral meetings in relevant international fora
- Exchanges of staff among regulatory authorities for varying lengths of time
- Internationalisation of in-house personnel
- Bilateral discussions between regulatory authorities (especially on specific themes of mutual interest)

The primary aim of these measures is to exchange experiences. Typically, this will involve sharing information, best practices, trouble-shooting techniques, etc. However, the exchange of experience also entails the exchange of understandings and points of view about various legal concepts and, more specifically, in the case of the TVwF Directive, about certain legal concepts that should be coordinated or even harmonised. In the absence of full harmonisation of legal concepts under the TVwF Directive, there is some room for national interpretations of various legal concepts to vie with one another<sup>12</sup> – but only to the extent that no authoritative interpretation of relevant terms has already been provided, e.g. by the Court of Justice of the European Communities (ECJ).

Although recourse to the ECJ is the ultimate step for seeking authoritative interpretations of terms and concepts used in the TVwF Directive, the existence and importance of other (official) interpretations should not be overlooked. Such interpretations are provided by the European Commission and by the Contact Committee set up under Article 23a, TVwF Directive (see further, *infra*). For instance, the Commission’s interpretative communication on advertising under the TVwF Directive recognises that in the absence of relevant case law, some provisions of the Directive concerning advertising “are open to interpretation”.<sup>13</sup> It therefore seeks to “increase legal certainty for economic operators, Member States and consumers”.<sup>14</sup> In practice, the interpretative communication is also self-binding for the Commission on how it exercises its discretionary power in starting infringement proceedings. To take another example (concerning events of major importance for society): the *Infront* case confirms that “under Article 3a(2) of the directive the Commission has the power to make a decision” that “produces definitive legal effects, notwithstanding the fact that Article 3a of Directive 89/552 does not expressly refer to the adoption by the Commission of a ‘decision’”.<sup>15</sup> This is an important finding for the principle of mutual recognition that underlies Article 3a, TVwF Directive. The final example in this connection concerns the Contact Committee, which counts among its tasks

11) “The Co-ordination and Co-operation between Regulatory Authorities in the Field of Broadcasting”, *supra*.

12) One suggested example might be the definition of minors, which tends to vary across States.

13) Commission interpretative communication on certain aspects of the provisions on televised advertising in the “Television without frontiers’ Directive (2004/C 102/02), 28 April 2004, para. 6. For a summary of the Communication, see: Sabina Gorini, “European Commission: Communication to Clarify Interpretation of Advertising Provisions in Television Without Frontiers Directive”, IRIS 2004-6: 4, available at <http://merlin.obs.coe.int/iris/2004/6/article5.en.html>

14) Commission interpretative communication on certain aspects of the provisions on televised advertising in the “Television without frontiers’ Directive, *op. cit.*, para. 6.

15) *Infront WM AG v. Commission of the European Communities*, Judgment of the Court of First Instance, of 15 December 2005, Case T-33/01, para. 107.

delivery of “own-initiative opinions or opinions requested by the Commission on the application by the Member States of the provisions of this Directive”.<sup>16</sup> As opinions, though, they lack binding legal effects.

National regulatory authorities have to operate within obvious constraints which often condition their approach to certain legal concepts. Examples of such strictures would include their specific mandates, constitutive features (e.g. size, power, composition) and their national legal and political systems. Nevertheless, there should be some scope for the approximation of shared understandings of certain material concepts of law. The ability to discuss common problems in a much more common language is in itself a step forward. In Germany, there has been a growing sense that discursive initiatives between the regulatory authorities in the various *Länder* are not always sufficient for the successful resolution of certain regulatory or interpretative problems in a consistent manner. This has led to a development whereby several thematic areas are now being subjected to binding decisions by a centralised organ. It was speculated that such a centripetal tendency could perhaps prove instructive for the European level as well.

## 2. Formal Structures

The above-mentioned measures, which are largely informal or *ad hoc* in nature, are complementary to the better-known structures that already exist at European level for the discussion of regulatory matters in the audiovisual sector. A flavour of the work conducted by the European Platform of Regulatory Authorities (EPRA) is provided by Botella i Coral and Machet’s paper. One of the factors that has contributed to the relative success of EPRA to date has been the limitation of its membership to representatives of regulatory authorities: this makes for frank discussions among homologous parties. Also of benefit to the discussions that take place within EPRA is the fact that its membership is not restricted to States that are bound by the ECTT and the TVwF Directive. For example, Israel is a member of EPRA, and its regulatory framework and practices provide an additional point of comparison for EPRA members that are governed by the dominant European regulatory regimes. Alongside EPRA, discussion fora pertaining specifically to the ECTT and the TVwF Directive also exist.

As regards the ECTT, the Standing Committee is the specifically instituted forum for discussion on matters relating to the Convention. It was established under Article 20, ECTT and its functions are set out in Article 21, ECTT. According to Article 20(2), “Each Party may be represented on the Standing Committee by one or more delegates”; however, each delegation has only one vote.

Within the framework of the TVwF Directive, the Contact Committee – established under the aegis of the Commission pursuant to Article 23a – is the primary forum for discussion between “representatives of the competent authorities of the Member States” and the Commission on matters pertaining to the Directive and the application thereof. In practice, the composition of the Contact Committee is mixed: some Member States are represented by policy-makers, whereas others are represented by governmental officials or regulatory authority personnel.

In 2003, a High Level Group of Regulatory Authorities in the Field of Broadcasting was instated at the behest of Commissioner Reding and it has been convening at annual intervals ever since.<sup>17</sup> Its meetings are attended by representatives of the independent regulatory authorities of Member States, candidate countries and EEA countries. In practice, its usefulness is primarily as a forum for discussion between the European Commission and regulatory authorities, as opposed to amongst regulatory authorities themselves.

## 3. Jurisdictional Questions

The need for maximum coordination and cooperation between regulatory authorities is particularly evident concerning jurisdictional questions. The recent case of *Extasi TV* usefully illustrates the point.<sup>18</sup> The UK authorities banned the television service *Extasi TV* because it had been broadcasting violent

16) Article 23a(2(b)), TVwF Directive.

17) An informal regulators’ group was already operating under the aegis of the European Commission prior to the formal establishment of the High Level Group. For more information about the work of the High Level Group, see, for example, High Level Group of Regulatory Authorities in the Field of Broadcasting, Annual Meeting, Conclusions of Chair, 24 March 2006.

18) See: David Goldberg, “GB – Government and Media Regulator Act Against Unacceptable Satellite TV Services and Programming”, IRIS 2005-3: 12, available at <http://merlin.obs.coe.int/iris/2005/3/article23.en.html>

pornography and had thereby “manifestly, seriously and gravely” infringed Article 22 of the TVwF Directive.<sup>19</sup> The European Commission identified “uncertainty as to which Member State had jurisdiction over [Extasi TV]” as a complicating factor in the case.<sup>20</sup> It could therefore be suggested that enhanced coordination between relevant regulatory authorities might have served to dispel some of the uncertainty in question. One of the tangible consequences of the case was the inclusion of an identification requirement for audiovisual media service providers in the proposed new Directive (Art. 3c).

Another useful illustration of the point is provided by the ongoing attempts of European regulatory authorities to consolidate existing cooperation between them, specifically with a view to combating incitement to hatred disseminated by (satellite) broadcasting.<sup>21</sup> The catalyst for these consolidation initiatives was a growing concern about the difficulties in regulating content that incites to racial and religious hatred which is broadcast from non-EU countries, as exemplified by the cases in which the French authorities banned the channels, *Al Manar*<sup>22</sup> and *Sahar 1*.<sup>23</sup> It could also be noted in passing that an earlier precedent for such concerns was the *Med TV* saga.<sup>24</sup> In 1999, the former British Independent Television Commission (ITC) suspended and subsequently revoked the satellite television licence of *Med TV* (a service targeting a Kurdish audience) for repeated breaches of the terms of its licence agreement and the ITC Programme Code. More specifically, the ITC found that *Med TV* had broadcast material “likely to encourage or incite to crime or lead to disorder”.<sup>25</sup>

These are only two examples that could be used to support the more general observation that many Member States currently experience very real problems related to (or arising from) the application of the country of origin principle at the national level. It is feared in some quarters that the proposed extension of the scope of the TVwF Directive will add to existing difficulties, not least because it may become even harder to identify the competent regulatory authorities for particular audiovisual services in other Member States. Such a state of affairs would arise, most notably, to the extent that some services covered by the new Directive may not be subject to licensing. Traditionally, licensing has been taken as providing clear indication of which regulatory authority has assumed responsibility for a given service. While it should be recognised that the TVwF Directive aims to eliminate blatant jurisdiction-shopping by channels, the constraints imposed on regulators by the wording of the present Directive should also be recognised. The revision of the Directive offers an opportunity to try to square this circle, perhaps by going even further than the changes that have already been proposed.

An interesting example of consultation between two national regulatory bodies is provided by the recent FANTV case. The company FANTV sought to be established in Latvia while targeting Sweden with its sports broadcasting offer. When FANTV applied for a broadcasting licence in Latvia, the *Nacionālā radio televīzijas padome* (National Broadcasting Council) of Latvia contacted the Swedish Broadcasting Commission with a view to ascertaining what the latter’s minimum requirements would be from the former if the former were to award a broadcasting licence in such circumstances. In their reply, the Swedish authorities mentioned the fact that Sweden has stricter rules on advertising directed at

19) Fifth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC “Television without Frontiers”, COM(2006) 49 final, 10 February 2006, p. 5. See further: The Foreign Satellite Service Proscription Order 2005, S.I. No. 220, 7 February 2005 (entry into force: 21 February 2005)  
[http://www.culture.gov.uk/NR/rdonlyres/809B372B-4A20-449C-A10A-3036CCD9F12C/0/Foreign\\_Satellite\\_Service\\_Proscription\\_Order.pdf](http://www.culture.gov.uk/NR/rdonlyres/809B372B-4A20-449C-A10A-3036CCD9F12C/0/Foreign_Satellite_Service_Proscription_Order.pdf)

Regulatory Impact Assessment: The Foreign Satellite Service Proscription Order 2005, available at:  
<http://www.culture.gov.uk/NR/rdonlyres/F86F1C6F-0D35-4B24-A532-C1C8501FFDC7/0/extasiriafinal.pdf>;  
 Explanatory Memorandum to the Foreign Satellite Service Proscription Order 2005, 2005 No. 220, available at:  
[http://www.opsi.gov.uk/si/em2005/uksiem\\_20050220\\_en.pdf](http://www.opsi.gov.uk/si/em2005/uksiem_20050220_en.pdf).

20) COM(2006) 49 final, *op. cit.*, p. 5.

21) Tarlach McGonagle, “European Commission: Broadcasting Regulators Fight Incitement to Hatred”, IRIS 2005-5: 5, available at <http://merlin.obs.coe.int/iris/2005/5/article5.en.html>; Mara Rossini, “European Commission: Broadcasting Regulators Encouraged to Reinforce Cross-border Cooperation under the Television without Frontiers Directive”, IRIS 2006-5: 7, available at <http://merlin.obs.coe.int/iris/2006/5/article7.en.html>

22) See further: Amélie Blocman, “FR – CSA Calls on Courts for Immediate Stop to Broadcasting by Unapproved Foreign Satellite Channel”, IRIS 2004-9: 11, available at <http://merlin.obs.coe.int/iris/2004/9/article21.en.html>; Amélie Blocman, “FR – *Al Manar* TV Soap Opera Continues”, IRIS 2005-1: 12, available at <http://merlin.obs.coe.int/iris/2005/1/article21.en.html> and Amélie Blocman, “FR – Eutelsat Must Stop Broadcasting *Al Manar* TV”, IRIS 2005-2: 12, available at <http://merlin.obs.coe.int/iris/2005/2/article21.en.html>

23) See further: Amélie Blocman, “FR – CSA Serves another Formal Notice on Eutelsat”, IRIS 2005-3: 11, available at <http://merlin.obs.coe.int/iris/2005/3/article19.en.html>; Amélie Blocman, “FR – *Conseil d’Etat* Upholds the Formal Notice Served on Eutelsat”, IRIS 2005-4: 9, available at <http://merlin.obs.coe.int/iris/2005/4/article15.en.html>

24) See further: Stefaan Verhulst, “United Kingdom: MED-TV Receives Suspension Order”, IRIS 1999-4: 13, available at <http://merlin.obs.coe.int/iris/1999/4/article23.en.html>; Tony Prosser, “United Kingdom: Regulator Revokes Licence of Satellite Broadcaster”, IRIS 1999-7: 12, available at <http://merlin.obs.coe.int/iris/1999/7/article21.en.html>

25) ITC News Release of 22 March 1999.

children and on advertising for alcoholic beverages. In the course of negotiations between FANTV and the Latvian Broadcasting Council, the Council asked FANTV whether it would be prepared to observe the Swedish conditions. FANTV stated its willingness to do so. On 30 March 2006, the Latvian National Broadcasting Council awarded FANTV a transfrontier broadcasting licence. The licence includes an additional protocol – a programming concept to which the company has undertaken to adhere, any deviation from which can result in the imposition of sanctions. Thus, in addition to the requirements set out by Latvian legislation, as regards the insertion of advertising in FANTV, the company has also undertaken to observe Swedish legislation that regulates advertising targeting children, and that places restrictions on the advertising of alcohol.

The proof of the pudding is in the eating, but at the time of writing, it was still too early to tell how this agreement would work in practice. On the one hand, it could be seen as a very useful example of how early consultation initiatives could forestall problems further down the line. As such, it could even prove a model for other regulatory authorities and provisions for routine *ex ante* consultation exercises and could have far-reaching consequences for preventing licensing problems in transfrontier broadcasting.<sup>26</sup>

Indeed, it has also been proposed in the context of the ECTT and of the TVwF Directive – *inter alia* by the European Broadcasting Union (EBU) – that cooperation between regulatory authorities concerning jurisdictional matters should be more systematic.<sup>27</sup> More specifically, the EBU has proposed that whenever a broadcaster seeks to establish itself in a State other than the State targeted by its services, there should be an obligation on the relevant authorities in the State of establishment to take into account the rules of receiving State before granting the broadcaster a licence.<sup>28</sup> Such an approach is partly designed to address the problem of abusive delocalisation.

On the other hand, though, the FANTV licence (see *infra*) could also be considered a far-reaching form of coordination between regulatory bodies which facilitates the application of stricter rules that pertain in the country of reception, thereby going against the grain of the TVwF Directive. The country of origin principle is a cornerstone of the Directive and the determination of jurisdiction over broadcasters.

According to Article 3(1) of the TVwF Directive, “Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive”. For the purposes of this discussion, the import of Article 3(1) can be gauged from two converse readings. First, it is not *explicitly* stated in Article 3 or elsewhere in the Directive that it would also be permissible for a Member State to impose the stricter national rules of another Member State on a broadcaster within the former’s jurisdiction. Secondly and conversely, the provision that States shall be “free” to impose such stricter rules – without specification as to how such ends could be achieved – may not preclude the imposition of stricter national rules of another Member State in certain circumstances (despite misgivings about its compatibility with the spirit of the Directive).

Such interpretive dilemmas were probed by the ECJ in the *De Agostini* case<sup>29</sup> when it ruled that Sweden was not allowed to apply its advertising rules to broadcasts transmitted by a service established under the jurisdiction of another Member State because they dealt with a subject coordinated by the Directive. The operative part of the judgment reads:

61. If provisions of the receiving State regulating the content of television broadcasts for reasons relating to the protection of minors against advertising were applied to broadcasts from other Member States, this would add a secondary control to the control which the broadcasting Member State must exercise under the Directive.

26) It could be noted in passing that *ex ante* procedures such as Article 3a, TVwF Directive, are few and far between; by way of contrast, *ex post facto* provisions are much more common, as illustrated by the tenor of Article 2 (7)-(10) of the proposed new Directive.

27) EBU comments on the Council of Europe consultation on the European Convention on Transfrontier Television: Scope and jurisdiction, European Broadcasting Union Legal Department, 11 May 2005; EBU Position on Issues Papers for the Liverpool Audiovisual Conference, European Broadcasting Union Legal Department, 5 September 2005; Draft Audiovisual Media Services Directive – Initial EBU Contribution to the First Reading, European Broadcasting Union Legal Department, 3 April 2006.

28) EBU comments on the Council of Europe consultation on the European Convention on Transfrontier Television: Scope and jurisdiction, *op. cit.*, p. 4.

29) Joined cases C-34/95, C-35/95 and C-36/95, Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95) [1997], Judgment of 9 July 1997, ECR I-3843.



62. It follows that the Directive is to be interpreted as precluding the application to television broadcasts from other Member States of a provision of a domestic broadcasting law which provides that advertisements broadcast in commercial breaks on television must not be designed to attract the attention of children under 12 years of age.<sup>30</sup>

The case of FANTV should, however, be distinguished from the *De Agostini* case, as in the former, it is Latvia that is ensuring that relevant Swedish rules are respected.

FANTV was awarded its licence after a period of negotiations between the Latvian Broadcasting Council and the applicant company which culminated in agreement between both sets of parties. However, it was suggested that this involves a private contract with a choice-of-law dimension to it and that the suitability of such agreements would depend on the broadcasting licence being an agreement of a contractual nature (e.g. as is the practice in France), which is not always the case. Another concern mooted was that the granting of licences on the basis of bilaterally negotiated contractual agreements could lead to arbitrary discrimination between licence applicants (although there was no suggestion whatever that this was the case regarding the FANTV case).

## Session III

### Introduction

The point of departure of Alexander Scheuer's paper, "Implementation and Monitoring: Upholding General Interest in View of Commercial Communications", is the compilation of a "non-exhaustive general list of public policy goals" that inform current and projected regulatory approaches to broadcasting/audiovisual media services in Europe. The first purpose of such conceptual contextualisation was to illustrate that the Directive is responsive to objectives other than its primary Internal Market objectives. Second, the paper sought to invite reflection on whether some of the provisions in the proposed new Directive actually correspond to the range of identified objectives, and whether they could also constitute adequate measures for furthering those objectives.

It should be stressed that not all of the public policy goals listed apply across the board: although some of them are undoubtedly of sweeping importance (e.g. freedom of expression), others (e.g. protection of works) are specific to narrower, discrete objectives pursued by (particular provisions of) the ECTT and the TVwF Directive. Moreover, some objectives are more central than others. In the case of the TVwF Directive, for example, the facilitation of cross-border audiovisual services is the primary goal, and other objectives - however imperative they may seem elsewhere - are merely secondary to that aim. In addition, certain public policy objectives stem from sources other than Internal Market rationales, and as such can have wide application across EU instruments (e.g. protection of minors, consumer protection and cultural policy). It should also be noted that particular objectives can be grounded in a number of distinct rationales. Those rationales are not mutually exclusive, but different weighting may be attached to each and the distribution of weighting can have a determinative impact on how the objective is pursued in practice. Product placement illustrates this point nicely (see *infra*). Needless to say, objectives and the prioritisation of objectives can differ between the European and national level, and also across States. It is important that any discussion of policy objectives reflect the duality between the European and national levels, as well as different possible emphases at the inter-State level.

### 1. Product Placement

It makes a considerable difference whether rationales for a prohibition on, or the regulation of, product placement would be grounded in the protection of viewers (from misleading representations) or of editorial independence (for the broadcaster) or of the authenticity of the work in question (author's rights). Although the cardinal concern here is arguably the protection of viewers, all three policy objectives would appear relevant, meaning that attention should shift to achieving the correct balance between them.

Consideration 46 of the proposed new Directive accepts the reality of product placement. Once the existence of the practice is accepted, the discussion turns to the adaptation of rules in order to uphold public policy objectives in respect of the practice. A relevant consideration is who would receive

<sup>30</sup>) *Ibid.*, paras. 61 & 62.

remuneration for the placement of products (i.e., the broadcaster, the producer, etc.)? Also of relevance is the broader approach to the insulation of editorial independence from (undue) commercial and advertising pressures. The thinking here is that product placement is merely one type of advertising and should therefore be subject to the overarching regulatory principles that apply to other kinds of advertising. This partly explains why Article 3h(4) of the proposed new Directive would prohibit product placement in news and current affairs programming, as well as audiovisual media services for children and documentaries. The full explanation, however, must also point out that the impermissibility of product placement for particular types of programmes is justified on the grounds of a perceived heightened risk that editorial independence might be influenced or compromised. The interests of transparency are therefore also at play.

The proposed regulation of product placement seeks to address anomalies arising from the present situation. Under existing rules, any kind of product placement not inserted by a broadcaster is presumptively allowed; it is only caught when it meets the definition of surreptitious advertising, which means that a broadcaster must receive a financial contribution or similar consideration. Other forms of product placement are not covered by existing rules. Another identified cause for concern is the well-established use of product placement practices in films produced in the US, which is in contrast to European films.

## 2. Advertising Breaks during Films/Programmes

The practice of splitting films into two parts and separating each part with news and weather items is increasing in frequency in a number of countries. The compatibility of the practice with the Italian legislation transposing the TVwF Directive is currently awaiting judicial scrutiny. The most obvious legal issue raised by the practice (and the focus of the ongoing proceedings in Italy) is the implications it has for the calculation of permissible advertising time under the TVwF Directive. The Swedish Broadcasting Commission has in the past dealt with several cases involving the interruption of films with news bulletins sandwiched between advertisements.<sup>31</sup> The Commission has taken the firm view that the equivalent provision in Swedish legislation to Article 11(3), TVwF Directive, applies when a film is interrupted by commercials, even if there are news programmes between those commercials. This stance is designed to prevent the circumvention of rules on the insertion of advertising by making a programme within another programme.

Another issue raised by the practice of inserting mini-programmes between two parts of a film or programme is whether such interruptions of films would breach copyright licence agreements. This issue has recently been the focus of judicial attention in a number of European States.<sup>32</sup> Even though it would be most logical for individual copyright holders to oppose such practices, there could also be a general public economic or other interest to oppose them (even if the individual copyright holders did not – for whatever reason – object to the violation of their rights).

# Session IV

## Introduction

Karol Jakubowicz's paper, "Implementation and Monitoring: Upholding Human Rights and Cultural Values", *supra*, provided contextual socio-political and philosophical background to the incipient regulatory flurry currently being experienced in the European audiovisual sector. One message that could be gleaned from his paper and the discussion it prompted is that the importance of ideological and global context is often under-recognised and understated. However, we would ignore it at our peril. To concentrate unduly on the minutiae of regulatory provisions could ultimately prevent us from seeing the wood for the trees.

## 1. The Art of the Possible

The interface between democracy, human rights and the media has always been characterised by its dynamism. This statement has never been as axiomatic as in the context of the dizzying pace of

31) See, by way of background, Greger Lindberg, "SE – Advertising Breaks Allowed", IRIS 2002-5: 7, available at <http://merlin.obs.coe.int/iris/2002/5/article13.en.html>

32) See, for example, Helene Hillerström Miksche, "SE – TV Commercial Breaks Ruled in Breach of Film Directors' Moral Rights", IRIS 2006-7: 19, available at <http://merlin.obs.coe.int/iris/2006/7/article34.en.html>

technological advances in contemporary society. Again, it is crucially important not to lose sight of the enduring principles of human rights and to continue to apply them to a rapidly changing media environment.

Although pressing technological questions were clearly a catalyst for the project to revise the TVwF Directive (and similar discussions as regards the ECTT), a prior and more fundamental issue must be addressed, *viz.* the scope of both instruments. These instruments are based on satellite broadcasting, a technology that has arguably already enjoyed its heyday in Europe and is, in any case, unlikely to be the dominant means of distribution for audiovisual content over the next decade. This realisation is addressed in the proposed *Audiovisual Media Services Directive* by the introduction of the concepts of linear and non-linear services. Even if such concepts were definitionally watertight, their introduction would not suffice to address the underlying question of the legal scope of both instruments. The debate should be structured around central questions of principle, such as: (i) what should be regulated in the future?, and (ii) how should it be regulated (i.e., in what form and with what level of detail)? Many of the strict rules that have characterised the highly regulated environment of traditional broadcasting are difficult to sustain in the new environment of increasingly individualised distribution.

## 2. New Articulations of Nationalism

The cultural objective which was behind the original push for a regulatory framework for television in Europe was the promotion of a (sense of) European identity. That objective quickly moulded into the more recognisable amalgamation of objectives that was later to become the ECTT, but questions relating to cultural identity in Europe have not gone away.

In order to be part of larger international entity that is open to all kinds of cultural influences, one needs to start with a secure sense of identity (however defined), otherwise insecurity is likely to feed discontent. A sense of security in one's own cultural identity is a prerequisite for effective engagement in any process of international integration. This is as true of European integration as much as it is of relations with the rest of the world. At both levels, such relations have an inter-religious and intercultural character, and dialogical interaction between groups is becoming increasingly imperative. A frequently heard criticism of current and previous European and national policy-making is that they have failed to provide that sense of security. Obviously neither the ECTT nor the TVwF Directive could possibly address this failing in and of themselves, but they should be part of a much broader process of trying to find an answer.

The rejection of the draft European Constitution in France is alternately explained in terms of a growing sense of public disenchantment, disenfranchisement, or insecurity (whether identity-related or economic). Such a sense of insecurity appears to be increasingly prevalent throughout Europe and is increasingly being picked up on at the European level.<sup>33</sup> It is a matter of considerable political concern that this sense of insecurity is gnawing away at the European project from the inside, so as to speak, as its strongest manifestations are often to be found amongst the oldest democracies in Europe and those which took the pioneering institution-building steps in the post-War period.

The interests of globalisation are conventionally understood as being in opposition to those of national sovereignty and identity. It is hardly surprising, then, that an increasingly internationalised European audiovisual area should prove a prime arena in which both sets of competing interests can vie with one another for supremacy. The question of jurisdiction, for example, goes beyond orderly regulation on an administrative level to implicate many more substantive concerns, such as the aforementioned national sovereignty and identity. The determination of jurisdiction therefore assumes the striking of a balance between – or at least a certain reconciliation of – European and national audiovisual policies.

A number of countries have put on record their concerns at the existing provisions in the TVwF Directive for determining jurisdiction over broadcasters.<sup>34</sup> Some of those concerns stem from

33) See, for example, Viviane Reding, "A 'Triple Play' for Europe", Digital Lifestyle Day 2006, Munich, 23 January 2006, Speech/06/28.

34) This development is treated in greater detail in Karol Jakubowicz, "Implementation and Monitoring: Upholding Human Rights and Cultural Values", *supra*. See further: Informal Ministerial Conference on Broadcasting, Ireland, 2-3 March 2004, Press Release issued by the Irish Department of Communications, Marine and Natural Resources, available at: <http://www.dcmnr.gov.ie/Broadcasting/Ministerial+Conference/>. See, by way of background to that Conference, convened under the Irish Presidency of the European Union (2004): André Lange & Susanne Nikoltchev, *Transfrontier Television in the European Union: Market Impact and Selected Legal Aspects* (Strasbourg, European Audiovisual Observatory, 2004).

dissatisfaction at being unable to pursue or enforce policies which they think are appropriate and right for protecting their citizens against unwanted programming or advertising or the wrong type of advertising, etc. It would therefore be reductionist to view the practice of using advertising windows exclusively in economic terms; they also involve cultural values. States have a limited amount of sovereignty as regards the determination of audiovisual policy and this is indicative of a much wider phenomenon of European integration. It is understandable that the sovereignty retained by States would be guarded very jealously by them. Objections to the dominance of foreign media entities in a given national market cannot lightly be dismissed as being singularly concerned with the closing off of markets and protectionism. Those objections are often fuelled by concerns for diversity of programming (especially in cultural and linguistic terms), the reinvestment of advertising revenue in original and independent and national/European programming. Cultural identity is a theme that unites all of these concerns.

To close a circle, then: against a general background of cultural insecurity, the endorsement of the country of origin principle in the European audiovisual sector – which is a vitally important site for creating and sustaining cultural identities – could appear threatening to certain features of the identities of individual States. A certain amount of fear was inspired by the first version of the proposed Services Directive which, like the TVwF Directive, relied on the country of origin principle, but unlike the TVwF Directive, did not rely on a minimal level of harmonisation as well.<sup>35</sup> The European Parliament subsequently amended the proposed Directive so that reliance on the country of origin principle would be replaced with “a pragmatic principle on ‘freedom to provide services’ as the regulatory basis for cross-border service provision in the EU”.<sup>36</sup> The European Parliament’s amendment of the proposed Services Directive subscribes to the more general view that the country of origin principle should not be absolute. Instead, the need to link the application of the country of origin principle to a certain level of substantive harmonisation was recognised as a more flexible mechanism for taking other issues into account.

### 3. Geographical Scope of ECTT

As already noted, *supra*, it is widely recognised that the extensive geographical scope of the ECTT plays a crucial role in: (i) securing a wider “European audiovisual area” than would otherwise be possible under the TVwF Directive alone, and (ii) fostering the underlying human rights, cultural and other values of the “European audiovisual area” in States that are located beyond the physical and political reach of EU membership. In light of this, the Standing Committee and the CDMC intend to endeavour to further extend the geographical scope of the ECTT, by inviting other States to accede to the Convention.

CIS States could be considered a priority area for further expansion of the ECTT. Presently, the Russian Federation – demographically the largest Member States of the Council of Europe - is not governed by the ECTT. In more general terms, six of the 10 former Soviet European countries have not ratified the ECTT;<sup>37</sup> four of them have not even signed it,<sup>38</sup> and one is not even eligible to sign it.<sup>39</sup> The Council of Europe would do well to resume its efforts to engage the States in question, and especially the Russian Federation, in talks about the need to sign and ratify the European Convention and other instruments. Such efforts would be timely, given Russia’s growing sense of international isolation, also *vis-à-vis* Europe. A preliminary step for the Council of Europe may involve attaining a higher level of familiarisation with the internal political ramifications and relevant governmental / institutional competences of the Russian Federation.

This intended accession drive will also target States which are not Members of the Council of Europe. Article 30(1) provides for accession to the ECTT by non-Member States of the Council of Europe. It reads:

35) Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, COM(2004) 2 final/3. See further: Wouter Gekiere, “European Commission: Statement on Services Directive”, IRIS 2005-4: 3, available at <http://merlin.obs.coe.int/iris/2005/4/article3.en.html>

36) Wouter Gekiere, “European Parliament: Vote in Plenary on Services Directive”, IRIS 2006-4: 6, available at <http://merlin.obs.coe.int/iris/2006/4/article8.en.html>

37) Armenia, Azerbaijan, Belarus, Georgia, Russia, Ukraine.

38) Armenia, Azerbaijan, Belarus, Russia.

39) Belarus.

After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Contracting States may invite any other State to accede to this Convention by a decision taken by the majority provided for in Article 20d. of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

The Holy See is a Party to the ECTT even though it is not a Member State of the Council of Europe. It is expected that political overtures will be made, in particular, to States on the southern shores of the Mediterranean Sea. One could speculate that this strategy is motivated at least in part by the objective of improving intercultural and interreligious dialogue with States bordering the Council of Europe bloc.

The likely success of such planned overtures is difficult to predict in advance. However, it seems realistic to assume that if States fear that their cherished cultural or religious values would be compromised by their accession to the ECTT (e.g. by requiring them to receive broadcasting output from Parties to the ECTT that is more secular and liberal in content than would otherwise be permitted in their countries), they simply would not accede to it in the first place.



# Annex

## **Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 (with Protocol Nos. 1, 4, 6, 7, 12 and 13)\***

### **Article 10 – Freedom of expression**

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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\*<http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>

**European Convention on Transfrontier Television (ETS No. 132) of 5 May 1989  
(Text amended according to the provisions of the Protocol (ETS No. 171) of 9 September 1998, which entered into force, on 1 March 2002)\***

**Article 4 – Freedom of reception and retransmission**

The Parties shall ensure freedom of expression and information in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention.

**Article 5 – Duties of the transmitting Parties**

1. Each transmitting Party shall ensure that all programme services transmitted by broadcasters within its jurisdiction comply with the terms of this Convention.
2. For the purposes of this Convention, a broadcaster within the jurisdiction of a Party is:
  - a broadcaster who is deemed to be established in that Party according to paragraph 3;
  - a broadcaster to whom paragraph 4 applies.
3. For the purpose of this Convention, a broadcaster shall be deemed to be established in a Party, hereinafter referred to as “transmitting Party” in the following cases:
  - a. the broadcaster has its head office in that Party and the decisions on programme schedules are taken in that Party;
  - b. if a broadcaster has its head office in one Party but decisions on programme schedules are taken in another Party, it shall be deemed to be established in the Party where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those Parties, the broadcaster shall be deemed to be established in the Party where it has its head office; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in neither of those Parties, the broadcaster shall be deemed to be established in the Party where it first began broadcasting in accordance with the system of law of that Party, provided that it maintains a stable and effective link with the economy of that Party;
  - c. if a broadcaster has its head office in a Party but decisions on programme schedules are taken in a State which is not Party to this Convention, or vice-versa, it shall be deemed to be established in the Party concerned, provided that a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in that Party;
  - d. if, when applying the criteria of paragraph 3 of Article 2 of Directive 97/36/EC of the European Parliament and of the Council of 19 June 1997 amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in member States concerning the pursuit of television broadcasting activities, a broadcaster is deemed to be established in a member State of the European Community, that broadcaster shall also be deemed to be established in that State for the purposes of this Convention.
4. A broadcaster to whom the provisions of paragraph 3 are not applicable is deemed to be within the jurisdiction of a Party, so-called transmitting Party, in the following cases:
  - a. it uses a frequency granted by that Party;
  - b. although it does not use a frequency granted by a Party it does use a satellite capacity appertaining to that Party;
  - c. although it uses neither a frequency granted by a Party nor a satellite capacity appertaining to a Party it does use a satellite up-link situated in that Party.
5. If the transmitting Party cannot be determined according to paragraph 4, the Standing Committee shall consider this issue according to Article 21, paragraph 1a, of this Convention, in order to determine this Party.
6. This Convention shall not apply to television broadcasts intended exclusively for reception in States which are not Party to this Convention, and which are not received directly or indirectly by the public in one or more Parties.

\*<http://conventions.coe.int/Treaty/en/Treaties/Html/132.htm>



### **Article 9bis – Access of the public to events of major importance**

1. Each Party retains the right to take measures to ensure that a broadcaster within its jurisdiction does not broadcast on an exclusive basis events which are regarded by that Party as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Party of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Party concerned may have recourse to the drafting of a list of designated events which it considers to be of major importance for society.
2. Parties shall ensure by appropriate means, respecting the legal guarantees granted by the Convention for the Protection of Human Rights and Fundamental Freedoms as well as, where appropriate, the national constitution, that a broadcaster within their jurisdiction does not exercise the exclusive rights purchased by that broadcaster following the date of entry into force of the Protocol amending the European Convention on Transfrontier Television in such a way that a substantial proportion of the public in another Party is deprived of the possibility of following events which are designated by that other Party, via whole or partial live coverage or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Party under paragraph 1, respecting the following requirements:
  - a. the Party implementing the legal measures referred to in paragraph 1 shall draw up a list of national or non-national events which are considered by that Party as being of major importance for society;
  - b. the Party shall do so in a clear and transparent manner in due and effective time;
  - c. the Party shall determine whether these events shall be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage;
  - d. the measures taken by the Party drawing up the list shall be proportionate and as detailed as necessary to enable other Parties to take measures referred to in this paragraph;
  - e. the Party drawing up the list shall notify the list and the corresponding legal measures to the Standing Committee, the time limit for which shall be fixed by the Standing Committee;
  - f. the measures taken by the Party drawing up the list shall be within the limitations of the guidelines of the Standing Committee referred to in paragraph 3 and the Standing Committee must have given a positive opinion on the measures.

Measures based on this paragraph shall apply only to those events published by the Standing Committee in the annual list referred to in paragraph 3 and to those exclusive rights purchased after the entry into force of the amending Protocol.

3. Once a year the Standing Committee shall:
  - a. publish a consolidated list of the enlisted events and corresponding legal measures notified by Parties in accordance with paragraph 2e;
  - b. draw up guidelines to be adopted by a majority of three quarters of the members in addition to the requirements listed up in paragraph 2a to e in order to avoid differences between the implementation of this article and that of corresponding European Community provisions.

### **Article 10 – Cultural objectives**

1. Each transmitting Party shall ensure, where practicable and by appropriate means, that a broadcaster within its jurisdiction reserves for European works a majority proportion of its transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and tele-shopping. 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.
2. In case of disagreement between a receiving Party and a transmitting Party on the application of the preceding paragraph, recourse may be had, at the request of one of the Parties, to the Standing Committee with a view to its formulating an advisory opinion on the subject. Such a disagreement shall not be submitted to the arbitration procedure provided for in Article 26.
3. The Parties undertake to look together for the most appropriate instruments and procedures to support, without discrimination between broadcasters, the activity and development of European production, particularly in countries with a low audiovisual production capacity or restricted language area.
4. The Parties shall ensure that a broadcaster within their jurisdiction does not broadcast cinematographic works outside periods agreed with the rights holders.

### **Article 10bis – Media pluralism**

The Parties, in the spirit of co-operation and mutual assistance which underlies this Convention, shall endeavour to avoid that programme services transmitted or retransmitted by a broadcaster or any other legal or natural persons within their jurisdiction, within the meaning of Article 3, endanger media pluralism.

**Article 11 – General standards**

1. Advertising and tele-shopping shall be fair and honest.
2. Advertising and tele-shopping shall not be misleading and shall not prejudice the interests of consumers.
3. Advertising and tele-shopping addressed to or using children shall avoid anything likely to harm their interests and shall have regard to their special susceptibilities.
4. Tele-shopping shall not exhort minors to contract for the sale or rental of goods and services.
5. The advertiser shall not exercise any editorial influence over the content of programmes.

**Article 14 – Insertion of advertising and tele-shopping**

1. Advertising and tele-shopping shall be inserted between programmes. Provided the conditions contained in paragraphs 2 to 5 of this article are fulfilled, advertising and tele-shopping spots may also be inserted during programmes in such a way that the integrity and value of the programme and the rights of the rights holders are not prejudiced.
2. In programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances comprising intervals, advertising and tele-shopping spots shall only be inserted between the parts or in the intervals.
3. The transmission of audiovisual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries), provided their scheduled duration is more than forty-five minutes, may be interrupted once for each complete period of forty-five minutes. A further interruption is allowed if their scheduled duration is at least twenty minutes longer than two or more complete periods of forty-five minutes.
4. Where programmes, other than those covered by paragraph 2, are interrupted by advertising or tele-shopping spots, a period of at least twenty minutes should elapse between each successive advertising or tele-shopping break within the programme.
5. Advertising and tele-shopping shall not be inserted in any broadcast of a religious service. News and current affairs programmes, documentaries, religious programmes, and children's programmes, when their scheduled duration is less than thirty minutes, shall not be interrupted by advertising or tele-shopping. If their scheduled duration is thirty minutes or longer, the provisions of the previous paragraphs shall apply.

**Article 16 – Advertising and tele-shopping directed specifically at a single Party**

1. In order to avoid distortions in competition and endangering the television system of a Party, advertising and tele-shopping which are specifically and with some frequency directed to audiences in a single Party other than the transmitting Party shall not circumvent the television advertising and tele-shopping rules in that particular Party.
2. The provisions of the preceding paragraph shall not apply where:
  - a. the rules concerned establish a discrimination between advertising and tele-shopping transmitted by a broadcaster within the jurisdiction of that Party and advertising and tele-shopping transmitted by a broadcaster or any other legal or natural person within the jurisdiction of another Party, or
  - b. the Parties concerned have concluded bilateral or multilateral agreements in this area.

**Article 20 – Standing Committee**

1. For the purposes of this Convention, a Standing Committee shall be set up.
2. Each Party may be represented on the Standing Committee by one or more delegates. Each delegation shall have one vote. Within the areas of its competence, the European Community shall exercise its right to vote with a number of votes equal to the number of its member States which are Parties to this Convention; the European Community shall not exercise its right to vote in cases where the member States concerned exercise theirs, and conversely.
3. Any State referred to in Article 29, paragraph 1, which is not a Party to this Convention may be represented on the Standing Committee by an observer.
4. The Standing Committee may seek the advice of experts in order to discharge its functions. It may, on its own initiative or at the request of the body concerned, invite any international or national, governmental or non-

governmental body technically qualified in the fields covered by this Convention to be represented by an observer at one or part of one of its meetings.

5. The Standing Committee shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within six months of the date of entry into force of the Convention. It shall subsequently meet whenever one-third of the Parties or the Committee of Ministers of the Council of Europe so requests, or on the initiative of the Secretary General of the Council of Europe in accordance with the provisions of Article 23, paragraph 2, or at the request of one or more Parties in accordance with the provisions of Articles 21, subparagraph c, and 25, paragraph 2.
6. A majority of the Parties shall constitute a quorum for holding a meeting of the Standing Committee.
7. Subject to the provisions of Article 9*bis*, paragraph 3b, and Article 23, paragraph 3, the decisions of the Standing Committee shall be taken by a majority of three-quarters of the members present.
8. Subject to the provisions of this Convention, the Standing Committee shall draw up its own Rules of Procedure.

#### **Article 21 – Functions of the Standing Committee**

1. The Standing Committee shall be responsible for following the application of this Convention. It may:
  - a. make recommendations to the Parties concerning the application of the Convention;
  - b. suggest any necessary modifications of the Convention and examine those proposed in accordance with the provisions of Article 23;
  - c. examine, at the request of one or more Parties, questions concerning the interpretation of the Convention;
  - d. use its best endeavours to secure a friendly settlement of any difficulty referred to it in accordance with the provisions of Article 25;
  - e. make recommendations to the Committee of Ministers concerning States other than those referred to in Article 29, paragraph 1, to be invited to accede to this Convention.
  - f. give opinions on abuse of rights under Article 24*bis*, paragraph 2c.
2. In addition, the Standing Committee shall:
  - a. draw up the guidelines referred to in Article 9*bis*, paragraph 3b, in order to avoid differences between the implementation of the rules of this Convention concerning access of the public to events of major importance for society and that of corresponding European Community provisions;
  - b. give an opinion on the measures taken by Parties which have drawn up a list of national or non-national events which are considered by those Parties as being of major importance for society in accordance with Article 9*bis*, paragraph 2;
  - c. publish once a year a consolidated list of the enlisted events and corresponding measures notified by Parties in accordance with Article 9*bis*, paragraph 2e.

#### **Article 24 – Alleged violations of this Convention**

1. When a Party finds a violation of this Convention, it shall communicate to the transmitting Party the alleged violation and the two Parties shall endeavour to overcome the difficulty on the basis of the provisions of Articles 19, 25 and 26.
2. If the alleged violation is of a manifest, serious and grave nature which raises important public issues and concerns Articles 7, paragraphs 1 or 2, 12, 13, paragraph 1, first sentence, 14 or 15, paragraphs 1 or 3, and if it persists within two weeks following the communication, the receiving Party may suspend provisionally the retransmission of the incriminated programme service.
3. In all other cases of alleged violation, with the exception of those provided for in paragraph 4, the receiving Party may suspend provisionally the retransmission of the incriminated programme service eight months following the communication, if the alleged violation persists.
4. The provisional suspension of retransmission shall not be allowed in the case of alleged violations of Articles 7, paragraph 3, 8, 9 or 10.

#### **Article 24*bis* – Alleged abuses of rights conferred by this Convention**

1. When the programme service of a broadcaster is wholly or principally directed at the territory of a Party other than that which has jurisdiction over the broadcaster (the “receiving Party”), and the broadcaster has established itself with a view to evading the laws in the areas covered by the Convention which would have applied to it had it fallen within the jurisdiction of that other Party, this shall constitute an abuse of rights.

2. Where such an abuse is alleged by a Party, the following procedure shall apply:
  - a. the Parties concerned shall endeavour to achieve a friendly settlement;
  - b. if they fail to do so within three months, the receiving Party shall refer the matter to the Standing Committee;
  - c. having heard the views of the Parties concerned, the Standing Committee shall, within six months of the date on which the matter was referred to it, give an opinion on whether an abuse of rights has been committed and shall inform the Parties concerned accordingly.
3. If the Standing Committee has concluded that an abuse of rights has occurred, the Party whose jurisdiction the broadcaster is deemed to be within shall take appropriate measures to remedy the abuse of rights and shall inform the Standing Committee of those measures.
4. If the Party whose jurisdiction the broadcaster is deemed to be within has failed to take the measures specified in paragraph 3 within six months, the arbitration procedure set out in Article 26, paragraph 2, and the appendix of the Convention shall be pursued by the Parties concerned.
5. A receiving Party shall not take any measures against the programme service concerned until the arbitration procedure has been completed.
6. Any measures proposed or taken under this article shall comply with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

#### **Article 27 – Other international agreements or arrangements**

1. In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.
2. Nothing in this Convention shall prevent the Parties from concluding international agreements completing or developing its provisions or extending their field of application.
3. In the case of bilateral agreements, this Convention shall not alter the rights and obligations of Parties which arise from such agreements and which do not affect the enjoyment of other Parties of their rights or the performance of their obligations under this Convention.

#### **Article 30 – Accession by non-member States**

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Contracting States may invite any other State to accede to this Convention by a decision taken by the majority provided for in Article 20d. of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.
2. In respect of any acceding State, this Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

**Protocol of 9 September 1998 (ETS 171) amending the European Convention on Transfrontier Television of 5 May 1989\*****Article 35**

1. This Protocol shall enter into force on the first day of the month following the date on which the last of the Parties to the Convention has deposited its instrument of acceptance with the Secretary General of the Council of Europe.
2. However, this Protocol shall enter into force following the expiry of a period of two years after the date on which it has been opened to acceptance, unless a Party to the Convention has notified the Secretary General of the Council of Europe of an objection to its entry into force. The right to make an objection shall be reserved to those States or the European Community which expressed their consent to be bound by the Convention prior to the expiry of a period of three months after the opening for acceptance of this Protocol.
3. Should such an objection be notified, the Protocol shall enter into force on the first day of the month following the date on which the Party to the Convention which has notified the objection has deposited its instrument of acceptance with the Secretary General of the Council of Europe.
4. A Party to the Convention may, at any time, declare that it will apply the Protocol on a provisional basis.

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\*<http://conventions.coe.int/Treaty/en/Treaties/Html/171.htm>

Since its entry into force on 1 March 2002, this Protocol forms an integral part of the Convention (ETS No. 132)

**Treaty establishing the European Community (consolidated text)  
Official Journal C 325 of 24 December 2002\***

**Article 10**

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

**Article 28**

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

**Article 43**

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

**Article 48**

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

**Article 49**

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

**Article 50**

Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

- a. activities of an industrial character;
- b. activities of a commercial character;
- c. activities of craftsmen;
- d. activities of the professions.

Without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

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\*<http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/12002E.html>

**Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC) as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (Consolidated text)\***

**Article 1**

[...]

c. 'television advertising' means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;

**Article 2**

1. Each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State.
2. For the purposes of this Directive the broadcasters under the jurisdiction of a Member State are:
  - those established in that Member State in accordance with paragraph 3;
  - those to whom paragraph 4 applies.
3. For the purposes of this Directive, a broadcaster shall be deemed to be established in a Member State in the following cases:
  - a. the broadcaster has its head office in that Member State and the editorial decisions about programme schedules are taken in that Member State;
  - b. if a broadcaster has its head office in one Member State but editorial decisions on programme schedules are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those Member States, the broadcaster shall be deemed to be established in the Member State where it has its head office; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in neither of those Member States, the broadcaster shall be deemed to be established in the Member State where it first began broadcasting in accordance with the system of law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;
  - c. if a broadcaster has its head office in a Member State but decisions on programme schedules are taken in a third country, or vice-versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in that Member State.
4. Broadcasters to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:
  - a. they use a frequency granted by that Member State;
  - b. although they do not use a frequency granted by a Member State they do use a satellite capacity appertaining to that Member State;
  - c. although they use neither a frequency granted by a Member State nor a satellite capacity appertaining to a Member State they do use a satellite up-link situated in that Member State.
5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the broadcaster is established.

**Article 2a**

1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.

\*[http://europa.eu.int/eur-lex/en/consleg/pdf/1989/en\\_1989L0552\\_do\\_001.pdf](http://europa.eu.int/eur-lex/en/consleg/pdf/1989/en_1989L0552_do_001.pdf)

2. Member States may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled:
  - a. a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22 (1) or (2) and/or Article 22a;
  - b. during the previous 12 months, the broadcaster has infringed the provision(s) referred to in (a) on at least two prior occasions;
  - c. the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again;
  - d. consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in (c), and the alleged infringement persists.

The Commission shall, within two months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Community law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.

3. Paragraph 2 shall be without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned.

### **Article 3**

1. Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive.
2. Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction effectively comply with the provisions of this Directive.
3. The measures shall include the appropriate procedures for third parties directly affected, including nationals of other Member States, to apply to the competent judicial or other authorities to seek effective compliance according to national provisions.

### **Article 3a**

1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.
2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of three months from the notification, the Commission shall verify that such measures are compatible with Community law and communicate them to the other Member States. It shall seek the opinion of the Committee established pursuant to Article 23a. It shall forthwith publish the measures taken in the Official Journal of the European Communities and at least once a year the consolidated list of the measures taken by Member States.
3. Member States shall ensure, by appropriate means, within the framework of their legislation that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters following the date of publication of this Directive in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with the preceding paragraphs via whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.

### **Article 11**

1. Advertising and teleshopping spots shall be inserted between programmes. Provided the conditions set out in paragraphs 2 to 5 are fulfilled, advertising and teleshopping spots may also be inserted during programmes in such a way that the integrity and value of the programme, taking into account natural breaks in and the duration and nature of the programme, and the rights of the rights holders are not prejudiced.
2. In programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances containing intervals, advertising and teleshopping spots shall only be inserted between the parts or in the intervals.



3. The transmission of audiovisual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries), provided their scheduled duration is more than 45 minutes, may be interrupted once for each period of 45 minutes. A further interruption shall be allowed if their scheduled duration is at least 20 minutes longer than two or more complete periods of 45 minutes.
4. Where programmes, other than those covered by paragraph 2, are interrupted by advertising or teleshopping spots, a period of at least 20 minutes should elapse between each successive advertising break within the programme.
5. Advertising and teleshopping shall not be inserted in any broadcast of a religious service. News and current affairs programmes, documentaries, religious programmes and children's programmes, when their scheduled duration is less than 30 minutes, shall not be interrupted by advertising or by teleshopping. If their scheduled duration is 30 minutes or longer, the provisions of the previous paragraphs shall apply.

#### **Article 23a**

1. A contact committee shall be set up under the aegis of the Commission. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and meet either on his initiative or at the request of the delegation of a Member State.
2. The tasks of this committee shall be:
  - a. to facilitate effective implementation of this Directive through regular consultation on any practical problems arising from its application, and particularly from the application of Article 2, as well as on any other matters on which exchanges of views are deemed useful;
  - b. to deliver own-initiative opinions or opinions requested by the Commission on the application by the Member States of the provisions of this Directive;
  - c. to be the forum for an exchange of views on what matters should be dealt with in the reports which Member States must submit pursuant to Article 4 (3), on the methodology of these, on the terms of reference for the independent study referred to in Article 25a, on the evaluation of tenders for this and on the study itself;
  - d. to discuss the outcome of regular consultations which the Commission holds with representatives of broadcasting organizations, producers, consumers, manufacturers, service providers and trade unions and the creative community;
  - e. to facilitate the exchange of information between the Member States and the Commission on the situation and the development of regulatory activities regarding television broadcasting services, taking account of the Community's audiovisual policy, as well as relevant developments in the technical field;
  - f. to examine any development arising in the sector on which an exchange of views appears useful.

**Proposal of 13 December 2005 for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM (2005) 646 final)\***

**Consideration 46**

(46) Product placement is a reality in cinematographic works and in audiovisual works made for television, but Member States regulate this practice differently. To ensure a level playing field, and thus enhance the competitiveness of the European media industry, it is necessary to adopt rules for product placement. The definition of product placement introduced here covers any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, normally in return for payment or for similar consideration. It is subject to the same qualitative rules and restrictions applying to advertising.

**Article 2**

[...]

“7. A Member State may, in order to prevent abuse or fraudulent conduct, adopt appropriate measures against a media service provider established in another Member State that directs all or most of its activity to the territory of the first Member State. This shall be proven on a case by case basis by the first Member State.

8. Member States may take measures pursuant to paragraph 7 only if all of the following conditions are met:

- a. the receiving Member State asks the Member State in which the media service provider is established to take measures;
- b. the latter Member State does not take such measures;
- c. the first Member State notifies the Commission and the Member State in which the media service provider is established of its intention to take such measures and
- d. the Commission decides that the measures are compatible with Community law.

9. Any measures pursuant to paragraph 7 shall be objectively necessary, applied in a non-discriminatory manner, be suitable for attaining the objectives which they pursue and may not go beyond what is necessary to attain them.

10. The Commission shall decide within three months following notification under paragraph 8. If the Commission decides that the measures are incompatible with Community law, the Member State in question shall refrain from taking the proposed measures.”

**Article 3c**

Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of the service at least the following information:

- a. the name of the media service provider;
- b. the geographic address at which the media service provider is established;
- c. the details of the media service provider, including his electronic mail address or website, which allow him to be contacted rapidly in a direct and effective manner;
- d. where applicable, the competent regulatory authority.

**Article 3h**

1. Audiovisual media services that are sponsored or that contain product placement shall meet the following requirements:

- a. the scheduling, where appropriate, and the content of such audiovisual media services may in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
- b. they must not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

\*[http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0646en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0646en01.pdf)

- c. viewers must be clearly informed of the existence of a sponsorship agreement and/or the existence of product placement. Sponsored programmes must be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or the end of the programmes. Programmes containing product placement must be appropriately identified at the start of the programme in order to avoid any confusion on the part of the viewer.
2. Audiovisual media services must not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products. Further, audiovisual media services must not contain placement of tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.
3. The sponsorship of audiovisual media services by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking but may not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.
4. News and current affairs shall not be sponsored and not contain product placement. Audiovisual media services for children and documentaries may not contain product placement.”



# Participants to the Workshop

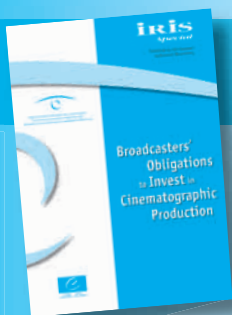
## *“Implementing the Regulation of Transfrontier Audiovisual Media Services”*

### 8 April 2006, Strasbourg, France

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