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**THIRD REPORT FROM THE COMMISSION TO THE COUNCIL, THE
EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE**

on the application of Directive 89/552/EEC "Television without Frontiers"

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TABLE OF CONTENTS

THIRD REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN
PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE on the application of
Directive 89/552/EEC "Television without Frontiers"

1.	Introduction.....	3
2.	Development of the television market in Europe (1997-2000)	4
3.	State of play in transposing the revised directive.....	7
4.	Application of the Directive.....	7
4.1.	Principles regarding jurisdiction (Article 2)	7
4.2.	Events of importance for society (Article 3a).....	8
4.3.	Promotion of distribution and production of television programmes (Articles 4 & 5)10	
4.4.	Application of the rules on advertising (Articles 10 to 20)	11
4.5.	Protection of minors and public order (Articles 22 to 22b).....	12
4.6.	Coordination between national authorities and the Commission.....	14
5.	Enlargement: Analysis of audiovisual legislation in the Candidate Countries.....	15
6.	Cooperation with the Council of Europe.....	16
7.	Conclusions and Prospects	17

1. INTRODUCTION

By means of this Communication the Commission is submitting to the European Parliament, the Council and the Economic and Social Committee the third report on the application of Directive 89/552/EEC¹, as amended by Directive 97/36/EC², "Television without Frontiers" (referred to below as 'the Directive').

Article 26 of the Directive provides that, not later than 31 December 2000, and every two years thereafter, the Commission must submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Directive as amended and, where appropriate, make further proposals to adapt it to developments in the field of television broadcasting, in particular in the light of recent technological developments.

The report deals with application of the Directive since it was amended in July 1997³ up until the end of 2000.

The report describes and analyses the salient facts relating to application of the Directive during the reference period. These cover, in particular, coordination between the national authorities and the Commission, protection of minors, application of Article 3a on events of major importance for society, application of the rules on advertising, the stage reached in transposing the Directive and an analysis of audiovisual legislation in the applicant countries wishing to join the European Union.

Since this report covers what is basically a period of transition, given that a review of the Directive's provisions is scheduled for the end of 2002, it makes no new proposals for amending the Directive. In the interim period the Commission will continue, in a transparent manner, to hold consultations, especially on how technological developments might affect the Directive's provisions. In particular, the Commission recently launched several studies in various fields covered by the Directive⁴. As part of this drive, public meetings will be organised, which will be attended *inter alia* by representatives of Europe's audiovisual industry. The results of the studies and meetings will provide important feedback for the Communication reviewing the Directive which the Commission intends to submit to the Council and Parliament in 2002.

Furthermore, it should be noted that, in keeping with Article 4(3) of the Directive, the application of Articles 4 and 5 thereof are dealt with in a separate report⁵. However, Point 4.3. of this report gives the separate report's main conclusions regarding Articles 4 and 5 (promotion of distribution and production of television programmes) of the Directive.

¹ OJ L 298/23, 17.10.1989.

² OJ L 202/60, 30.07.1997.

³ The cut-off date for the second application report.

⁴ OJ S 149, 05.08.2000.

⁵ COM(2000) 442 final.

2. DEVELOPMENT OF THE TELEVISION MARKET IN EUROPE (1997-2000)⁶

Industry

The television sector, within a larger audiovisual industry, witnessed a period of continuous development from 1997 to 2000.

Against a background of increased and qualitatively improved availability of transmission and reception infrastructures, the providers of TV services have developed their offer both in quantitative and qualitative terms. At the beginning of 2000, over 580 channels with potential national coverage were broadcast in the EU via terrestrial, satellite or cable means. This number represents an increase of about 58% and 170% compared to the number of channels reported at the end of 1998 and 1996 respectively⁷. Many of the existing channels are broadcast over more than one type of transmission infrastructure and are regularly received in more than one EU country, mainly via satellite. This has increased the overall cross-border features of the audiovisual market. In the small Member States - notably those sharing a language with other larger Member States - terrestrial and, mainly, cable broadcasting of foreign channels is fairly common. Around 50 channels target mainly markets in countries other than their country of establishment. At the same time 22 digital packages were distributed, through satellite or cable, in European Union countries, with almost all Member States counting at least one package. Moreover, three Member States have launched digital terrestrial TV services since 1998 (United Kingdom, 1998, Sweden, 1999, Spain 2000). Trial broadcasting of digital terrestrial programmes is underway in several other European countries⁸.

Beside the generalist public and private free-to-air channels (about 83 channels broadcasting a total of about 550 000 hours per year), a growing number of thematic channels are broadcast within the packages offered by pay-TV operators, either via satellite or cable networks as well as by digital terrestrial broadcasting. The programming and marketing of such channels differ from operator to operator and a precise quantitative assessment of the programming time is almost impossible. Nevertheless, a reasonable estimate is around 3.5 million broadcast hours per year. The most popular genres include films, sports, programmes for children, music and leisure programmes, but more and more channels are dedicated to "niche markets" (such as training and education, TV series, cartoons, documentaries, history, travel, videogames, financial services, home-shopping, religion, erotic and pornographic programmes). Channels linked to a local audience are also in rapid development and are likely to benefit from the increased possibilities of transmission through satellite, cable and - in the near future - digital terrestrial television.

Specialised surveys⁹ covering the largest markets have recently shown that TV fiction of national origin tended to prevail during prime time (with limited exceptions such as Italy and Spain) in 1999, while US fiction continued to fill the other fiction slots of the schedules. The presence of European non-domestic TV fiction and feature films remained quite limited. As a consequence of such programming patterns, trade in TV rights with the US in 1998 showed a deficit of about US \$ 2.9 billion (+ 14% vs. 1997) out of a total audiovisual deficit evaluated

⁶ All the statistical data in this communication were supplied by the European Audiovisual Observatory, unless otherwise specified.

⁷ Commission report on the application of Articles 4 and 5 of the TWF Directive. COM(2000) 442 final.

⁸ See also Commission Report on the Development of the Market for Digital TV in the EU in the context of Directive 95/47/EC.

⁹ Report 2000 'Television Fiction in Europe' by Eurofiction.

at US \$ 6.6 billion. A large part of this deficit was due to the trade in feature films, TV fiction and cartoons. This trade imbalance continued in 1999.

Audience

Against the steady and diversified increase of supply of TV services, the demand from the public, the audience, has only marginally increased in recent years without, nevertheless, showing the contraction of daily viewing time predicted by many analysts in connection with the development of mass access to the Internet. In actual fact, the proliferation of channels and delivery platforms has largely contributed to the popularity of TV as an entertainment and information medium and the number of hours EU citizens spend watching TV has remained within a range of between about 140 minutes/day (Austria) to about 230 minutes/day (Italy and Greece).

The audience of public service channels differs widely from country to country: daily market shares during the first six months of 2000 vary from 2/3 in Denmark¹⁰ to 1/10 in Greece. In 1999, the public service channels lost some market share in Austria, Ireland, Spain, UK, Portugal and Sweden, while in other countries their audience remained stable and even improved in Belgium.

In almost all Member States the “established” free private channels, which developed in the mid-80s, are facing the competition of a new type of operator, both free and pay TVs, arriving on the market through the traditional terrestrial broadcasting pathway (Channel 5 in UK, Nelonen in Finland) or, more often, through cable and/or satellite.

The audience structure in relation to the transmission mode varies from country to country and is often the consequence of the development models followed since the Sixties and Seventies. Germany, where cable and satellite reception is widely developed, has the most fragmented market. In the United Kingdom the market share of channels with no terrestrial transmission is above 11%, while in France it has reached about 7% and about 10% in Germany during the first six months of 2000. In Belgium and the Netherlands, where cable distribution is widespread, terrestrial broadcasting is almost limited to the public service channels while all the major commercial broadcasters are exclusively transmitted by cable. In these countries, too, the public service programmes are followed by the public almost exclusively via cable. By contrast, in Italy cable transmission is almost non-existent, satellite reception is mainly driven by pay TV and both the public service and commercial channels are generally received via terrestrial transmission.

The development of pay television has been boosted in most European countries by the progressive availability of digital transmission techniques via satellite and cable, as well as the supply of packages offering premium and thematic channels. Subscribers to pay-TV premium services were estimated at over 18 million at the end of 1999, while 13 million households are equipped to receive digital programmes.

Overall value of the market

Almost all EU households are equipped with TV sets (over 152 million in 2000, +12 million vs. 1997) and the number of 16:9 TV sets is expanding (about 5.5 million at the end of 1999). The number of households equipped to receive direct satellite broadcasting (and which are, therefore, able to have access to radio and other distant broadcasting services) increased to a

¹⁰ This estimate includes data referring to TV2, a mixed public/private broadcaster.

share of 18% of all households, while TV cable connections reached about 29% of all households. Cable networks are considered to be strategic by several operators in view of the possibility of providing their customers with a large range of services in a soon-to-be all-digital environment: easy access to TV interactivity, to the Internet and voice telephony. Households with access to the Internet was put at 12% of all EU households in mid-1999¹¹.

The overall turnover of the TV and radio broadcasting sector in the European Union in 1998 has been estimated by the European Audiovisual Observatory at about € 48 billion, compared with € 44 billion in 1997 (+ 9.1%).

Advertising remains the main financing source for EU TV broadcasters. After several years of uninterrupted expansion, the gross TV advertising market for private and public service operators can be estimated at about € 23.2 billion in 1999, (+ 13.4% vs. 1998). Forecasts predict a further increase of 8.8% in 2000 and 6.8% in 2001¹². The positive trend in the expansion of the number of pay-TV subscriptions has also boosted the net revenues of such channels to an overall amount of € 7.3 billion in 1998, an increase of 22% versus the previous year. Although complete data are not available for 1999, a growth rate of around 18% seems likely.

The public service broadcasters continue to be funded mostly through the licence fees paid by viewers. The total revenues of radio-television public services in 1998 totalled € 23.8 billion (+ 4.2% vs. 1997). Grants and loan guarantees remain an important form of financing for some public broadcasters (Spain, Portugal), while in the Netherlands the licence fee was replaced by funding through the general taxation system as of the beginning of 2000. The share of commercial revenues of the public service broadcasters is increasing in several countries (Belgium, Denmark, Spain, Italy, Sweden) and accounts, in general, for 1/3 of total revenues. By contrast, in Germany, and more recently in France, the policy followed has put more emphasis on systems based on licence fees as the main source of revenues necessary to fulfil the public service remit.

Company concentration

In order to respond to the challenge linked to technological developments, several private broadcasters have followed a policy of strategic alliances and mergers both within the audiovisual sector and with partners in neighbouring segments or markets such as the Internet and telecoms. Many such alliances aim to create synergies between audiovisual content providers and audiovisual services distributors.

The most significant event was probably the merger of the audiovisual activities of the Pearson Group with CLT-UFA¹³, with the later increase of the RTL Group's participation in the Spanish private channel Antena 3. The reorganisation of the Kirch Gruppe has allowed further alliance of the German companies with the Italian Mediaset¹⁴ and the British BSkyB¹⁵. The Commission was able to accept the BSkyB/Kirch joint venture subject to commitments agreed with the parties. These provide access to proprietary technologies and ensure migration to open standards in order to prevent market foreclosure via the creation or strengthening of a dominant position. In Germany Sat.1 and PRO Sieben have been merged

¹¹ Telecommunication survey 1999 by Gallup Europe.

¹² European Advertising and Media Forecast, September 2000 by NTC.

¹³ Commission Decision of 29.6.2000: Comp/M. 1958/Bertelsmann/GBL/Pearson TV. IP/00/691.

¹⁴ Commission Decision of 3.8.1999: Comp/JV. 1574/Kirch/Mediaset. IP/99/611.

¹⁵ Commission Decision of 21.3.2000: Comp/JV. 37/BSkyB/Kirch PayTV. IP/00/279.

into one company. In the UK, the concentration process of the ITV network has been accelerated by Granada's takeover of United News and Media. Last but not least, the merger between Vivendi and the Canadian company Seagram (owner of Universal Studios)¹⁶ has forged a transatlantic alliance placing the various CANAL+ channels in a new situation.

3. STATE OF PLAY IN TRANSPOSING THE REVISED DIRECTIVE

As the Guardian of the Treaties, the Commission's first priority is to ensure that Directive 97/36/EC of 30 June 1997, which amended the 1989 Directive, is transposed correctly. The transposal date laid down in the Directive was 30 December 1998.

At the time this report was adopted, 12 Member States (Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Austria, Portugal, Finland, Sweden, United Kingdom) had given notification of the national measures implementing Directive 97/36/EC. Transposal is under way in the three other Member States (Italy, Luxembourg, Netherlands). The Commission has initiated proceedings on this score before the Court of Justice of the European Communities¹⁷.

4. APPLICATION OF THE DIRECTIVE

4.1. Principles regarding jurisdiction (Article 2)

The revised Directive lays down a firm legal framework allowing television operators to develop their activities in the European Union. The main objective is to create the necessary conditions for free movement of tv broadcasts. The revised Directive has spelled out and clarified a number of provisions, including the principle of regulation only in the originating Member State and the criteria for making broadcasters subject to that State's legal system. The Commission has monitored compliance with and the effectiveness of these principles during the reference period.

As a result, the Commission instituted infringement proceedings against Belgium (press release of 5 July 1999, IP/99/455) because it felt that the Flemish audiovisual authorities had exceeded their powers. The Commission felt that the decision taken by the *Vlaams Commissariaat voor de media* obliging channel VT4, which comes under British jurisdiction, to submit a request for authorisation to it, infringed - on the one hand - the Directive's rules on legal jurisdiction, which state that only the State of establishment of the broadcaster has the powers to control it, and - on the other - Article 10 of the EC Treaty. The Commission also felt that the contested decision was incompatible with European Court of Justice case law, which says that the powers of the receiving Member State should be limited to verifying that the broadcasts in question actually emanate from another Member State (Case C-11/95 – judgment of 10 September 1996). Furthermore, the Commission was informed of the Dutch authorities' decision (*Commissariaat voor de Media*) to ban the distribution of RTL 4 and RTL 5 programmes to the Netherlands unless RTL/Veronica De Holland Media Groep SA obtained Dutch licences for these television channels. The Commission is closely watching developments on this.

¹⁶ Commission Decision of 13.10.2000: Comp/m. 2050/Vivendi/Seagram/Canal+. IP/00/1162.

¹⁷ CEC/Italy: Case C-2000/207; CEC/Luxembourg: Case C-2000/119; CEC/Netherlands: C-2000/145.

4.2. Events of importance for society (Article 3a)

Article 3a(1) of the Directive provides Member States with a legal basis for taking *national measures* with a view to protecting designated events of major importance for society. Consequently, Article 3a(1) constitutes a voluntary provision, which may or may not be implemented by the respective Member State. Article 3a(2) describes the procedure for obtaining a preliminary assessment by the Commission that the measures taken appear to be in conformity with Community law: in this respect, the measures taken pursuant to Article 3a(1) are to be notified immediately to the Commission. Within three months the Commission has to verify that the measures taken are compatible with Community law, communicate them to the other Member States and seek the opinion of the Contact Committee. Once the measures have been evaluated along the lines mentioned above (conformity with Community law), they are to be published in the Official Journal of the European Communities.

Article 3a(3) of the Directive sets out a system aimed at avoiding circumvention of a particular Member State's legislation by broadcasters subject to another Member State's jurisdiction. In this respect, the paragraph is part of the *acquis* created by the Directive and therefore, in contrast to Article 3a(1) and (2), mandatory in relation to every Member State.

As regards the examination procedure, the following practice has been established. Formal notification is preceded by informal bilateral talks between the Commission and the respective Member State in order to carry out a preliminary assessment of the measures envisaged. This procedure is advisable to avoid multiple national procedures. The measures taken by the Member States normally consist of drawing up a list of events of major importance for society plus a set of accompanying measures.

By 24 October 2000 measures in relation to Article 3a(1) of the Directive have been taken by Denmark, Italy, Germany and the United Kingdom. Furthermore, Austria, the Netherlands, Belgium and France have indicated that they intend to notify draft measures in the near future.

Denmark notified measures taken pursuant to Article 3a(1) of the Directive to the Commission on 14 December 1998, and the Contact Committee raised no objections to these in its Opinion of 13 January 1999.

The measures are defined in the "Order No 809 on the use of TV rights to events of major importance for society" of November 1998, whereby 10% of the public is defined as a substantial proportion which must not be deprived of the right to follow an event.

The listed events are: the Summer and Winter Olympic Games in their entirety; World and European football men's championship: all matches with Danish participation together with semi-finals and finals; World and European handball championships (men and women): all matches with Danish participation together with semi-finals and finals; Denmark's world and European championship qualifying matches in football (men); Denmark's world and European championship qualifying matches in handball (women). The measures were published in the Official Journal of the European Communities on 21.07.2000¹⁸.

Germany notified draft measures to be taken pursuant to Article 3a(1) of the Directive to the Commission on 28 April 1999, and the Contact Committee raised no objections in its Opinion

¹⁸ OJ C 209, 21.7.2000, p. 3.

of 7 July 1999. The entry into force of the draft measures was notified to the Commission by letter of 5 September 2000.

The measures are laid down in Paragraph 5a of the "*Vierter Rundfunkänderungsstaatsvertrag*" (4th amendment to the Inter-Länder Treaty on Broadcasting). According to German legislation, a third of households constitutes a "substantial proportion of the public".

The listed events are: the Summer and Winter Olympic Games; World and European championships - all matches with German participation, together with the opening game, the semi-finals and the Final; the semi-finals and the Final of the German FA Cup; the German national football team's home and away matches; the finals of European football club competitions (Champions League, UEFA Cup) with German participation. The measures were published in the Official Journal of the European Communities on 29 September 2000¹⁹.

Italy notified measures taken pursuant to Article 3a(1) of the Directive to the Commission on 10 May 1999, and the Contact Committee raised no objections in its Opinion of 7 July.

The measures taken by Italy are laid down in the "*Delibera n° 8/1999 dell'Autorità per le garanzie nelle comunicazioni*" (Decision No 8/1999 of the Communications Authority). A substantial proportion of the public is defined as 10%.

The list includes the following events: the Summer and Winter Olympic Games; the football World Cup Final and all World Cup championship matches involving the Italian national team; the European Football Championship Final and all European Football Championship matches involving the Italian national team; all matches involving the Italian national football team, at home and away, in official competitions; the Final and the semi-finals of the Champions League and the UEFA Cup where an Italian team is involved; the Tour of Italy (Giro d'Italia) cycling competition; the Formula One Italian Grand Prix; the San Remo Italian music festival. The measures were published in the Official Journal of the European Communities on 21 July 2000²⁰.

The **United Kingdom** notified measures taken pursuant to Article 3a(1) of the Directive to the Commission on 5 May 2000, and the Contact Committee raised no objections in its Opinion of 6 June 2000.

The measures taken by the United Kingdom are laid down in: Part IV of the Broadcasting Act 1996, the Television Broadcasting Regulations 2000, the Independent Commission's Code on Sport and other Listed Events and several declarations by the Secretary of State for Culture, Media and Sports. According to UK legislation, a substantial part of the public is defined as 5%. The list consists of two parts: the events listed in Group A are to be covered live, whereas Group B events are subject to secondary coverage. In this respect, minimum requirements regarding secondary coverage (minimum length, maximum delay in relation to the event) have been defined.

The list of Group A events includes: the Olympic Games; the FIFA World Cup Finals Tournament; the FA Cup Final; the Scottish FA Cup Final (in Scotland); the Grand National; the Derby; the Wimbledon Tennis Finals; the European Football Championship Finals Tournament; the Rugby League Challenge Cup Final; the Rugby World Cup Final.

¹⁹ OJ C 277, 29.9.2000, p. 4.

²⁰ OJ C 209, 21.07.2000, p. 5.

The list of Group B events for secondary coverage include: Cricket Test matches played in England; non-Finals play in the Wimbledon Tournament, all other matches in the Rugby World Cup Finals Tournament; Five Nations Rugby Tournament Matches involving home countries; the Commonwealth Games; the World Athletics Championship; the Final, the semi-finals and matches of the Cricket World Cup involving home nation teams; the Ryder Cup; the Open Golf Championship. The measures were published in the Official Journal of the European Communities on 18 November 2000²¹.

In accordance with Article 3a(2) of the Directive, a consolidated list of the measures taken by Member States has been published in the Official Journal of the European Communities²². The next such publication is planned for the end of 2000.

Implementation of Article 3a(3) of the Directive is, as already mentioned, mandatory for all Member States. Its effective implementation is essential to ensure that Member States' specific provisions with regard to events of major importance, as permitted under Article 3a(1), are not undermined by broadcasters coming under the jurisdiction of other Member States. In three cases, broadcasters under the jurisdiction of the United Kingdom have broadcast events listed by Denmark in a way that prevented a substantial part of the Danish population from seeing these events. Two of these cases are currently subject to judicial review in the United Kingdom. The Commission is closely monitoring the development of these cases. Furthermore, the interpretation of Article 3a(3) and its application by the Member States are being examined by the Commission, the aim being to draw up guidelines on Article 3a(3).

4.3. Promotion of distribution and production of television programmes (Articles 4 & 5)

The Commission adopted the fourth Communication to the Council and the European Parliament on application of Articles 4 and 5 of Directive 89/552/EEC, as amended by Directive 97/36/EC, for the period 1997-8 on promoting distribution and production of television programmes²³. These Articles state that broadcasters should, whenever practicable, reserve a majority proportion of their transmission time for European works, and 10% of their air time - or 10% of their programming budget - to European works made by producers independent of broadcasting organisations.

The Communication consists of three chapters and three Annexes. In Chapter I the Commission gives its opinion on application of Articles 4 and 5 in 1997 and 1998. The other two chapters contain summaries of the national reports sent in by the Member States and by those European Free Trade Association (EFTA) states that form part of the European Economic Area (EEA).

The first annex sets out the suggested new guidelines for monitoring application of the Directive; the second lists the channels not achieving the target for European works and/or broadcasts of independent productions; and finally, the third annex gives the parameters used to calculate the weighted averages of European works broadcast.

The Commission notes that the objectives of Articles 4 and 5 of the Directive have been generally achieved. The weighted average of European works broadcast by the major

²¹ OJ C 328, 18.11.2000, p. 2.

²² OJ C 209, 21.7.2000, p. 3.

²³ COM(2000) 442 final.

channels varies from 53.3% to 81.7 %, except for Portugal where the figure is 43%. It should be noted that most of the Member States have introduced legislation that is more rigorous than that contained in the Directive.

Overall, the television channels' broadcasting of European works and independent productions satisfactorily complies with the rules contained in the Directive, and the aims of the Directive have been generally achieved. Progress was made in broadcasts of European works in the recent period as compared with the 1997/98 period. The report records the reasons given by the channels failing to meet the obligations set out in the Directive.

Among the reasons given by the channels failing to meet their obligations, the following are worthy of particular mention: the newness of certain channels and their resulting financial fragility, the difficulty of finding or producing European works for thematic channels, and the fact that certain channels are subsidiaries of third-country organisations, which mainly draw on their own stocks.

Furthermore, the Commission has announced its intention, in accordance with Article 26 of the Directive, to review all the Directive's provisions in 2002, and this will involve consultation with all interested parties.

4.4. Application of the rules on advertising (Articles 10 to 20)

The Directive lays down rules concerning the amount of advertising permitted on screen (daily and hourly limits, Article 18), the number of and form of advertising interruptions (Article 11), and rules applicable to the content and presentation of advertising messages (Articles 10, 12, 13, 14, 15 and 16). Specific rules (Article 17) are applied to sponsorship.

The Commission received several complaints about alleged failure in certain Member States to comply with the rules on advertising and sponsorship. In addition, the Commission had addressed to it several parliamentary questions concerning compliance with these provisions in Member States.

The complaints – often coming from consumers' associations – report that the quantitative ceilings are being systematically exceeded. The problems particularly concern the practices of certain broadcasters in Greece, Spain, Italy and Portugal. The Commission is in the process of gathering the information it needs to assess the extent to which these alleged excesses could constitute infringements by the Member States concerned, with a view to taking the relevant corrective measures.

What is more, as regards application of the provisions in Directive 89/552/EEC not amended by Directive 97/36, infringement proceedings, for poor application, have been initiated in three cases concerning Greece, Spain and Italy (for non-compliance with the provisions on advertising).

Also, in its judgment of 28 October 1998 (Case C-6/98, PRO Sieben Media AG) concerning the restriction on broadcast time devoted to advertising, the Court of Justice ruled that Article 11(3) of the Directive should be construed as prescribing the gross principle, so that, in order to calculate the 45-minute period for the purpose of determining the number of advertising interruptions allowed in the broadcasting of audiovisual works such as feature films and films made for television, the duration of the advertisements must be included in that period. This judgment confirms the Commission's interpretation of this article in the Directive.

The Commission would point out that each Member State has an obligation to ensure that all programmes transmitted by broadcasters under its jurisdiction respect the rules of the Directive and, more generally, the law applicable to programmes intended for an audience in that Member State.

Furthermore, the Commission recently launched a study on developments in new advertising techniques. The aim is to allow the Commission to gain an overall and accurate picture of the current situation and probable developments in advertising, sponsorship and teleshopping methods in the various media, i.e. television, radio, cinema and the Internet.

The Commission considers it an absolute priority to create a real level playing field between operators established in the different Member States, along with a level of protection of the interests of television viewers in the Union which is at that of the Directive. It intends to equip itself with the means to increase its capacity for monitoring complaints and checking implementation of Community law in this field.

4.5. Protection of minors and public order (Articles 22 to 22b)

As an exception to the general rule of freedom of reception and non-restriction of retransmission, Article 2a(2) of the Directive allows the Member States - provided that they respect a special procedure - to take measures against broadcasters under the jurisdiction of another Member State who "manifestly, seriously and gravely" infringe Article 22 of the Directive. This is designed to protect minors from programmes which could seriously impair their "physical, mental or moral development", and to ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.

The Member State concerned must notify the television broadcaster and the Commission in writing of the alleged infringements and the measures it intends to take if any such infringement occurs again.

Consultations must be undertaken. If they do not produce an amicable settlement within 15 days of the notification, and the alleged infringement persists, the receiving Member State may take unilateral provisional measures against the channel concerned.

The Commission must decide whether the measures taken are compatible with Community law, within two months following notification of the measures taken by the Member State. If it decides that they are not, it may require the Member State to put an end to the measures in question as a matter of urgency.

During the period in question, only one Member State (the United Kingdom) felt it was necessary to have recourse, on one occasion, to this procedure.

The consultations did not produce a settlement and the British authorities considered it necessary to adopt a prohibition order against the channel, which was under the jurisdiction of another Member State.

Following contacts with the Member States concerned and after considering the effects of the measures communicated by the United Kingdom, the Commission held, in December 1998, that these measures were compatible with Community law. This judgment was largely based on a test of proportionality and on an assessment of the possible discriminatory effects of the

measures. The broadcaster concerned has appealed against this decision to the Court of First Instance which held on 13th December that the application was inadmissible²⁴.

The Commission considers application of Article 2a(2) in the reference period to have been satisfactory. It has protected the general interest with a minimum of restriction on freedom to provide services.

However, the Commission would stress that its assessment of the measures taken under Article 2a(2) is based on factual and legal considerations; the moral assessment of the content of the programmes depends on the judgment of each Member State, which has the principal responsibility for authorising or prohibiting the transmission of certain television programmes by broadcasters under its jurisdiction who may be caught by Article 22. The Directive anticipates the possibility of a difference in judgment between the authorities of the originating country and those of the receiving country.

Furthermore, the measures taken by the receiving Member State are without prejudice to those taken, if necessary, by the Member State which has jurisdiction over the broadcaster in question. It is not, therefore, a question of transferring jurisdiction from one State to another, but of an exceptional possibility offered to the receiving Member State to take measures to protect its interest in situations of incontestable gravity, according to a precise procedure.

It is also important to highlight the fact that, in the system of Community rules created by the Directive (Article 2a(1)), Member States are not permitted to apply discriminatory moral criteria to the broadcasters under their jurisdiction: a stricter attitude to programmes to be received in their territory and a more lenient attitude to programmes destined to be broadcast abroad (typically, satellite channel programmes) would not be acceptable. On the contrary, the Member States are bound to ensure that all broadcasters under their jurisdiction comply with Article 22.

Article 22b study on parental control of Television Broadcasting

On 12 July 1999 the Commission issued a Communication on the results of a study on Parental Control of Television Broadcasting²⁵. This study had been carried out pursuant to Article 22b(2) of the Directive (as revised). It considered, inter alia, the desirability of:

the requirement for television sets to be equipped with technical filtering devices;

the setting up of appropriate rating systems²⁶,

encouraging family viewing policies and educational and awareness measures.

The study was published on the World Wide Web on 19 March 1999²⁷. The main findings are:

Children are watching more television alone and the number of television channels has increased to the point where it is difficult for regulators to monitor them. Digital technology allows viewers to arrange their own viewing schedules, and broadcasting on the Internet makes monitoring impossible.

²⁴ T 69/99 Danish Satellite TV (DSTV) A/S (Eurotica Rendez-Vous Television) v. CEC 13/12/00

²⁵ Communication on the Study on Parental Control of Television Broadcasting COM/99/0371 final, 19.07.1999.

²⁶ Rating systems assess the suitability of media (in this case television) content for particular age groups.

²⁷ http://europa.eu.int/comm/dg10/avpolicy/key_doc/parental_control/index.html.

The V-chip technology adopted in North America is technically unsuited for Europe. It is becoming obsolete, because it is based on analogue technology. Digital broadcasting offers much more sophisticated and reliable means for filtering and blocking unsuitable programming.

Technical devices cannot substitute entirely for broadcaster responsibility.

Set-top boxes and digital televisions should be interoperable, so that different filtering and blocking software can be installed on all of them. Cultural differences rule out a harmonised rating system, but digital technology would allow for a flexible and culture-specific approach to filter systems.

There is a great need for awareness-raising and educational actions with regard to harmful audiovisual content, in all its forms, and the protection systems in place.

Finally, there is a need for greater coherence in the rating systems for television, cinema, video, the Internet and video games.

The Commission, as a first step, consulted the DVB²⁸ on the technical implications of the study. The DVB, wishing to give a comprehensive reply to the Commission, has carried out a follow-up study to investigate the options for a coherent approach to rating and filtering in broadcasting and on the Internet. This follow-up study proposes several options for achieving this goal and the Commission will, in turn, take this forward in the context of its work on the Council Recommendation on the protection of minors and human dignity²⁹ and the Action Plan on Safer Use of the Internet³⁰. Further details in this respect will be given in the Commission's evaluative report on the Council Recommendation³¹.

The European Parliament adopted on 5 October 2000 a resolution³² on the abovementioned Communication on the results of a study on Parental Control of Television Broadcasting.

4.6. Coordination between national authorities and the Commission

Application of the rules of the Directive is the responsibility of each Member State's national authorities (ministries and/or independent authorities) responsible for regulating the audiovisual industry. Systematic contact with the national bodies (ministries and/or independent regulatory authorities) has been maintained, particularly through the Contact Committee set up by the Directive. This Committee, which is composed of representatives of Member States' competent authorities, is chaired by a Commission representative and meets either on his initiative or at the request of the delegation of a Member State. The Committee has fulfilled the tasks conferred on it by the Directive, and has, in particular, facilitated effective implementation of the Directive; it has delivered opinions, especially under the

²⁸ The Digital Video Broadcasting Project - a global consortium with a membership of over 220 broadcasters, manufacturers, network operators and regulatory bodies in more than 30 countries.

²⁹ Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity (OJ L 270, 07.10.1998, p. 48).

³⁰ Decision 276/1999/EC of The European Parliament and of the Council of 25 January 1999 adopting a Multiannual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks.

³¹ To be adopted at the beginning of 2001.

³² European Parliament Resolution A5-0258/2000, 5.10.2000.

procedure laid down in Article 3a(2) concerning events of major importance for society (see Point 4.2), and facilitated the exchange of information between Member States and the Commission on the situation and developments in the sector.

The Commission's activities involving coordination with the national bodies in the audiovisual field also took place within the framework of the European Platform of Regulatory Authorities (EPRA) set up in April 1995 in Malta with the aim of providing regulatory authority representatives with a forum for discussion and mutual exchange of views on regulatory matters in the audiovisual field, both Europe-wide and national. What is more, the Commission has also contributed financially to setting up EPRA's website. EPRA currently has 34 members³³. The European Commission (Education & Culture DG) and the Council of Europe (Media Division) have permanent-observer status. The Commission actively participates in the Platform's meetings and activities, chiefly in order to boost cooperation among the European regulatory authorities.

EPRA has held 12 meetings, the last one in Bratislava on 26 and 27 October 2000.

5. ENLARGEMENT: ANALYSIS OF AUDIOVISUAL LEGISLATION IN THE CANDIDATE COUNTRIES

Since 1997, most of the candidate countries have been working to bring themselves into line with the Directive, and new legislation has been enacted in eight candidate countries³⁴ to this end. Furthermore, the legislative process is under way in six candidate countries³⁵.

Mainly due to the fact that any review of national broadcasting legislation is a complex and sensitive exercise encompassing political and technical issues which go far beyond the scope of the Community *acquis*, progress was relatively slow in the beginning of the reference period. In Central and Eastern Europe, for example, many issues are at stake at the same time: transforming the state television into a modern public service television, creating or reinforcing broadcasting regulatory authorities, defining a licensing mechanism, developing support mechanisms for the creation of local content. Most often, the task of aligning broadcasting legislation with the *acquis* has been delayed by such legitimate internal political debates.

However, the year 2000 already appears to be a turning point in this alignment process. Five candidate countries³⁶ have already achieved a very high degree of alignment with the *acquis*. Other legislative initiatives are under way, which should lead to new legislation before the end of the year.

For a majority of candidate countries, the priority will now shift from alignment efforts to implementation of the *acquis*. In this respect, efforts will probably be needed in candidate countries.

³³ Representatives of the audiovisual regulatory bodies (European Union, European Free Trade Association, Central and Eastern European Countries).

³⁴ Bulgaria, Cyprus, Estonia, Latvia, Lithuania, Malta, Poland and Slovak Republic.

³⁵ Czech Republic, Hungary, Latvia, Poland, Romania, Slovenia.

³⁶ Bulgaria, Cyprus, Estonia, Lithuania and Slovak Republic.

6. COOPERATION WITH THE COUNCIL OF EUROPE

The aim of the Council of Europe Member States when drawing up the European Convention on Transfrontier Television in 1989 was to bolster the free flow of information and ideas by encouraging transfrontier movement of television programme services on the basis of certain common rules.

These rules were intended to ensure that free transfrontier movement of television programme services promotes the fundamental values common to the Council of Europe Member States, in particular pluralism of ideas and opinions. The Convention constitutes a set of basic common rules for harmonious development of transfrontier television programme services. It confirms the guarantee of reception and establishes the principle of non-restriction of retransmission of programme services which conform to the common rules as mentioned.

The European Convention on Transfrontier Television was opened for signing on 5 May 1989 by the Council of Europe's Committee of Ministers. It came into force on 1 May 1993.

Given the major technical and economic developments occurring in television broadcasting and the appearance of new communication services in Europe since the Convention was adopted in 1989, and bearing in mind that the European Community had adopted Directive 97/36/EC of the European Parliament and Council of 30 June 1997 amending Directive 89/552/EEC, the Council of Europe saw an urgent need to amend some of the Convention's provisions in order to develop a coherent approach to transfrontier television between the Convention and the revised Directive.

The Protocol amending the Convention was adopted by the Committee of Ministers on 9 September 1998 and was opened for acceptance by the Parties to the Convention on 1 October 1998.

The Protocol takes effect when all the Parties to the current Convention have accepted it, or alternatively, two years after it has been opened for acceptance (i.e. 1 October 2000) unless a State which is already a Party to the Convention has lodged an objection against such automatic entry into force. Only France had lodged an objection prior to the date in question.

The Commission has played an active role in the activities of the Standing Committee on Transfrontier Television (its task is to monitor application of the Convention and suggest, where appropriate, amendments to it), the main aim being to ensure consistency between the provisions of the European Convention on Transfrontier Television and those set out in the "Television without Frontiers" Directive. This objective - which was politically and legally very important, *inter alia* allowing its geographical scope to be extended to cover regulation of such matters in Central and Eastern Europe - has been achieved.

Furthermore, following the Council Decision of 22 November 1999³⁷ on formalising Community participation in the European Audiovisual Observatory (EAO), the Commission - as the Community's representative - formally applied for membership of the Observatory on 16 November 2000 after the necessary amendments had been made to the EAO's statute and financial regulation. It also stepped up its operational contacts with the Observatory, especially in connection with analysing developments on the audiovisual market in the Union, the other countries of Europe and the rest of the world.

³⁷ OJ L 307, 02.12.1999, p. 61.

7. CONCLUSIONS AND PROSPECTS

The Directive continues to function effectively as a means of ensuring the freedom to provide television services in the Community. Beyond the final control of the transposition of the Directive, the Commission continues to verify its effective implementation and takes action where necessary to ensure it. The separate report on the application of Articles 4 and 5 of the Directive³⁸ indicated generally satisfactory results in terms of channels meeting the requirements concerning European works. Certain kinds of channels, in particular newer ones and special-interest channels, have difficulties in meeting these requirements.

Whilst the Directive is currently achieving its objective, it is clear that, largely as a result of the introduction of digital technology and the development of the Internet, broadcasting is undergoing a profound change. These changes are described briefly in section 2. The nature of these developments is such as to call for a review of certain provisions in the Directive. For example, digital technology permits a wide range of new advertising techniques for which the current provisions may not be appropriate. Digital technology also allows for a vast increase in the number of available channels, and hard-disk recording technologies allow viewers to effectively construct their own viewing schedules. Increased viewer control has the potential to alter usage patterns and may have implications for the measures in the Directive concerning the promotion of European works, for example.

The next report on the application of the Directive is due by 31 December 2002. In order to ascertain more precisely the impact – both potential and actual – of technological and market developments, the Commission will carry out a full review of the Directive by this date.

For the purposes of this review, the Commission has launched three major studies in the fields covered by the Directive. The first of these will evaluate the impact of measures to promote the distribution and production of European television programmes. It will, in particular, evaluate the effectiveness of the quotas in the Directive as compared with other measures. The second study will be a very broad one. It will analyse the recent technological and market developments in the sector and attempt to identify cause-and-effect relationships. It will provide the Commission with a set of likely scenarios for the future development of the market. The third study will examine the development of new advertising techniques, in particular regarding how separation between advertising and other forms of content could be achieved.

The review will also take into account other consumer concerns, such as interoperability and conditional access systems, as well as the implications for consumers of the switch to digital broadcasting. In this respect it should be noted that the Commission has already, in its package of proposals concerning electronic communications adopted on 12 July 2000, proposed a new Directive which would cover conditional access systems and other associated facilities³⁹.

The Commission will conduct this review in a fully open manner. It will seek the views of all interested parties. The studies mentioned above, for example, include an obligation for the contractor to conduct a series of workshops in Brussels during the course of 2001 in order to allow for input from all concerned. At the beginning of 2002, the Commission will publish a

³⁸ Fourth Communication from the Commission to the Council on the application of Articles 4 and 5 of Directive 89/552/EEC “Television without Frontiers” for the period 1997-8, COM (2000) 442 final.

³⁹ Proposal for a Directive of the European Parliament and the Council on access to, and interconnection of, electronic communications networks and associated facilities, COM (2000) 384, 12 July 2000.

consultation document based on the results of the studies. It will invite written comments from all interested parties and will, in addition, conduct a series of hearings in 2002. The results of the studies and the consultation will provide the necessary elements and information for the next report on the application of the directive. This will include any proposals for amending the Directive which the Commission considers necessary, in particular in the light of market and technological developments.