Review of the Television without Frontiers Directive

State of internal EBU reflection in May 2002

(NB: This is not an official EBU Position Paper)

Contents

PART 1: GENERAL QUESTIONS
1.1 Political options: need for revision and timing
1.2 Scope of the Directive: a more horizontal approach?
1.3 The density of regulation (graduated approach)
1.4 The coherence between the legal framework for the audiovisual market and other Community legislation
1.5 Method of regulation (regulation, co-regulation and self-regulation)
1.6 What exactly are the obstacles to the free movement of audiovisual content services in a digital environment?

PART 2: EVENTS OF MAJOR IMPORTANCE TO SOCIETY

PART 3: QUOTAS AND OTHER MEASURES TO PROMOTE THE PRODUCTION AND DISTRIBUTION OF PROGRAMMES
3.1 Quotas for European works (Article 4)
3.2 Measures to promote the circulation of non-national European works
3.3 Quotas for independent productions (Article 5)

PART 4: TELEVISION ADVERTISING AND SPONSORSHIP
4.1 Basic principles
4.2 Virtual advertising and split-screen advertising

PART 5: PROTECTION OF MINORS AND HUMAN DIGNITY

PART 6: RIGHT OF REPLY

PART 7: CONTENT-RELATED PROVISIONS OF THE MUST-CARRY TYPE
PART 1: GENERAL QUESTIONS

1.1 Political options: need for revision and timing

The European Commission has been considering several political options:

- a *major in-depth revision* which would aim at extending the scope of the Directive to take into account new audiovisual services (for example, covering all audiovisual content services delivered at a distance);
- a *minor* revision which would not modify the scope of application but would aim to *simplify and deregulate*;
- a *technical* revision which would merely *refine* the existing text to improve clarity and legal certainty;
- a *postponement* of the revision for a few years.

| Proposed answer | In view of digitization and convergence, there will certainly be a need for a major revision to create a coherent regulatory framework for both traditional and new audiovisual services. However, as there are still many uncertainties regarding the development of digital television and on-line delivery of audiovisual services, it would be appropriate to wait another two years before embarking upon a full-scale revision. A minor revision at this stage would make no sense. Nevertheless, it should be possible, already now, to provide useful guidance to national regulators - in the form of implementation guidelines or recommendations - in areas already coordinated by the Directive, e.g. with regard to new forms of television advertising (split-screen, virtual advertising) or concerning disputes on the value of rights for listed events (Article 3a), where arbitration proceedings could make the provisions of the Directive more effective. Such measures could be seen as important steps in the preparation of a future revision of the Directive. |

➢ Points for discussion

If the European Commission decides to postpone the revision for two or three years, the question will arise as to how this period can be best used by the Commission for improved preparation – probably through more direct contact with interested parties and less involvement by consultants.

If a future Directive were to have a broader scope and include on-demand audiovisual services, the regulatory task would be considerable, and a consensus would first need to be built on basic principles for content regulation in the digital age.
Further considerations

To guarantee a level playing-field with its competitors and to preserve general interest objectives it would seem to be in the interests of EBU members to suggest an in-depth revision.

However, such a revision would represent a considerable amount of work because beyond the widening of the scope of application (with new "outside" borders), every chapter of the Directive would be the subject of an in-depth examination to adapt it to the different modes of delivery (with new "inside" borders between different kinds of services).

The difficulty of such an undertaking would lay in legislating on services whose development can hardly be foreseen today. It would therefore be almost impossible to achieve a text within a reasonable timeframe which would be flexible enough to take into account the speed of market evolution and would also ensure legal certainty for the operators while also protecting the general interest objectives.

The two options with regard to a "mini-revision" would not seem to provide real benefits for EBU members.

On the contrary, given that even a mini-revision would run the risk of becoming a protracted process, it could delay the necessary in-depth revision beyond a reasonable period. Satisfactory solutions for new forms of television advertising (such as split-screen and virtual advertising) could be found without changing the text of the Directive.

It is likely that deregulation of advertising rules, if at all realistic in the framework of a mini-revision, would mainly concern quantitative restrictions, where public service broadcasters are very often subject to stricter rules in any case. As advertising is also a sensitive issue, a partial solution, not addressing, for example, concerns about advertising directed at children, might lack the necessary balance. Moreover, drawing up new rules on advertising would entail developing further the concepts of self-regulation and co-regulation, but that would mean entering the discussion on the regulation of new audiovisual services.

In any event, it does not seem very realistic to have a narrowly-limited revision and not to touch on the scope of application. As soon as the advertising rules, for instance, are dealt with, it will be necessary to take into account the new techniques of interactive advertising and therefore to touch on the scope of application of the Directive.

Probably the one area where EBU members may wish to seek improvements to the current Directive is Article 3a (events of major importance to society). However, there is likely to be much pressure from sports rights owners in the opposite direction, i.e. either to liberalize or abolish that Article. In view of the relative lack of experience with implementing it (it was introduced only at the last revision stage, many Member States have still not drawn up national lists, and the 2002 Football World Cup is the first real "test case"), the most likely outcome at this stage may be retaining the status quo.
If a postponement were to be decided upon, it would be necessary to take into account the institutional calendar in order to fix a time-limit. The mandate of the European Parliament will end in June 2004, and a new Commission will take office in January 2005.

1.2 Scope of the Directive: a more horizontal approach?

Is the definition of television broadcasting in the Directive still valid in a digital environment in which all networks can increasingly deliver all kinds of electronic content, or should the scope – which is currently limited to point-to-multipoint television – be extended to cover all forms of audiovisual content services? Such a directive would cover content services in a more horizontal manner, whatever the mode of transmission or distribution, similarly to the horizontal approach chosen for infrastructure regulation (the new Communications Directives).

| EBU consensus so far* | There is a need for a regulatory framework for television broadcasting and new interactive audiovisual services which is as consistent as possible, with recognition that this might include a graduated approach. The current definition of "television broadcasting" is too narrow to cope with new developments. A review of the scope and purposes of the Directive is thus required. |


➢ Further considerations

Under the current Directive, the demarcation line between television services and information society services has been drawn at the point between near-video-on-demand and video-on-demand. This does not make sense, since for the viewer the technical difference between the two forms of distribution is not significant, and the democratic, cultural and social relevance of the audiovisual service may be the same.

In theory, a coherent legal framework for television broadcasting and new interactive audiovisual services could also be achieved by two separate Directives. However, the better solution would certainly be to have a future Directive covering all audiovisual content services. As this would imply a substantial review of the content of the "Television without Frontiers" Directive, it would not simply be an "extension of the scope" of the current Directive but would entail the elaboration of a new Directive with a broader scope.

1.3 The density of regulation (graduated approach)

Could there be a graduated approach which establishes more or less the same minimum standards for all audiovisual content services, but including a graduated cross-media approach to regulation (in other words, with less regulation where users have more control, e.g. video-on-demand, but more regulation for services where users have less control, e.g. free-to-air television)?
EBU consensus so far*  
"… with recognition that this might include a graduated approach".


| Proposed answer | The EBU would agree with a graduated cross-media approach but has strong reservations about "user control" as the only or even the main criterion. It is also important to take into account what impact a service has on public opinion forming or on cultural life. This will also depend on the kind of content which is distributed. For example:  
- Does it make a real difference whether viewers watch a dedicated television news channel or whether they select individual news items transmitted by the same provider upon individual request? In both cases the news items are likely to be the same, and viewers have no influence over their content.  
- The fact that viewers pay for a service does not mean that they can actually influence the content or have a broader choice. Particularly in view of the *de facto* monopolies of pay-TV platforms in certain markets, there is no justification for less strict rules for pay-TV compared to free-to-air television. |

### 1.4 The coherence between the legal framework for the audiovisual market and other Community legislation

How should it fit in with other legislation which has an impact on the sector, e.g. telecoms, e-commerce, copyright, consumer protection and other single market directives?

| Proposed answer | All these directives need to be carefully coordinated, even if they concern different "layers" of regulation which can be applied simultaneously to an electronic communications service: the "Television without Frontiers" Directive regarding audiovisual content aspects, the Communications Directives regarding transmission/infrastructure, the e-commerce Directive concerning transactions with users, the Copyright Directives regarding the protection of content, etc.  
In the consultations on the new regulatory package for communications infrastructure, we have put much emphasis on the links which exist between content and carriage, particularly regarding the allocation of frequencies, "must-carry" rules, and access to "digital gateways" (conditional access systems, application programming interfaces, etc.). Similar links also exist between other "layers" of regulation and need to be taken into account.  
For example, with regard to interactive television advertising, there is a link between the "Television without Frontiers" Directive, which regulates television advertising, and the e-commerce Directive, which regulates commercial communications in interactive services. |
1.5 Method of regulation (regulation, co-regulation and self-regulation)

Should self- and/or co-regulation play a greater role? Should one rethink complementarity between regulation, co-regulation and self-regulation, and, if so, at what levels?

<table>
<thead>
<tr>
<th>EBU consensus so far*</th>
<th>There is increased scope for co-regulatory approaches (particularly with regard to new advertising techniques).</th>
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| Proposed answer | The concept of co-regulation is promising but it needs to be developed further, especially in a cross-frontier context. We are not sure whether it will be possible to develop a viable mechanism for co-regulation at EU level. |

1.6 What exactly are the obstacles to the free movement of audiovisual content services in a digital environment?

Technical considerations

Incompatible or different technical delivery systems are a barrier to the free movement of audiovisual content in the digital environment.

The Internet uses common systems agreed by a worldwide technical body, which has meant the content can flow freely across the world via the Internet (though this has drawbacks sometimes).

Despite the success of the DVB Project, digital broadcasting is currently a patchwork of incompatible or different standards, both between countries and inside the same countries. If any one element of a technical system is not common, it makes no difference if all the rest is common. One is constrained by the weakest link. This is what has happened with digital television broadcasting in Europe. Technically speaking, for digital broadcasting today we have "Television with Frontiers".

These incompatible systems have occurred because of market forces. There was no guiding hand to lead Europe to a complete common standard for digital television broadcasting - as there had been in the case of GSM. Only parts of the system were agreed upon in the DVB Project. Pay-TV operators liked having most of the digital receivers the same, because it made the receivers cheaper to manufacture and subsidize, but they argued that they needed their own technical universe to make sure they succeeded commercially. We may disagree, but this is not a black and white situation of right and wrong. As if to exemplify that the pay-TV operators may be justified, in the one digital broadcast environment where there is a common system, DAB, there has been no commercial success.
Probably the most critical issue is having different technical universes within the same country for multimedia broadcasting (the "API"). In this case, notions of "must carry" have no meaning for the multimedia which may be a vital part of the content. Must carry becomes "can't carry for technical reasons". The problem is not just that there are alternative technical systems for the same function. If all the systems had the same capabilities, then content could be converted and carried across systems. But if the systems have different capabilities, the conversion cannot be done, even if everyone wants it done.

We are on the threshold of the development of "digital rights management" systems. If we act now to ensure that only common systems are permitted to be used, we may avoid history repeating itself.

**Legal considerations**

Whereas the digital environment makes national borders less important or even superfluous, owners of rights with respect to the content of audiovisual services (copyright and neighbouring rights holders and their collecting societies, sports organizations and their agencies) tend to re-emphasize the role of national territories. Such a position is simply based on the expectation that sales per territory generate more revenue than sales on a pan-European basis. A recent example is the obligation imposed on broadcasters acquiring rights to major sports events, such as the World Cup Football, to encrypt their digital services insofar as they might be received in other European countries, despite the linguistic differences.

On the other hand, it needs to be recognized that the free flow of audiovisual services provided by European producers and broadcasters depends on the possibility of their functioning as a "one-stop-shop" for the exploitation of their services. The experience of European broadcasters with their own productions stored in their archives is that in most cases, and particularly in the new media, such a possibility is extremely limited, if not virtually excluded. In other audiovisual content-producing regions of the world, pan-European rights can normally be cleared much more easily. Another obstacle is the apparent lack of international competition (or transparent cooperation) among copyright collecting societies, which forces broadcasters to negotiate, for cross-border exploitations, with such societies in all the countries concerned. Consequently, we are in favour of simplified legal mechanisms which facilitate rights clearance for audiovisual content throughout Europe.
PART 2: EVENTS OF MAJOR IMPORTANCE TO SOCIETY

What about the provisions on the exercise of exclusive (sports) rights? Is the maintenance of the existing Article 3a in the Directive justified in the light of both the experience gathered and the developments expected? Is there a case for considering the proposal for an "access-to-news" provision in order to ensure the free flow of information in the single market?

| EBU consensus so far* | a) Need to improve the effectiveness of the protection of listed events in all Member States; arbitration procedures as a solution in cases of non-agreement on licensing conditions  
|                        | b) Introduction of complementary rules on news (or short) reporting (similar to the Council of Europe Convention). |

| Proposed answer        | Both the necessity of Article 3a of the "Television without Frontiers" Directive and the need to maintain such a regulation have been proven by the first "test case", the 2002 Football World Cup, the broadcasting rights to which were first acquired by KirchMedia. It is highly unlikely that the European public at large would have obtained, through the negotiations by free-to-air broadcasters, any reasonable access to enjoy the event via free television if such a regulation had not been in place. Moreover, even the contractual obligation for some parts of the event to be shown on free-to-air television, imposed by the sports federation, did not prevent the highly speculative purchase of the rights by a media group with strong pay-TV interests.  
|                        | The threat that an increasing number of events of major importance for society will become unavailable for the ordinary television audience is still apparent. Experience so far shows that this threat is not limited to countries which have not yet designated such events under their national law. However, it needs to be realized that since the purpose of the regulation, and particularly the "appropriate means" mentioned in Article 3(a)(3), is to ensure that virtually all citizens can view major events on free television, this aim cannot be achieved through the free market or competition law. Moreover, to avoid the risk of being considered merely a "paper tiger", the regulation needs to be reinforced so that it operates satisfactorily. With a view to increasing legal security for all parties concerned and preventing speculative rights purchases more effectively, the regulation therefore needs to be accompanied by guiding principles, so that it provides more specific information for Member States on the appropriate choice and implementation of national measures. |

The Directive should also include a new provision on the right to make short (news) reports on any event of importance to national society. In the area of "news access", there is a serious risk that matters will go the same way as have major events, resulting in growing difficulties for broadcasters (or other news providers) to obtain physical access to the venue of any important event for the purposes of news reporting. Although news access is normally provided through contractual arrangements, sports organizers sometimes try to limit such access by making it subject to a "technical fee" which in reality amounts to much more than fair compensation for the cost of making reporting facilities available. Member States should have the legal means to safeguard the citizen's fundamental right of access to information, independently of the regulation on listed events.

Further considerations

In view of the decision by the Danish Ministry of Culture to abolish the listed events legislation, it seems crucial to have improvements to the current framework proposed to the Commission as soon as possible. At this stage, it may be wise to recommend at least the most important guiding principles, e.g. that

- consistent application of the predominant aim of the regulation requires that the rights to designated events must be offered first to services which, under the national law, qualify for transmission thereof on free television ("qualifying services");

- Member States may adopt any measures to ensure, e.g. via arbitration or mediation proceedings, that the offer of rights to qualifying services is subject to reasonable conditions and a fair price;

- when determining a reasonable price level for the rights to an event, the starting-point is the price range which qualifying services would be prepared to pay if they had to compete for exclusive rights to that event;

- Member States shall nominate an independent broadcasting authority to decide whether a non-qualifying service would have legitimate reasons to exercise the rights.

Insofar as it is not yet sufficiently recognized, it should also be clarified that any criteria for determining whether an event is of major importance for national society are subject to the decision of Member States, as such a determination must necessarily be based on the circumstances prevailing in that country.¹

If any revision of the Directive were to encompass radio services, it might also be worthwhile looking at possible options for the radio coverage of major (sports) events.

¹ This does not exclude that the Commission may wish to issue (or maintain) certain "guidelines" on the most pertinent criteria for such a determination, such as

(i) the event has special general resonance, i.e. not only for those who usually follow it;
(ii) it has distinct importance, e.g. as a catalyst for national identity;
(iii) it involves the national team or national representatives, or
(iv) it has traditionally been broadcast on free-to-air television and attracted large audiences.
PART 3: QUOTAS AND OTHER MEASURES TO PROMOTE THE PRODUCTION AND DISTRIBUTION OF PROGRAMMES

What about the provisions on promoting European-originated content?

| EBU consensus so far* | The quota system should be reviewed in line with the underlying public policy objectives. Any reinforcement of the quota system through additional sub-quotas or scheduling obligations, particularly in prime time, should be excluded, so as to safeguard programme autonomy. |


European works

3.1 Quotas for European works (Article 4)

Should there be a reinforcement of the quota system through one or more of the following measures

(a) an increase in the percentage reserved for European works (e.g. to 60%)?

(b) a more detailed definition of "European works"?

(c) a precise definition or abolition of "where practicable and by appropriate means"?

(d) a redefinition of the reference base ("assiette"), so as to target the quota to audiovisual works with shelf-life ("programmes de stock") in contrast to talk-shows and studio-based programmes?

(e) the introduction of a quantified obligation to invest in new European works?

| Proposed answer | The members of the EBU are fully committed to promoting the production and distribution of European works, an objective which normally coincides with their specific public service remit. Consequently, they do not merely fulfil the minimum requirements set out in the Directive. (More detailed information to be added) |
At the same time, the EBU and its members see no need or justification for reinforcing the quota for European works in the way indicated above. They have the following particular concerns about the individual measures (a) to (e):

(a) Increasing the quota beyond 50% would not automatically help the circulation of European works or lead to greater cultural diversity (the latter objective would also require enough transmission time to be left for works which are of neither European nor US origin).

(b) The current definition of "European works" in Article 6 of the Directive is already very complex, and difficult to handle for an ever-increasing number of programmes which are broadcast. Adding further criteria could thus prove counter-productive. It would probably reduce the definition's practical value and increase doubts as to the effective application of the quota system as a whole.

(c) A certain degree of flexibility will continue to be needed, also to take into account new developments. It is primarily for Member States to clarify the meaning of "where practicable and by appropriate means".

(d) Although at the last revision stage the EBU was rather in favour of redefining the reference base ("assiette") and to apply the quotas to positively-defined programme categories such as fiction/drama (including comedy), documentaries, animation and children's programmes, it no longer believes that such a change would be warranted. Reasons include the multiplication of thematic channels and the economic importance of studio-based programmes.

(e) Adding investment quotas on top of transmission quotas, i.e. cumulating both, would lead to an excessively cumbersome regime and impose a disproportionate burden on television broadcasters.

It should not be thought that the EBU's strong reservations with regard to the above-mentioned measures reflects a lack of understanding or support for the desire of the European cinema and audiovisual production industries to strengthen their presence. However, it needs to be recognized that the presence of European audiovisual works is generally satisfactory in EU Member States as far as television is concerned, but not with respect to cinema. Accordingly, if there is a political will to improve the situation, action should be taken first in the cinema sector. In the audiovisual exploitation chain, cinema comes before television. If a film is successful in the cinema, that also greatly increases its value on television (and its attractiveness for the audience). Problems need to be addressed at the root; consequently, it would not suffice to try to solve cinema problems by tightening already tight regulations in the television sector, while leaving the cinema sector essentially unregulated.
(Experience in various European countries shows that there are measures available to improve cultural diversity on cinema screens without having to resort to screen quotas.)

**Points for discussion**

Further discussions may be needed to clarify the EBU position on investment quotas as a possible replacement for transmission quotas. Whereas some EBU members are firmly opposed to investment quotas, others are already subject to them and may suffer from the fact that the current Article 4 obliges Member States that want to introduce investment quotas to cumulate both forms of quotas. This might be an argument for giving Member States a choice between transmission and investment quotas, as is already the case in Article 5 with respect to the quota for independent productions. Moreover, investment obligations are often seen as better suited to the new digital interactive environment than traditional transmission quotas.

To be prepared for further discussions on investment quotas, it would be interesting to know what percentage of their television programming budget (or revenue) EBU members invest in (new) European works.

The mention above of "other measures available to improve cultural diversity on cinema screens" refers *inter alia* to taxes on cinema tickets and to self-regulatory systems (such as the one recently introduced in Switzerland).

### 3.2 Measures to promote the circulation of non-national European works

As the current quotas are mainly fulfilled through national works, the question is whether further measures should be introduced to achieve better circulation of European works outside their national home markets. Is there a need for such measures? In particular, should one or more of the following measures be introduced

(a) financial incentives (or even sub-quotas) for the broadcasting of non-national European works?

(b) transmission or investment quotas for new European co-productions?

(c) the creation of a European production fund (financed by broadcasters)?
| Proposed answer | The organization of programme exchanges and co-productions among members has long been among the key objectives of the EBU. Whereas exchanges in the areas of news, information, culture and sport have a longstanding tradition, the EBU has recently stepped up its activity regarding co-productions in areas such as documentaries, animation, youth and education.

(examples to be added)

While programme exchanges and co-productions cannot work in all cases in the same way and with the same success, there is clearly scope for an extension, which can provide important cultural and economic benefits. The EBU is therefore favourable to measures which facilitate and promote, on a voluntary basis, the circulation of European works within Europe.

The MEDIA plus programme already contributes to this objective, but it is limited in scope and hardly has a direct impact on broadcasters. Opening up the MEDIA programme more for broadcasters, or setting up a new fund covering extra costs for the circulation of non-national European works, could help to increase the number of European co-productions and enhance the circulation of audiovisual works within Europe.

The success of *Northvision,* the programme exchange and co-production scheme of public service broadcasters in the five Nordic countries, is certainly partly the result of these countries being closely related in cultural and historical terms. But it can also be explained by the fact that extra money is made available for Nordic co-productions (through the Nordic TV Fund), so that extra costs for co-productions are covered and a financial incentive exists for the participating broadcasters.

Whilst appreciating the value of European funds such as MEDIA plus and *Eurimages,* the EBU and its members would be opposed to the proposal of a European production fund financed by broadcasters themselves. Such a fund would not provide fresh resources but would merely redistribute existing ones at an additional cost, without ensuring that audiovisual productions correspond to what viewers want and what broadcasters require (particularly to fulfil their public service remit).

The diversity of cultures in Europe depends, to a large extent, on the existence of viable audiovisual production and broadcasting sectors in each Member State and region. Ensuring their development is the paramount objective of audiovisual policies (including cinema funds) at the national and regional levels. In the framework of these national/regional policies, broadcasters already contribute significantly to the funding of new cinematographic and television productions.

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2 In the 1990s the number of co-production projects was more than doubled, today amounting to almost 300 titles with an equal share of approximately 30% each in documentary, drama and in the children/youth sectors, the remaining 10% being education and light entertainment projects.
While we recognize the promotion of the diversity of cultures in Europe as a legitimate objective for European cultural and audiovisual policy, we do not believe that the introduction of (sub-)quotas for non-national European works or similar obligations imposed upon broadcasters would be an appropriate way of achieving this objective. In this sensitive area, positive incentive measures are more appropriate than binding obligations.

It should also be borne in mind that the existing quota system in the Directive does not oblige broadcasters to import programmes from other European countries (or to participate in international co-productions) but simply facilitates such activities (by removing regulatory barriers and replacing various national quotas by a single European one). It has never been the objective of the current Directive to remove cultural or linguistic barriers by means of regulatory intervention, and this natural limit should also be respected in a revised Directive.

Points for discussion

It is for the Council and the European Parliament to answer the essentially political question of whether the European Union should take measures, in the interests of cultural diversity in Europe or of the competitiveness of the European audiovisual industry, to promote the circulation of audiovisual works within Europe. If there is a political will to take action, it is for us to ensure that it results only in measures which are appropriate and which facilitate programme exchanges and co-productions, rather than impinging on broadcasters' programming and budgetary autonomy. It would thus seem important for the EBU to be ready to put forward constructive proposals if and when this becomes opportune.

It may be necessary, in particular, to specify the requirements for any new or revised European fund. EBU discussions so far seem to indicate that if a new European co-production fund were to be created and partly financed from contributions by broadcasters, such contributions would need to be voluntary and, ideally, project-based. While Northvision was regarded as a very good example of successful cooperation among EBU members, there were doubts as to whether it could serve as a model at the European level.

In the EBU discussions, mention was also made of the need to distinguish between international co-productions and programme acquisitions/exchanges, as their cultural and economic implications were not necessarily the same.

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3 In its Resolution of 13 November 2001 on achieving better circulation of European films in the internal market and the candidate countries (point 8), the European Parliament calls on the Commission to investigate inter alia the desirability and feasibility of introducing a new framework for television broadcasters regarding (a) European cinema promotion in programmes, (b) a quota for non-national European works and (c) investment obligations in European films (either through contributions to national/regional funds or through individual coproductions and co-financing). The Council Resolution of 21 January 2002 on the development of the audiovisual sector also indicates a certain political interest, as it mentions improved circulation of European works as an objective.
Independent productions

3.3 Quotas for independent productions (Article 5)

Should there be a reinforcement of the quota system through one or more of the following measures?

(a) an increase in the quota (e.g. from 10% to 25%)?

(b) an investment quota for new works (in particular for certain programme categories - "programmes de stock")?

(c) a European definition of an independent producer (possibly with a requirement that secondary rights must be held by the producer and not by the broadcaster)?

(d) the setting-up of an independent European control body (possibly with a certification system for independent productions)?

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<th>Proposed answer</th>
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<tbody>
<tr>
<td>In the EBU's view there is no need or justification for a reinforcement of the independent production quota system. Before any reinforcement were to be considered, it would in any case be necessary to clarify the underlying public policy objectives and to analyse new industry structures. Potentially conflicting objectives such as cultural diversity and the competitiveness of the European industry need to be the subject of a proper balance, and new objectives such as media pluralism and technological neutrality need to be taken on board. The new media environment is characterized by convergence, vertical integration, concentration and the emergence of big media groups. A small number of media groups have developed which are active not only in several European markets (and beyond) but also at different stages of the audiovisual value chain, including production, distribution and transmission. Normally their activities extend to both traditional television and new electronic media. Moreover, new entrants, such as telecommunications, cable or information technology companies, have acquired, and will continue to acquire, stakes in audiovisual production and broadcasting companies. This has led to a new balance of power and a much more complex industry structure for audiovisual production and distribution. Production companies and broadcasters increasingly form part of, or depend on, such media groups.</td>
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4 See page 3 et seqq. of the EBU Comments of 9 July 2001 on the Commission staff working paper on certain legal aspects relating to cinematographic and other audiovisual works SEC(2001) 619.
In particular, the EBU has the following concerns about the individual measures (a) to (d) above:

(a) Such an increase would be incompatible with the audiovisual market structure in many Member States.

There is also the problem that such an increased quota requirement could be fulfilled only by giving a greater role to a few European audiovisual media and production groups, made possible through a "liberal" definition of "independent producers" (so as to avoid disqualifying producers which are linked to such media groups). However, this would turn the purpose of Article 5 upside down: the result would be greater media concentration rather than greater pluralism of production.

The independent production quota has been justified to date as a means of fostering pluralism of production, guaranteeing a certain role for SME production houses, and limiting vertical integration, but it would not be justified to restrict broadcasters' programme autonomy simply in order to favour the emergence of a few pan-European media groups.

(b) Article 5 already offers Member States a choice between transmission quotas and investment quotas. Only a few Member States have introduced a combination of transmission and investment quotas.

(c) The lack of a common European definition can be explained by the need to take account of the differences in national situations. In fact, depending *inter alia* on the market size and language(s) spoken, the structure of the independent production sector varies considerably from one Member State to another. In certain markets, specialized domestic producers may more or less have only one broadcaster to work for.

Any measures or mandatory criteria limiting the holding of rights by broadcasters in works which they have themselves commissioned and funded would run counter to the underlying objectives of the Directive.  

- Limitations on the rights retained by the commissioning broadcaster, with regard to works which are fully or primarily financed by him, deny the broadcaster the fruits of his investment and risk-taking. Such measures oblige the broadcaster to invest in independent productions without receiving full value in exchange. In other words, broadcasters would be forced to subsidize independent producers.

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5 For more details, see pages 17 et seqq. of the EBU Comments of 9 July 2001 on the Commission staff working paper on certain legal aspects relating to cinematographic and other audiovisual works SEC(2001) 619.
- Limitations on broadcasters' rights will - depending on the "affiliation" of the independent producer - have distortive effects. For example, if in a given market most producers were linked, in some way or other, to one or more media or communications groups, independent broadcasters, and particularly public service broadcasters, would have no choice but to commission works from such producers in order to fulfil their quota obligations. The result could be a serious distortion of competition between integrated media groups and independent broadcasters.

- If broadcasters were no longer able to acquire the necessary rights to their commissioned productions, this could also become an obstacle to the transfrontier and pan-European distribution of their television channels (in particular via DTH satellite).

More generally, in view of new industry structures (see above), the definition of "independent producer" can no longer simply focus on the producer/broadcaster relationship. Nor can it ignore the fact that many production houses are, although not directly owned by a broadcaster, linked to media groups which have vested interests in different parts of the audiovisual value chain, including broadcasting and new audiovisual media. At the same time, "independent broadcasters", i.e. broadcasters such as public service broadcasters not belonging to media groups, find it increasingly difficult to compete with such groups, not least in terms of access to cinematographic and other audiovisual works.

(d) Individual Member States have already established independent regulatory authorities for the broadcasting sector (at the national or regional level). Any move to centralize some of their functions at the European level would seem unrealistic in view of Member States' competences in this area. A European control body or certification system would also add another unnecessary layer of bureaucracy.

➢ Further considerations

EBU discussions have confirmed the view that the definition of "independent producers" should continue to be left primarily for the Member States to determine. Consequently, there is only reduced scope for common EBU input regarding the criteria for independence.
However, in view of independent producers' lobbying in favour of the "retention of rights" criteria, and the findings of the Doutrelepont consultancy study that a significant number of Member States have not defined "independent producers" at all, the question of definition is likely to resurface at Member States level. Consequently, it is important for exchanges of views and experience among EBU members to continue.

Within the European audiovisual production sector there seem to be varying views on how "independent producers" should be defined and whether there should be regulatory intervention on the retention of rights. A recent paper by the European Film Companies Alliance (EFCA)\(^6\) does not mention the retention of rights but proposes that the criteria of independence should be assessed through the shareholding structure of a company (a company qualifies as independent provided that the broadcaster owns less than 25% of the share and/or the voting rights). On the other hand, many of the representatives of independent producers who spoke at the meetings organized by Doutrelepont favoured criteria based on the retention of rights: they seemed to believe that reserving rights for independent producers would help them to build up rights catalogues and thus strengthen them, while criteria related to ownership would deny independent producers access to new capital (from broadcasters and media/communications groups) and thus weaken them.

EBU discussions have shown, in addition to the generally-supported rejection of criteria based on the retention of rights, a certain interest in definitions where independence is required only in the relationship between the producer and the particular broadcaster that has commissioned, co-produced or acquired the work in question (independence vis-à-vis a particular broadcaster rather than independence vis-à-vis all broadcasters). Apparently there are two Member States (France and Luxembourg) which currently understand the independence requirement in this sense ("independent of the transmitting broadcaster"). Such a definition would allow a subsidiary of a broadcaster to qualify as an independent producer in so far as it produces for other broadcasters. However, such a definition would still leave open the question of whether additional criteria are needed to prevent the quota from reinforcing trends towards media concentration and vertical integration; for this purpose, a market share threshold (with regard to audiovisual production) may be considered.

PART 4: TELEVISION ADVERTISING AND SPONSORSHIP

What rules are needed and appropriate for advertising, sponsorship, etc.? Should the Directive's existing "quantitative" restrictions on advertising be reduced or abandoned, to be replaced by a general requirement to separate advertising from editorial content? Could the implementation of such a general requirement be left to self-regulation and/or co-regulation? Similarly, is there a case for reviewing and simplifying the existing "qualitative" restrictions?

The proliferation, thanks to digital technology, of television channels as well as the advent of new electronic media and new forms of commercial communications (especially virtual advertising, split-screen advertising and interactive advertising), give rise to a number of questions regarding the advertising and sponsorship system currently set out in the Television without Frontiers Directive.

In this respect, some forms of advertising, such as virtual advertising and split-screen advertising, require particular attention. Their use gives rise to considerable legal uncertainty, particularly regarding quantitative restrictions, insertion rules and the amount of advertising. Moreover, interactive advertising requires particular study, given that it is closely linked to the issue of the Television without Frontiers Directive's scope and the possibility of it being opened up to new interactive on-demand services.

| EBU consensus so far* | The essential principles should be retained and applied not only for television but also for new interactive audiovisual services. Such principles include the prohibition of surreptitious and subliminal advertising, the identification of commercial communications and their separation from editorial content. There is increased scope for co-regulatory approaches (also with regard to new advertising techniques). |


4.1 Basic principles

Generally speaking, it is important to ensure that there is a consistent regulatory framework for commercial communications (advertising, sponsorship and teleshopping) which is valid for all audiovisual or multi-media communications services offered to the public (television, radio, cinema, the Internet and mobile telephony).

A number of basic principles, which are already recognized, such as:
- precise identification of advertising and sponsorship and their separation from the editorial content
- ban on surreptitious advertising and sponsorship and on the use of subliminal techniques
- regulation of advertising directed at minors, particularly in programmes/products for children
- avoiding influence by advertisers and sponsors over the content and scheduling of programmes
- principles related to tobacco, medical products and alcohol should apply not only to television but also to new interactive audiovisual services.
However, with regard to the quantitative restrictions related to programming (Article 11) and duration (Article 18) of advertising breaks, the debate is a more difficult one. Opinions are divided on whether the quantitative restrictions related to advertising should be maintained, reduced or abandoned. Of the EBU members funded by public resources, the great majority are subject to even stricter rules concerning the maximum quantity of television advertising and its scheduling. At all events, to the extent that these rules are maintained they should be clarified and simplified, and perhaps also relaxed, particularly regarding the transmission of certain sports and cultural events.

### 4.2 Virtual advertising and split-screen advertising

<table>
<thead>
<tr>
<th>Proposed answer</th>
<th>There is a need for a clear and appropriate regulatory framework for new advertising techniques.</th>
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It is already possible to provide indications about virtual advertising and split-screen advertising.

With regard to virtual advertising, some provisions of the EBU Memorandum adopted in May 2000 could be taken up to permit various principles and rules in the Television without Frontiers Directive to be clarified.

<table>
<thead>
<tr>
<th>Proposed answer</th>
<th>Firstly, the presence of virtual advertising must be indicated to viewers by appropriate means, normally at the beginning and/or end of the programme. Broadcasters themselves must ensure that they are informed of the use of virtual advertising. Consequently, no virtual advertising may be inserted into the signal by the organizer of the event, his agents or any third party without the prior agreement of the broadcaster(s) holding the transmission rights. The responsibility and editorial independence of broadcasters must be respected. Moreover, it should be specified that virtual advertising may be inserted only on surfaces at the venue which are customarily used for advertising. In the particular case of sports events, virtual advertising may also be inserted on the field of play/surface, only outside competition times and only if there are no players/competitors on the field of play/surface. Virtual advertising must not be used for products or services for which television advertising is prohibited in the country where the broadcaster is established. Virtual advertising which is specifically targeted at audiences in a single country must not be used as a means of by-passing the rules of that particular country.</th>
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➢ **Points for discussion**

As regards the application of the Directive's rules on the duration of advertising, such rules cannot apply to virtual advertising if the latter merely replaces advertising which already exists on site.
With respect to *split-screen advertising*:

| Proposed answer | Split-screen advertising must be clearly identified and distinctly separate from the programme, through the use of visual and/or acoustic means. In the case of visual means, the spatial separation of advertising from editorial content must be possible (instead of the separation in terms of time which is commonly accepted). The creation of an "advertising" logo valid throughout Europe could be envisaged. |

> **Points for discussion**

Although the rules on the duration of advertising could hardly be irrelevant for split-screen advertising, the application of such rules would create specific difficulties which would need to be examined in greater depth.
PART 5: PROTECTION OF MINORS AND HUMAN DIGNITY

What rules are needed and appropriate for the protection of minors and human dignity? To what extent can and will the protection of minors and human dignity be ensured through the possibility of encryption available in a digital environment? Could a common rating system for electronic content be drawn up? What would be the role of self-regulation and/or co-regulation in such a system?

| EBU consensus so far* | The current system for television, which is essentially based on the watershed and the age of viewers, is still an effective means of protecting children. |
| Proposed answer       | As regards digital television, other effective, appropriate means could be envisaged. However, possible technical measures should not remove from broadcasters their responsibility for the content which they broadcast. The obligatory introduction of filtering measures would tend to be counter-productive. A common rating system for electronic content could prove very useful. Nonetheless, it gives rise to a number of questions related to implementation, especially in terms of drawing up common descriptive criteria for content. |


As regards a common rating system for content, it would be necessary to give thought to ways of clarifying the evaluation and indexing of audiovisual content in Europe. All parties' practices and experience in the rating of programmes should be analysed and compared more closely, with the aim of finding clear, common, readily understandable symbols, along the same lines as road signs.

In this regard, the EBU welcomes the study on existing rating practices within the European Community which the Commission is proposing to undertake.
PART 6: RIGHT OF REPLY

Should the Directive's existing obligation on the right of reply be strengthened and/or clarified?

| Proposed answer | No changes seem necessary to us at the moment. However, it will certainly be necessary to examine whether it would be possible and appropriate to introduce an equivalent instrument applicable to statements of facts for interactive and on-line services, with a view to providing effective legal protection for third parties. |

PART 7: CONTENT-RELATED PROVISIONS OF THE MUST-CARRY TYPE

Is there a case for considering the proposal for content-related provisions of the must-carry type?

| EBU consensus so far* | Must-carry rules and rules on the display of services on electronic programme guides: if not dealt with in the new universal service Directive, these issues should be addressed in the "Television without Frontiers" Directive, as they concern both infrastructure and content. |
| Proposed answer | The new Universal Service Directive, which was formally adopted on 14 February 2002, contains a common basic framework (Article 31), which recognizes the right of Member States to impose reasonable "must-carry" obligations on network operators. Similarly, the new Access Directive (Article 6(4)) recognizes the right of Member States to ensure that "must-carry" broadcasts are prominently displayed on navigators and electronic programme guides (and to impose other obligations in relation to the presentational aspects of navigators/guides). At this stage, we do not perceive any need for European harmonization of content-related provisions of the "must-carry" type. (Like the lists of "major events", the lists of "must-carry" services will naturally vary from country to country.) |


➢ Further considerations:

There may, however, be access issues (e.g. regarding certain broadcasting platforms) not entirely resolved by the Universal Service Directive which may need complementary measures in the context of content regulation. (If the EBU wished to raise this point, we would need to be more specific regarding measures to be taken.)