



**Observations on behalf of the European Heart Network to the Issue Paper  
for the audiovisual conference in Liverpool regarding the Television  
without Frontiers Directive (TVWF)**

***Commercial communications***

*August 2005*

**EXECUTIVE SUMMARY OF SUBMISSION ON BEHALF OF THE EUROPEAN HEART  
NETWORK**

In the European Union, there is widespread concern about the increasing prevalence of overweight and obesity among children. Approximately 20% of school-age children in Europe are overweight, of which a quarter is obese, with a significant likelihood that some will have multiple risk factors for cardiovascular diseases, type 2 diabetes and other co-morbidities before or during early adulthood.

Advertising has an impact on children's food preferences, purchase behaviour and consumption at both brand level and category levels and is independent of other factors. It is considered as a significant contribution to poor dietary health including childhood obesity amongst those concerned with public health.

In the framework of a pan-European project on children, obesity and associated avoidable chronic diseases, coordinated by the EHN and co-funded by the European Commission, the extent and nature of food marketing of unhealthy food to children was assessed. One of the findings was that the percentage of TV advertisements for food aimed at children that were for unhealthy foods ranged from 49% to nearly 100%.

Referring to Article 152 in the Treaty and several Council Conclusions, EHN believes that the revision of the Television without Frontiers Directive presents an ideal opportunity to make a contribution to halting and reversing the epidemic of obesity and to prevent avoidable diet-related chronic diseases, such as cardiovascular diseases.

Recommendations:

- Establish a basic tier of qualitative rules applicable to all commercial communications regardless of audiovisual media;
- Prohibit advertising of unhealthy food and drinks to children in Article 16 of the TVWF Directive;
- Define "children's programmes" appropriately so as to ensure that advertising, sponsorship and product placement will not lead to an increase in exposure to commercial communications of unhealthy food and drinks, including brands, to children (see page 4 of this paper);
- Prohibit product placement in programmes that are likely to be viewed by children.

## I INTRODUCTION

The European Heart Network (EHN) is a Brussels-based alliance of heart foundations and others concerned non-governmental organisations in 26 European countries.

EHN plays a leading role in the prevention and reduction of cardiovascular disease\* so that it is no longer a major cause of premature death and disability throughout Europe.

## II BACKGROUND

### *Public Consultation 2003*

EHN attended the public hearings in April 2003, which were part of the consultation process, and in July 2003, EHN submitted its comments which concentrated on commercial communication of unhealthy\*\* food to children.

In its submission, EHN recommended that Article 16 be amended to include a general reference to the protection of minor's *health* and to include a specific ban on advertising of unhealthy food and drinks to minors in or around television programmes viewed by children.

EHN made this recommendation because of the widespread concern about the increasing prevalence of overweight and obesity among children. Approximately 20% of school-age children in Europe are overweight, of which a quarter is obese, with a significant likelihood that some will have multiple risk factors for cardiovascular diseases, type 2 diabetes and other co-morbidities before or during early adulthood.

EHN emphasised that marketing of unhealthy food to children, including in particular TV advertising, has an impact on children's food preferences, purchase behaviour and consumption at both brand level and category levels and is independent of other factors\*\*\*. It is considered as a significant contribution to childhood obesity amongst those concerned with public health.

In the European Commission's assessment of the outcome of the public hearing, the Commission stated that Article 16 was generally considered to be satisfactory. However, the Commission did acknowledge that '*according to certain contributions, not everyone agrees that the rules on the general standards and the protection of minors are being applied satisfactorily.*'

### *Focus Groups 2004/2005*

Following the public consultation, EHN participated in Focus Group 2 meetings on the '*level of detail in the regulation in the regulation of television advertising*'. During the meetings of Focus Group 2, EHN maintained that Article 16 on television advertising to children was not respected; that implementation measures alone were unlikely to achieve

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\* Cardiovascular disease is the major cause of early death and disability in the European Union

\*\* Unhealthy food is defined as food that is high in fat, sugar or salt

\*\*\* Hastings et al, 2003

the aims of Article 16; and that the only appropriate response to the health issues arising from substantial amounts of advertising of unhealthy food to children was to prohibit such advertising.

EHN also expressed concern about the proposal from the Commission to consider abandoning the principle of separation between advertising and programmes and, thus, allowing in general the use of product placement.

### III DISCUSSION OF ISSUE PAPER ON COMMERCIAL COMMUNICATIONS

#### *Findings from report on 'Marketing of unhealthy food to children in Europe'*<sup>\*\*\*\*</sup>

On 1 March 2004, EHN commenced a project on children, obesity and associated avoidable chronic diseases, co-funded by the European Commission. The aim of this project is to tackle the obesity epidemic among children and young people. In the first phase of the project, the extent and nature of food marketing of unhealthy food to children was assessed by EHN member organisations in 20 European countries, of which 18 EU Member States and two EEA Member States.

*Some of the findings are:*

- those concerned with children's health and well-being – health, consumer and other citizens' organisations – tend to argue that 'unhealthy' food marketing to children is one of the significant contributors to poor dietary health and childhood obesity;
- the percentage of TV advertisements for food aimed at children that were for unhealthy foods ranged from 49% in Italy to nearly 100% in Denmark and the UK;
- a considerable amount of money is spent by companies marketing unhealthy foods to children, with the great majority spent on TV advertisements. However, there are signs that the proportion of advertising budgets spent on TV may be declining slightly, with small but rising proportions being diverted into other media and environments such as marketing in schools and the Internet;
- regulation of marketing to children is generally very weak and variable, with the majority of regulatory effort focusing on TV; in the 20 countries surveyed, there is at least one statutory code on broadcast advertising broadly based on the Television Without Frontiers Directive. Sweden and Norway have tried to protect their children from TV advertisements by prohibiting them within their borders. However, their efforts are being undermined by advertisements on cable and satellite TV broadcast from other countries, and by other forms of marketing.

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<sup>\*\*\*\*</sup> The Marketing of Unhealthy Foods to Children in Europe. EHN. Brussels 2005

***Specific comments to: I Rules common to all audiovisual commercial communications – Issues 1, 3 and 4***

*Issue 1 – The concept of audiovisual commercial communications*

EHN takes note that most experts consulted were in favour of technologically neutral rules, thus having one set of qualitative rules applicable to all audiovisual commercial communications whether linear or non-linear.

EHN supports the proposal to establish a basic tier of qualitative rules applicable to all commercial communications regardless of audiovisual media, i.e. television, internet.

EHN also takes note that the groups consulted were in favour of the adoption of a new definition of ‘audiovisual commercial communications’ to cover audiovisual commercial communications of all kinds, including for instance product placement. EHN will discuss this further below under *Issue 4 – Identification of commercial communications in general, including sponsored spots*.

*Issue 3 – Rules relating to public health considerations (tobacco, alcohol, medicines)*

Tobacco, alcohol and medicines are clearly related to public health. It is widely recognised that diet is a major health determinant and it has been estimated that unhealthy diets account for around 30% of cardiovascular deaths. Unhealthy diets are clearly directly related to obesity, which is a significant risk factor for cardiovascular diseases.

Tobacco, alcohol and medicines are covered specifically in the TVWF. EHN believes that considering the serious health consequences of obesity epidemic amongst children, the TVWF should include in Article 16 a prohibition on TV advertising of unhealthy food and drinks to children.

The definition of “children’s programmes” should be broad enough to take account of all programmes where a significant proportion of the audience are children, based on the acknowledged audience profile for the programme. Restrictions should not be limited to only those programmes whose stated target audience are children but also include programmes that are likely to be viewed by children.

*Issue 4 – Identification of commercial communications in general, including sponsored spots*

EHN recognises that product placement is allowed to a limited extent in the interpretation of the current TVWF – namely for the purpose of identifying the sponsor - but otherwise it is not authorised due to the principles of identification and separation.

If product placement were to be considered as a legitimate commercial communication (see above under *Issue 1 – The concept of audiovisual commercial communications*), it would have to comply with the principles set out in the TVWF Directive’s Articles 12 to 16 whereby such advertising technique may not be implemented in religious programmes, news programmes or children’s programmes.

EHN has expressed concern about abandoning the principle of separation and allowing in general the use of product placement as a legitimate commercial communication. Should the new Directive not prohibit advertising of unhealthy food and drinks to children, as recommended by the EHN, and should it authorise product placement, it remains essential that “children’s programmes” be defined appropriately so as to avoid an increase in exposure to commercial communications to children for unhealthy food and drinks, including brands (see also under issue 3, above). Such an increase is inevitable since product placement will be *additional* to regular advertising spots.

The fact that there would be an obligation to provide clear identification at the beginning of programmes containing product placement is not considered a relevant safeguard where children are concerned. EHN believes it cannot be assumed that identification will offset or diminish the promotional effect of product placement to young viewers and therefore product placement should not be permitted in programmes likely to be viewed by children.

#### **IV CONCLUSIONS AND RECOMMENDATIONS**

EHN believes that the revision of the Television without Frontiers Directive presents an ideal opportunity to make a contribution to halting and reversing the epidemic of obesity and avoidable diet-related chronic diseases, such as cardiovascular diseases.

This would be in line with the Treaty’s Article 152 which aims at mainstreaming health into all EU policies.

In addition, EHN draws the Commission’s attention to the Council Conclusions on Obesity of December 2002 where the Council underlines the need for a cross-sectoral approach to prevent problems resulting from obesity, including in the education and cultural sectors, and invites the Commission to ensure that prevention of obesity is taken into account in all relevant Community policies. EHN also refers to the more recent Council Conclusions on promoting Heart Health of June 2004 where the Council invites the Commission to address the impact on public health of the promotion, marketing and presentation of foodstuffs.

EHN recommends to:

- Establish a basic tier of qualitative rules applicable to all commercial communications regardless of audiovisual media;
- Prohibit advertising of unhealthy food and drinks to children in Article 16 of the TVWF Directive;
- Define “children’s programmes” appropriately so as to ensure that advertising, sponsorship and product placement will not lead to an increase in exposure to commercial communications of unhealthy food and drinks, including brands, to children;
- Prohibit product placement in programmes that are likely to be viewed by children.

## ISSUE PAPER FOR THE LIVERPOOL AUDIOVISUAL CONFERENCE (1)

### Rules Applicable to Audiovisual Content Services

#### Response by EURALVA – European Alliance of Listener's & Viewer's Associations

1. *The notion of Audiovisual Content Services.* We recognise the value of a two-tier framework for the electronic delivery of audiovisual content, in which there is a basic tier of rules which apply to all services with audiovisual content, plus a subset of rules for linear audiovisual services which are derived from those in the TVWF Directive.

2. Moreover, we consider that this two-tier framework should take precedence over any liberalisation of services which may be included in a more wide-reaching "Services Directive."

3. We agree that the term "audiovisual content services" should be technologically neutral and it would therefore include radio broadcasts.

4. *Basic Rules.* We agree that there should be five categories of basic rules: (a) protection of minors and human dignity; (b) identification of commercial communications; (c) minimum qualitative obligations regarding commercial communications; (d) Right of reply; and (e) Basic identification/masthead requirements.

5. *The Protection of Minors and Human Dignity:* We agree that there are no European standards of public decency which would allow the terms "pornography" or "gratuitous violence" to be defined at European level. Nevertheless we reject the proposal that these standards should simply be left to individual Member States. We believe that the correct approach is for Member States to develop, in association with the Council of Europe, a co-regulatory approach to establishing common standards together with producers and distributors of audiovisual content services. This, we believe, could lead to a progressive harmonisation of standards across all Member States.

Furthermore, bearing in mind the current distinction in articles 22(1) and 22(2) of the current TVWF Directive between programmes which might seriously impair the physical, mental or moral development of minors, and those which are only likely to do so, the Commission should, as provided for in article 22b of the current directive, proceed to review progress, in liaison with competent Member States, in setting up appropriate rating systems and encouraging family viewing policies for all audiovisual works.

6. *Identification of Commercial Content.* We agree that the commercial communications should be subject to the principle of identification, and that the definition used should be the same. However, we submit that the definition of "commercial communication" in the e-commerce Directive is broader than the summary given by the Commission in the Issues Paper. In particular, the e-commerce Directive only excepts communications relating to the goods, services or image of the company, organisation or person *if they are compiled in an independent manner, particularly when this is without financial consideration.*

The e-commerce Directive therefore requires a communication of this nature to fulfil two conditions before it can be classified as a "non-commercial communication". The first, and mandatory requirement, is that it must be compiled by the producer in an

independent manner, and the second, but subsidiary, criterion is that it *may* be deemed to have been compiled in an independent manner, if it has been produced without financial consideration. Moreover, we submit that the phrase “without financial consideration” is wider than the term “without financial compensation” which the Commission uses in its issues paper.

For instance, if the producer of a communication was only able to make that communication by featuring the products or the services of an advertiser or a sponsor [for example, by rewriting the script, mentioning them by name in the commentary, or by positioning them in close-up in front of the camera] in a manner that was acceptable to the advertiser or sponsor, then the communication would clearly not have been made in an independent manner. This would be the case, regardless of whether any money had changed hands or not. For the producer would clearly have been dependent on the inclusion, location and mention of those products or services in a manner that was acceptable to the advertiser or sponsor, regardless of whether any actual financial transaction had taken place. Indeed, any involvement by an advertiser or sponsor in shaping the final structure of the production would mean that the communication had not been compiled in an independent manner.

We therefore consider that for consistency, the new TVWF Directive should use precisely the same words as those used in the e-Commerce Directive.

7. We also agree that surreptitious commercial communications should continue to be prohibited.

8. Moreover, although we accept that the mode in which a communication was identified as a commercial communication would be adapted to the characteristic of that particular mode of communication, that mode of identification must also be obvious to the average listener or viewer. Arrangements therefore need to be put in place to ensure two things. These are (a) a common EU-standard for all commercial communications in a given mode of communication; and (b) a requirement that those standards require the notification that the work is indeed a commercial communication gives *due prominence* to the commercial identity of the work. In our view, this would best be achieved by EU-wide co-regulation between all Member States and the relevant trade associations.

9. *Qualitative rules regarding commercial communications.* We agree that the principles contained in article 12 TVWF [respect for human dignity etc.] should continue to apply to all audiovisual content services. We also consider that the prohibitions on advertisements, sponsorship and teleshopping for tobacco products, and alcoholic products which are directed at young people, should remain for both linear and non-linear media. The health and social reasons for preventing the commercial promotion of these products will not diminish because of the non-linear nature of the audiovisual service concerned.

10. We also recognise the value to listeners and viewers of allowing, under certain conditions, objective information about products that are currently prohibited under Article 14 TVWF. However, this is a complex and tricky area and more extensive debate is needed about the precise nature of the meaning of the phrase “under certain conditions”. As this is an editorial matter, we suggest discussions with the Council of Europe over this topic.

11. *Right of Reply.* We welcome the proposal to introduce measures in the domestic law or practice of Member States in order to ensure a right of reply or equivalent remedies in relation to audiovisual content services, without prejudice to the

possibility of adjusting its exercise to the particularities of each type of medium. But they need to be established in a practical form.

It is important to recognise that it will be difficult to extend the proposal for a right of reply to non-linear services, since the successful exercise of a right of reply depends on that reply being broadcast on that same service several days after the offending broadcast. Moreover, in order to be able to exercise a right of reply, listeners and viewers need to be assured of minimum standards which enable them to identify in which jurisdiction the right can, or must, be exercised; the name and address of the body to whom their claim should be addressed, the form in which the claim for a right of reply must be submitted; and a reasonable time in which to submit the claim in the format required by the adjudicating body. In addition, the possibility should exist for unsuccessful claimants to make an appeal against any rejection of their claim, probably through the judicial system of the relevant Member State.

12. *Basic Identification/Masthead Requirements.* We consider it essential that listeners and viewers should be able to access easily, directly and permanently, information about the identity of any particular provider of an audiovisual content service, whether linear or non-linear. We would, however, oppose any requirement for there to be an identification logo permanently visible on the screen. One solution could possibly be to establish an ancillary web-site for each service. Crucially, this source of basic identification would have to include not only the name, address, telephone number and e-mail address of the provider concerned, but also the name of the Member State in which the provider was registered, and the co-ordinates of the body to which any claim for the improper use of advertising, sponsorship or teleshopping, or for the exercise of a right of reply, should be addressed.

13. *Territorial Competence.* Although this is not primarily an issue for listeners and viewers, for the reasons cited above, viewers must be able to identify easily the country of origin of each audiovisual service. We therefore support the Commission's proposal, advanced in s. 2.2., that a specific registration service should be set up for providers of audiovisual content services, analogous to that established in the VAT Directive, whereby any operator not yet established in the EU, could opt to be registered in any EU Member State, provided that it obeyed all the relevant existing provisions in that Member State.

End  
22 August 2005.

## ISSUE PAPER FOR THE LIVERPOOL AUDIOVISUAL CONFERENCE (2)

### Right to Information and the Right to Short Reports

#### Response by EURALVA – European Alliance of Listener's & Viewer's Associations

1. *Events of Major Importance.* In the view of Voice of the Listener & Viewer (VLV), the current provisions which allow each Member State to take national measures to ensure that a series of events of major national importance can be seen by a significant part of the public in that Member State, generally works well. There is no need for the Commission to endorse the national rules by a formal decision, or to harmonise the concept of "a substantial proportion of the public."

2. A problem has arisen however, when the broadcasting rights to an event in a given Member State are held by a broadcaster registered in another Member State. In this case the rights of the broadcaster have taken precedence over the rights of the elected Government of the first Member State to ensure that the event can be seen by a significant part of its television viewers. The application of EU rules, which prevent a Member State from exercising any leverage over the commercial activities of a broadcaster in another Member State, undermines the right of access by the public to events of major national importance, as guaranteed by the European Convention on Trans-frontier Television. Moreover, whereas the European Court of Justice has drawn a distinction between the existence of intellectual property rights and the manner in which they are exercised, we consider that in order to promote inter-state trade, the revised directive should require any broadcaster that is registered in another Member State to sub-license to a free-to-air broadcaster registered in the first Member State, the right to broadcast that event simultaneously in return for the payment of an equitable remuneration. .

3. *The Right to Information.* VLV shares the view of public service broadcasters and of some Member States that a statutorily harmonised right to access newsworthy events should be established at European level. A development of this nature would recognise the growing interest of Europe's viewers in being able to watch domestic coverage of newsworthy events in other Member States. A development of this nature would also enable viewers to get better value for their money by allowing broadcasters to retransmit short extracts made by a broadcaster in another Member State, rather than sending their own crews to cover the event. It would also be more environmentally friendly, by reducing unnecessary travel.

Although Directive 2001/29/EC allows Member States to impose limits on copyright of this nature, not all Member States do so, which effectively discriminates between the rights of broadcasters (and therefore of viewers) living in countries which have imposed such a limitation, and those which have not. We therefore support the proposal to establish in a future directive a right of trans-frontier access to short programme extracts in information programmes, provided only that they cannot already be accessed by each viewer at a time and at a place convenient to them.

Ends  
22 August 2005.

## ISSUE PAPER FOR THE LIVERPOOL AUDIOVISUAL CONFERENCE (3)

### Cultural Diversity and the Promotion of European and Independent Audiovisual Production

#### Response by EURALVA – European Alliance of Listener's & Viewer's Associations

1. Listeners and Viewers welcome Cultural Diversity, and the Promotion of European Audiovisual Production. However, there is no direct correlation between these aims and the promotion of Independent Production.

2. *Non-linear Services* With the growth of non-linear audiovisual communication, it may well become increasingly difficult to distinguish between linear and non-linear communication. We therefore question the value to listeners and viewers of continuing to demand a European screen quota from linear services. As currently formulated, linear services can meet their quota by re-screening old European audiovisual productions that have already been widely shown.

3. In general, we consider that in order to promote both cultural diversity and European production, the new Directive should require both linear and non-linear audiovisual communication services to meet investment quotas for European audiovisual productions. We therefore support the proposal to introduce an investment quota for non-linear services.

4. *Monitoring the Application of Articles 4 and 5 in Member States:* We recognize that these quotas could only be met "where practicable", but we also consider that the new directive should introduce a procedure whereby the Commission can verify that the application of that criterion by each Member State was applied in an agreed and consistent manner.

5. *Encouraging European Co-production.* While we recognise that the average proportion of non-domestic European works has stagnated to a relatively low level, we are not convinced that the situation would be improved by amending the screen quota. In our view, the best way to improve the situation would be to provide additional incentives through the MEDIA programme, for both linear and non-linear services to screen non-national European works, including European co-productions in which a non-national producer was the majority partner.

6. *Concept of the Independent Producer.* The concept of the "independent producer" becomes more difficult to sustain, as non-linear services develop alongside linear services. While we recognise that the support of independent producers by television companies can make a contribution to increased cultural diversity, we would not support the proposal to include an additional criterion requiring the retention of secondary rights to be given a more prominent position. Many of the arguments in this area are driven more by free market rhetoric than by careful analysis of the investment policies of broadcasters and independent producers. For instance, the recent study conducted by Oliver and Ohlbaum for the European Commission, relies on the reported profits of independent producers, rather than on their investment strategies. Moreover, the policy of requiring public service broadcasters to relinquish secondary rights, as recently implemented by Ofcom, the Office of Communications, in the UK, would merely encourage the growth of non-linear audiovisual services at the expense of linear audiovisual services. Furthermore, where linear audiovisual services, such as public service broadcasters, receive state aid, the introduction by

individual states, such as France and the United Kingdom, of the mandatory retention by independent producers of secondary rights could well constitute *an abuse of state aid*. The fact that the retention of secondary rights "might facilitate the development of independent European 'majors'" is not only purely speculative, but also unlikely to promote cultural diversity. True cultural diversity in Europe has emerged from enlightened investment by public service broadcasters. This has included the opportunity for them to re-screen popular programmes in which they have already invested.

7. *Sleeping Rights*. We would however, support proposals for both television broadcasters and independent producers to be required to put any "sleeping rights" in their programmes into the marketplace.

Ends  
22 August 2005.

## ISSUE PAPER FOR THE LIVERPOOL AUDIOVISUAL CONFERENCE (4)

### Commercial Communications

#### Response by EURALVA – European Alliance of Listener's & Viewer's Associations

1. We consider that the introduction of the concept of audiovisual commercial communications is acceptable, provided that listeners and viewers can easily identify them as such, and that their introduction does not unduly destabilise the production of non-commercial communications by linear services.
2. We also support the principle that the concept should be technologically neutral.
3. In addition, we agree that the definition of audiovisual commercial communication should be the same as that in the e-Commerce Directive. We are concerned however, that the Commission's gloss excludes the requirement in article 2(f) of Directive 2000/31 that any works that are deemed to be non-commercial must be compiled in an independent manner. In our view, viewers must be informed that any audiovisual communication which benefits from product placement is an audiovisual commercial communication, regardless of whether any money changes hands.
4. We agree that audiovisual commercial communications should observe the rules in the TVWF Directive on Human Dignity and the Protection of Minors, and those relating to public health considerations. But we reiterate our observations made in response to Issue Paper 1.
5. We agree that the ban on promoting medicines and medical treatment that are only available on prescription should be maintained for all audiovisual commercial communications.
6. *Identification of Commercial Communications in General, including Sponsored Spots.* We agree that television viewers continue to need to be protected by the twin principles of the Directive which require advertising and teleshopping to be "recognisable as such" and "kept quite separate" from other parts of programmes. Moreover, we also agree that these principles are valid, and remain even more justified in an environment in which split screens, increased opportunities for interactivity, and new and future forms of audiovisual commercial communication tend to reduce the clarity of distinction between editorial content and commercial communication.
7. We also agree that this dual requirement has implicitly led to a situation in which many broadcasters have transmitted programmes over which they have no production responsibility which contain product placement. We therefore welcome the recognition that the Directive on unfair commercial practices, which was adopted on 11 May 2005, includes the concept of "legitimate product placement." Such products are, however, commercial communications. We therefore welcome the Commission's proposal to authorise communications involving product placement, accompanied by the obligation to provide clear identification of its commercial nature.

8. We do not agree, however, that such audiovisual commercial communications should only have to provide clear identification at the beginning of the programme concerned. We also consider that there should also be clear identification both at the end of the programme, and where such programmes are interrupted by advertising breaks, immediately after the advertising break. Moreover, there is a strong argument that there should permanently be a logo on the screen indicating the commercial nature of the programme.

9. We also reject the proposal that principle of editorial separation should be dropped. We submit that the requirements embodied in articles 10(1), 10(3) and 10(4) of the current TVWF Directive should be maintained in order to inform viewers about the nature of the programme that they are watching. The requirement for clear sponsor credits, both at the beginning and the end of the programme, could easily satisfy the requirements of article 10(1). Article 10(3) remains valid, since we also consider it undesirable that product placement programmes should use subliminal techniques. Finally, given our requirement that the commercial nature of these audiovisual communications should be transparent, we also submit that surreptitious product placement should be prohibited, as could be provided for in article 10(4). Not to do so, would permit the return of unregulated product placement in non-commercial programmes.

10. *Identification of sponsored content.* We agree that listeners and viewers should be able to identify the sponsor of a programme or audiovisual communication. In its Interpretative Communication, the Commission ruled that

“During broadcasts of sponsored programmes, no explicit reference may be made to the product or services of the sponsor or a third party, except where such a reference *serves the sole purpose* of identifying the sponsor or making explicit the link between the programme and the undertaking sponsoring it.” [C (2004) 1450, p. 14 (our emphasis)].

In its Issues Paper however, the Commission summarises its earlier interpretation of the TVWF Directive permitting the sponsor to make any reference to its products or services “*provided they are not given undue prominence.*”

This is a wider, and far more subjective, exemption to the general prohibition on the reference in a programme to a sponsor's products or services, which we consider to extend beyond the meaning of the words in the current Directive. It is a definition that will lead to widely differing interpretations in each of the Member States, and therefore mislead viewers who are watching a transfrontier broadcast. Moreover, viewers might be misled if a sponsor were entitled to give “due prominence” – whatever that might be – to its product or services. For example, a commercial interpretation of that phrase might be that the more financial support a sponsor gave to a programme, the more prominence that it was entitled to expect for its product or service.

11. We therefore submit that the phrase “undue prominence” should only be used (if used at all) to distinguish between product placement programmes (which would clearly be audiovisual commercial communications) and programmes that are deemed to be guilty of incorporating surreptitious advertising.

12. *Application of the Rules.* In general we consider that the application of qualitative rules by Member States has worked well. However, with the growth of commercial communication, a degree of co-regulation would seem to be more appropriate. In addition, co-regulation could also encourage the emergence of EU-wide standards that would encourage more inter-state trade in commercial communications than is currently the case. We share the view of the public service broadcasters and other

consumers associations of a move towards co-regulation backed up by the public authorities, together with a sufficiently dissuasive series of penalties, which would imply the participation of industry and civil society on an equal footing.

13. *Quantitative Rules on Advertising.* We share the view that the hourly limits on advertising on linear services are broadly correct and should not be changed. With regards to no-linear, or on-demand, services, it would be wrong to abolish quantitative rules totally. Viewers need to be sure when they pay to watch a programme, they will not have to endure an unduly large quantity of advertising in the middle of a programme. We submit that more thought needs to be given to this.

14. We recognise that the rule on the daily amount of commercial communications provides no added value, since the limit is extremely high. We submit that it should not be abolished however. First, as the Commission observes in its Interpretative Communication, although Article 18(1) of the TVWF Directive on daily duration is applicable to telepromotion spots and programmes, they are not covered by article 18(2) on the hourly duration of television advertising.

Moreover, the proposal to allow the transmission on linear services of sponsored and product placement programmes means that a new form of regulation should be used to ensure that they do not "crowd out" non-commercial programmes on linear services.

*We therefore submit that the daily limit on all forms of audiovisual commercial communication should be retained in a modified form.*

15. *Insertion of Advertising.* We reject any proposal to relax the rules allowing the insertion of advertising in programmes. Any increase would undermine further the twin principles of identification and separation which were designed to protect viewers, and on which the TVWF Directive was originally agreed. Moreover, we question the authority of the Commission to invoke the *in dubio pro libertate* principle in order to justify the insertion of split-screen or virtual advertising within programmes. This undermines the principle of separation enshrined in article 10 of the TVWF Directive. Moreover, they are still advertisements, regardless of their form.

16. We support the maintenance of the ban on commercial communications during religious services, and the restrictions on the number of interruptions in cinematographic works, news programmes and programmes for children.

17. Although in general we deplore the insertion of advertisements into programmes that do not already consist of autonomous parts, we would however, support a relaxation in the rules regulating the intervals between advertising breaks, as specified in arts. 10(3) and 10(4) of the TVWF Directive, provided there is no increase in the actual number of breaks. This, we believe, could give sensitive schedulers more flexibility in inserting the advertising breaks into the programme at editorially more appropriate points.

Ends

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**ISSUE PAPER FOR THE LIVERPOOL AUDIOVISUAL CONFERENCE (5)**

**Protection of Minors and Human Dignity  
Right of Reply**

**Response by EURALVA – European Alliance of Listener's & Viewer's  
Associations**

1. *Protection of minors.* We agree that minors should be protected in both linear and non-linear services. We welcome the encouragement for Member States to put in place systems of co-regulation or self-regulation for non-linear services.
2. *Incitement to hatred.* We agree that both linear and non-linear services should not contain any incitement to hatred.
3. *Right of Reply.* We agree that the right of reply, or its equivalent, should be extended to all electronic media, although we remain unclear about how this could be exercised in non-linear services.
4. *The Exercise of the Right of Reply.* Because of differences in national legislation, and the application of the country of origin principle in the TVWF Directive, viewers of both linear and non-linear services need to be provided with basic information about how to exercise their right of reply. As the number of EU Member States expands, and trans-frontier broadcasting proliferates, viewers will need to have easy access to information about the relevant jurisdiction, the appropriate adjudicating body, the prescribed format for any complaint, the time within which it has to be submitted, and the options for any appeal against an adverse decision. The simplest way in which to do this would be to require each service, whether linear or non-linear, to provide this information, possibly via a web-site.
5. It may also be necessary to develop minimum European standards for the exercise of the right of reply, possibly in association with the Council of Europe.

Ends

22 August 2005.

## ISSUE PAPER FOR THE LIVERPOOL AUDIOVISUAL CONFERENCE (6)

### Media Pluralism - What should be the European Union's role?

#### Response by EURALVA – European Alliance of Listener's & Viewer's Associations

1. We agree that the European Union's role in the protection of media pluralism is unclear. In part, this is because the discussions have been conceptually confused. The discussions have failed to distinguish clearly between pluralism in communication services, pluralism in communication programmes, and in programme content.
2. In our view, pluralism in programme content, and pluralism in the programmes themselves is more important to listeners and viewers than pluralism in communication services.
3. We submit that a new approach is needed which brings together the approach of the Council of Europe with that of the European Union, since the latter is restricted by the provisions of the Treaty of Rome.
4. Consider, for instance, the implementation by the European Commission of the Amsterdam Protocol on public service broadcasting. Because of the provisions of the Treaty, the Commission could only deal with the financial and administrative dimensions of public service broadcasting, and was forced to leave it to individual Member States to develop their own definition of what precisely was meant by the term "public service broadcasting". This meant that the Commission was unable to incorporate the pioneering work done by the Council of Europe in developing a unanimously European-wide agreed position on public service broadcasting, which already contained within it several provisions on pluralism of content in public service broadcasting.
5. The difficulty with the Council of Europe however, is that the implementation of its agreements rely on the voluntary co-operation of Member States, and as the Commission observes in its issues paper, according to the forthcoming EIM study undertaken for the European Parliament, *On the Information of the Citizen in the EU*, "The status and independence of public service broadcasting is in no way assured in many of the countries of the EU"
6. We agree with the European Commission that a central question is "the asset value of additional European actions", and in our view, the pleas for more, clear and comparable data regarding circulation and audience figures, more transparency on the ownership and interests of media companies, and the establishment of an Observatory focussing on media markets and concentration, and so on, could merely delay for several years any hope of addressing the problem the report has identified.
7. We submit that the true path to Media Pluralism in the EU lies in bringing the role of public service broadcasters out of the margins into the centre of EU audiovisual policy, and of working with the Council of Europe to establish a genuinely pluralistic policy that involves information content as well as growth in the number of audiovisual communication services.

Ends.

22 August 2005.