

## **RESPONSE BY THE EUROPEAN ALLIANCE OF LISTENERS AND VIEWERS ASSOCIATIONS (EURALVA) TO ISSUES RAISED BY THE EUROPEAN COMMISSION IN FOCUS GROUPS 1-3 FOR THE REVISION OF THE EUROPEAN UNION'S TELEVISION WITHOUT FRONTIERS' DIRECTIVE**

### *Focus Group 1: The Regulation of Audiovisual Content*

1. EURALVA does not support the proposals for a graduated regulatory framework for the delivery of audiovisual content to viewers of television services. Bearing in mind that:

(1) the provisions of Article 3(1) of the Directive which entitles Member States to require television broadcasters within their jurisdiction to comply with stricter rules;

(2) the provisions of Article 22 of the Directive which entitles Member States to take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously harm or impair, or in certain specified cases are likely to harm or impair, the physical, mental or moral development of minors; and

(3) the provisions of Article 10(2) of the European Convention of Human Rights (which has now been incorporated into Part I of the Treaty Establishing a Constitution for Europe) require that any restrictions that are imposed on the right to impart information and ideas must be 'necessary in a democratic society';

EURALVA considers that any restrictions on audiovisual content in the revised directive should only be those that are necessary in a democratic society, and that *they should apply to all forms of television broadcasting, whether linear or non-linear, and whatever their market share.*

2. EURALVA supports the continuation of the restrictions on advertising and teleshopping in Articles 12-16 of the Directive, and the restrictions on programme content in Articles 22 and 22a of the Directive, since it considers that these are still necessary in a democratic society.

3. In addition, given the right of protection that is guaranteed to children in the United Nations Declaration on the Right of the Child [fellow EURALVA members please give the correct legal citation] EURALVA considers it necessary to *amend Article 22a of the*

*Directive* to include a ban on any audiovisual material portraying violence to children, including sexual violence.

4. EURALVA recognises that it may occasionally be necessary to include material in a fictional production which involves the *simulated* portrayal of violence to children. In such circumstances, Member States shall be authorised to put in place arrangements that regulate such simulated portrayals. These could be by a form of directly delegated regulation, or by means of co-regulation with the domestic society for the protection of children in that Member State.

5. Moreover, although EURALVA recognises that it may be technically possible for consumers living in the European Union to download by means of electronic communication, audiovisual material that portrays violence towards children which has been produced and stored outside the EU, it considers that the EU should give a lead in this area to other countries in the world by banning such material in all electronic communication services licensed in the EU.

*Focus Group 2: The Level of Detail in the Regulation of Television Advertising*

6. EURALVA welcomes the Commission's recognition that television advertising continues to need special regulation which goes beyond that laid down in the misleading advertising directives, and in the proposal for a new directive on commercial practices. It is important to insist however, that any new television advertising techniques, such as split screen advertising and virtual advertising, should continue to be regulated within the framework of the Television Without Frontiers Directive. Europe's television viewers need to be assured that the regulatory framework for these new advertising technologies will be the same as that for traditional forms of television advertising.

7. Moreover, it is unlikely that any of the emerging European legislation on consumer protection is likely to apply to viewers of free-to-air television services. It is only for subscription television services, where the viewer is required to sign a written contract with the supplier of the service, that the viewer assumes the legal status of a consumer, and would therefore enjoy the contractual benefits of general consumer protection legislation. In this context, viewers of free-to-air television services will continue to have to rely on the minimum standards for the protection of viewers spelt out in the Television Without Frontiers Directive.

8. Television viewers are currently protected by a certain number of minimum rules in the Television Without Frontiers Directive which have been included, in the words of the relevant recital in the 1989 text of the Directive, "*In order to ensure that the interests of consumers as television viewers are fully and properly protected.*" EURALVA submits that when revising the Directive to take account of new technological developments, the EU must ensure that the interests of consumers as television viewers *continue to be fully and properly protected*. This means that, the rationale of Article 10(1) of the Directive, which requires that television advertising and teleshopping shall be readily recognizable as such, and kept quite separate from other parts of the programme service by optical and/or acoustic means, is not only (in the Commission's words) "to be able to recognize and distinguish advertising from editorial content", but also to enable viewers, should they so wish, *to watch the editorial content without having to watch the advertising content*. EURALVA therefore submits that the Commission is misguided in its attempt in its *Interpretative Communication* [C (2004) 1450] to invoke the principle of *in dubio pro libertate*. (page 4) In establishing its interpretative communication the Commission must not only take into account the absence of relevant case law, but also the guiding words of the relevant recital in the original text of the 1989 Directive.

9. With regard to Article 10 of the Directive therefore, EURALVA rejects the Commission's proposal that article 10(2) of the Directive needs to be reviewed in the light of the development of **split-screen advertising**. While it may be true that the regulators in Germany and the United Kingdom already permit split-screen advertising, EURALVA submits that these are a *de facto* breach of Article 10(2) and the practice should become an exception, as required by Article 10(2) of the Directive, forthwith.

10. With regard to the issue of **surreptitious advertising**, EURALVA submits that this activity should continue to be banned, as currently required by Article 10(4). EURALVA recognizes the problems faced by National Regulatory Authorities in distinguishing between the surreptitious advertising and a lawful reference to goods, services, brands, or the names of economic operators, but it considers that the Commission's suggestion of adopting the criterion of *undue prominence* to be misguided. If the EU were to pursue this path, it would introduce **a separate set of subjective criteria of regulation for each Member State**. What is needed instead, is for the EU to establish a common set of regulatory arrangements which apply equally to all Member States.

**11. EURALVA therefore proposes two changes to the revised text of the Directive:**

(a) The rules that relate to the common commercial practice of 'product placement' should be assimilated to the rules for programme sponsorship in the Directive; and

(b) In order to ensure that any allegedly surreptitious advertising is not intended by the broadcaster, each broadcaster should be required to produce an affidavit for its relevant National Regulatory Authority, which certifies that every programme that it broadcasts contains no surreptitious advertising or sponsorship beyond that allowed in the rules on programme sponsorship in the Directive, which will have been revised to take account of the practice of product placement. This would then place upon the broadcaster the onus of ensuring that any commercial goods or services portrayed in a programme were neither there to serve advertising, nor were capable of misleading the public.

12. With regard to **interactive advertising**, EURALVA recognizes that once a viewer has moved into an interactive area where the service is supplied on individual demand, it ceases to be a television service and become an information service that lies outside the provisions of the TWF Directive. However, EURALVA considers it to be important that each individual viewer is informed every time s/he moves from an area that is regulated by the TWF Directive into an area that is regulated by the Misleading Advertising and electronic services directives. On each occasion therefore, the advertiser should be required to give them a warning notice, and require them to sign an electronic contract which also gives them consumer protection against any harm which arises from any interactive advertising that they may subsequently encounter.

13. With regard to **virtual sponsorship**, EURALVA shares the Commission's view (which arises in turn from paragraph 62-65 of the Judgement of the European Court of Justice in *RTL Television GmbH v. Niedersächsische Landesmedienanstalt für Privaten Rundfunk*) that this must not affect the comfort and pleasure of the viewer. Thus, in addition to obeying all the other rules on sponsorship in the Directive, notably those in articles 1 and 17, virtual sponsorship shall not intrude on the viewer's pleasure of watching the event being broadcast.

14. Thus EURALVA submits that an addendum should be added to article 17(1)(a) of the Directive (which forbids the sponsor from influencing either the content or the scheduling of a sponsored programme, in such a way as to affect the responsibility and editorial independence of the broadcaster in respect of the programme) to the effect that neither shall the sponsor affect the

pleasure or the comfort of the viewer. Thus, while it may be acceptable for the sponsor to replace existing advertising boards on the field of the event by superimposing new images, the new superimposed images must not extend beyond those advertising images already visible on the field of play.

15. Moreover, EURALVA supports the Commission's view that viewers must be informed in advance of the presence of virtual advertising messages in broadcasts of sporting and other events of public interest.

*Focus Group 3: The Right to Information and the Right to Short Extracts*

16. EURALVA considers that the provision of Article 5(3) of Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society permit any Member State to make an exception to the exclusive right to communicate a work to the public, in order to make a short extract of the work available to viewers by means of other television broadcasters. This enables parties to the European Convention on Transfrontier Television to introduce (as specified in article 9 of the Convention) 'the right to short reporting on events of high interest for the public to information being undermined due to the exercise by a broadcaster within its jurisdiction of exclusive rights.' Moreover, article 10(1) of the European Convention on Human Rights gives citizens *the right to receive information* of this nature.

17. EURALVA therefore considers that a new article (probably article 3b) needs to be added to the Television Without Frontiers Directive which makes it mandatory for every Member State *to make an exception to the exclusive right to reproduce and communicate to the public, which permits any broadcaster to broadcast to the public a short extract of a report of an event of high public interest*. This exception would apply whether or not the event was the subject of an exclusive broadcasting right. In EURALVA's view, since such a broadcast would normally be made after the end of the event in question, such a provision would comply with the provisions of Article 5(5) of Directive 2001/29/EC, since it would be a special case that would not conflict with the normal exploitation of the broadcast, and the broadcasting of such an extract would not unreasonably prejudice the legitimate interests of the rightholder.

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