

UK GOVERNMENT RESPONSE TO THE COMMISSION CONSULTATION ON TVWF DIRECTIVE 89/552/EEC AS AMENDED BY 97/36/EC

INTRODUCTION

1. As the Commission will recall, at the May 9 2002 Ministers' Council the UK pressed for a wide-ranging consultation on the effectiveness and future operation of this Directive in the light of converging delivery systems and growth of digital television. We welcome the positive response of the Commission, as demonstrated by this transparent consultation, involving Member States, the European Parliament, industry stakeholders and the creative sector (producers, authors, distributors etc). We also welcome the commissioning of independent studies on new advertising techniques and the current and future state of the audiovisual market now available which will have informed the Commission's thinking, as well as that of all other parties involved. We look forward to the new study on the effectiveness of Chapter 3, to be available later this year.

2. In composing the UK Government's response, we have had the benefit, over nearly two years, of hearing the views of a wide range of stakeholders in a Policy Focus Group (PFG), jointly chaired by officials from the Independent Television Commission (ITC) and the Department for Culture, Media and Sport (DCMS). This Group mirrors a similar group set up to examine the Electronic Communications package, and contribute to its implementation. The PFG formed a Working Party of six key players (ITC, Channel 3, BBC, BSkyB, the Satellite and Cable Broadcasters Group and the Advertising Association), to look in detail at the existing provisions of the TVWF Directive, discuss possible changes, and do so in the context of other Directives relevant to the audiovisual sector.

3. Each of these participants will be replying separately to the Discussion Papers on the six themes put out by the Commission, as will other members of the PFG, with appropriate concentration on the areas most relevant to their concerns. The UK Government is in broad agreement with their views. Importantly, the views of ITC/OFCOM are in close harmony with those of the UK expressed in this response.

4. Therefore, the UK Government response will concentrate on some of the broader issues, as addressed in its Communications Bill, soon to become an Act of Parliament, and those specific questions from the Commission which the UK considers as centrally important to the future-proofing of the Directive in the light of market, technological and content developments, bearing in mind that these will probably change between now and any proposals from the (new) Commission in 2005.

5. With this last point in mind, the UK hopes that the Commission, in its Communication in response to the present consultation, will highlight key issues which seem to need further, detailed and in depth discussion in the course of 2004. This further in depth discussion should also apply to any draft guidelines which the Commission might produce this year on new advertising techniques and their compatibility with the advertising Chapter IV of the existing Directive. The importance of such an approach is reinforced by the entry of 10 new Member States in May 2004.

ESSENTIAL PRINCIPLES

6. **The TVWF Directive is primarily a Single Market Directive**, designed to facilitate the free movement of television services across frontiers, based on “the country of origin” principle. It has an important secondary purpose, reflected in the addition, in the recitals to 97/36/EC, of (now) Article 151(4), the taking into account, and promotion of, cultural objectives. The UK considers these legal bases to remain valid and especially draws attention to the strong element of subsidiarity where cultural aspects are concerned. Any proposals to harmonise on a Europe-wide basis must address what value is added, but also whether value is subtracted in terms of cultural diversity and plurality of views and application.

7. The UK considers the Directive to have worked well. It has given a positive stimulus to the broadcasting industry, shown in the growth of channels in the UK, from 25 in 1989 to over 200 in 2003, especially services which operate on a pan-European transfrontier basis.

8. While it remains the case that most of the channels which were available in 1989 in the European Union, free-to-air and of national, universal, or near universal, coverage, today continue to hold the majority of audience share, major satellite broadcasters and platform operators delivering multi-channel non-terrestrial viewing such as BSkyB and Canal Plus have a growing market share, and are, subject to copyright restrictions, truly Trans-Frontier. Similarly, the growth of cable delivery allows for many more “national” channels to be marketed across borders. The national free-to-air digital terrestrial broadcasters are now developing new media ancillary services, such as linked websites and interactive services. So, an essential principle will be not to stifle these developments, but allow the Directive to facilitate them in a flexible, forward-looking way. This will involve looking at the scope of the Directive, which this submission will do separately and subsequently.

9. Apart from the derogation, in Articles 2a and 22, from the country of origin principle, the only other “semi-derogation” from single market rules lies with **“listed events” Article 3a**. It is optional for a Member State to list, or even if so, to notify to the Commission, in order to achieve mutual recognition by the other Member States. We would wish to retain this Article. Taken together, these two derogations are limited in scope, in the general public interest, and as such have a limited effect on distortion of competition between Member States. **No other derogation should be envisaged**, since the Directive must uphold single market principles and not open the door to fragmentation.

10. The Copyright Directive impacts on TVWF, and any conclusions of the Commission must take these into account. This particularly includes the issue of short extracts, which seems to be a problem going beyond the EU, and relates to non-broadcasters for the most part. However, a recital might reinforce the need to implement the Copyright Directive in this area, in all Member States, and mention the freedom of information which news agencies can provide, for a reasonable fee if required, especially to small broadcasters in an expanded European Union.

11. **Regulation must be proportionate to the objective desired.** We are concerned that future proposals must reflect this, and our comments on the Advertising Chapter highlight some areas where regulation must be more flexible. It

must also be made clear that co-regulation should, wherever possible, be the tool to deliver objectives in this and the protection of minors Chapter. In a Directive addressed to Member States, pure self-regulation does not seem appropriate, since the Member States are ultimately responsible for correct implementation. Some reserve powers must be available to either the appointed regulator, or the State, or both acting co-operatively.

12. **The flexibility currently provided in Articles 4 and 5** – “where practicable”, “over time” **must be retained** in relation to European and independent production quotas, and these **must not be increased** above the existing minimum of 50+ and 10% respectively. This level is often exceeded for channels where a Member State considers that, for cultural purposes, or as part of a public service broadcasting commitment, more is desirable. In the UK the BBC, ITV, Channel 4 and Channel 5 are obliged to deliver between 55% and 65% and 25% respectively.

13. It seems that Articles 4 and 5 have provided an overall stimulus to the European creative audiovisual industries, but flexibility remains a key element in this. 50 plus and 10% are targets to be aimed at, but for multi-channel television channels and services, often with tiny audience shares, narrow niche interests or predominantly non-European programming content, these targets may be impossible to achieve. We discuss Articles 4 and 5 more fully under the specific subject.

14. **The protection of minors must remain an essential principle.** The separation of Article 22 into 22(1) and 22(2) has made clearer the distinction between “might seriously impair” and “are likely to impair” the physical, mental or moral development of minors”. The margin of appreciation culturally, morally and socially allowed in this derogation from the state of origin principle must be exercised with due regard to proportionality in a Member State’s response against another Member State’s broadcaster, but the Commission, in giving its decision under Article 2a.2(d), should have due regard to the margin of appreciation and, if in doubt, err on the side of the view of the receiving Member State, after full consultation.

15. Finally, **an essential principle is that the provisions of TVWF do not conflict with other EU instruments**, and that these other instruments do not conflict

with TVWF. Where a number of legal instruments with a bearing on audiovisual matters are due for review, national capitals and the Commission must be vigilant and, if necessary, bring specific issues to the attention of the respective working groups, for separate discussion according to the particular and sometimes conflicting, interests involved.

SPECIFIC QUESTIONS

(a) **Theme 1: Access to events of major importance to society**

16. The UK has, to date, the only experience of putting the mutual recognition procedures in Article 3a.3 into practice, in the case of Regina v ITC, ex parte TV Danmark. This case ran the full UK judicial course to the House of Lords (25 July 2001, UKHL, 42) and highlighted the questions involved in the extent to which a Member State, or its regulatory authority, should follow the law of the Member State whose “substantial proportion” of its public was to be deprived of seeing an important event, in this case the Danish football team in the qualifying matches for the 2002 World Cup. These questions would include what would constitute a “fair price” on the Danish market, how much discretion did the ITC have, and how far should they follow the views of the Danish Competition Council.

17. It seems to the UK that such issues are, in their resolution, for each individual case, and cannot be legislated upon. Guidelines are helpful, and could be revisited by the Contact Committee and/or a committee of national regulators, were one to be created.

18. Proposals for harmonisation –

- a) of what constitutes “a substantial proportion of the population” and
- b) a single European list

would not be helpful, and would run counter to the essential principle that this is an area of national sensitivities and culture, to be left to Member States.

19. Retrospection, where contracts entered into before an event is placed on a national list would be caught, is not a legal principle attractive to the UK.

(b) **Theme 2: Promotion of cultural diversity and of competitiveness of the European programme industry**

20. As mentioned under “Essential Principles”, the flexibility in Articles 4 and 5 must be retained. Successive UK biennial returns to the Commission have demonstrated that, where practicable, and in close discussion with the DCMS, (with whom monitoring responsibility presently lies for cable and satellite broadcasters), steady increases in both European and independent works have been achieved. The stricter/higher national quotas for the principal free to air channels have also been met, but may need reassessment in the light of market forces in the future. This will fall to OFCOM, as may the monitoring of cable and satellite performance.

21. Articles 4, 5 and 6 provide a useful focus, and reminder, for the broadcasters and Member States of the importance of the European production sector. But if they were not in the Directive, it is the UK Government’s view that a combination of the commercial interests of major terrestrial broadcasters, and the stricter national rules allowed in Article 3.1, could substitute. Most viewers tire of a wall-to-wall diet of non-European programme content, so it is in the market place of vying for audience share, advertising revenue and subscribers, that the majority of decisions are made to commission or show content with which the viewers can identify. And it is for Member States to consider, in relation to their public service broadcasters, the value-added of precise national rules. This higher level of obligation is reflected in the “3-tier” system of regulation in the Communications Bill. However, we cannot lose sight of “viewer choice” where certain specialised film channels, for example, reflect the position of a wider market, where theatrical exhibition is dominated by non-European product. Such channels must be able quickly to respond to the preferences of viewers, and to meet these the need to purchase packages of films negotiated with the non-European suppliers must rely on business decisions by the operators, often at short notice.

22. Having said that, it is, on the balance of probabilities, likely that these Articles have been a positive stimulus to a number of cable and satellite broadcasters, especially those whose parent company is a major global conglomerate. These have

established, or are in the process of establishing studios in Europe, and entering into co-production agreements with independent producers. We have no objection to these Articles remaining in the Directive, provided the existing flexibility remains, and the targets for quotas are not increased.

23. But there is another important objective, in the UK's view, which is the stimulation generally of employment in the production sector. We have argued in the past that sports channels, news channels, and sport, games and news programming should not be entirely excluded from quotas, as the Commission does at present. Most of this content employs European workers, either to make or assemble. Large commitments of resources are invested in studios and outdoor equipment, and "background stories" behind sports and news programming involve more traditional creative and editorial skills. With the evolution of ancillary digital services, this "non-event" content will grow in volume, and we need to consider how to include such content in any future returns to the Commission.

24. Finally, we do not consider that harmonised definitions of "European works" or "independent producer" would be helpful. No real problems have arisen so far, and there should remain scope for each Member State to judge, in relation to its own production landscape, how the definition in Article 6 (European Works) and the indicative definitions in Recital 31, consolidated unofficial text, (independent producer) meet the requirements of Articles 4 and 5. Flexibility, as in the UK's system of revision as necessary in secondary legislation, is desirable.

(c) **Theme 3: Protection of general interests in television advertising, sponsorship, teleshopping and self promotion**

25. The UK has said, in other fora, that Chapter IV, on advertising etc, is generally satisfactory and would seek little change. It is important that advertisers keep the trust of consumers, but it is in their interests to do so, whether in linear-streamed delivery or interactive. It is a matter for national regulation to ensure this is the case. But it must be clear that such regulation can be of a co-regulatory kind. In addressing the issues arising from advertising in its Communications Bill, the UK has agreed to a system of "accredited self-regulation", where the regulator, OFCOM, will retain

reserve powers, but the industry will develop and “own” its Code of Practice, alongside an industry appointed Complaints Committee, and regular reporting on performance. Such a system will not create lesser standards – if anything they will be higher – but will be less of a burden on the regulator.

26. It follows that the UK expects the General Standards (Article 12) and those relating to minors (Article 16) will continue to be upheld by the advertising industry. Its existing low level of complaints, especially of those upheld, we expect to continue in relation to broadcast advertising, a term which we use generically to cover also sponsorship, teleshopping and self-promotion.

27. There is one Article, 11, which we think should be made more flexible, now we have a multiplicity of channels of various kinds. We would wish to keep the overall minutage of the Directive, but allow editorial flexibility as to the appropriate points for insertion of ads and teleshopping spots between and during programmes. It should be enough to put into the Directive a general criterion that insertion of ads should be in “natural breaks” and leave it to the judgement of programme controllers as to when this should be. This will also reinforce the principle of national cultural appreciation. It should be noted that at least one broadcaster has pointed out that the “20 minute rule” can cost as much as 30% of a programme budget in order to meet it.

28. The UK expresses concern that initiatives elsewhere in the Commission, and in the World Health Organisation, in relation, for example, to tightening provisions on advertising of alcohol, fatty foods and other possibly “harmful” products, not always food, must be kept in view. The Directive is pre-eminent in respect of alcohol advertising on TV, and has laid down satisfactory minimum standards, in Article 15, to which Member States may respond with proportionate stricter standards provided they do not distort competition between Member States. There are no detailed rules on “fatty foods”, though Article 12(d) might be prayed in aid. This area is not as straightforward as alcohol or tobacco – one person’s dislike is another person’s banquet, and such products are not just the globally marketed fast food brands, but cultural icons such as Yorkshire pudding, black sausage and clotted cream teas.

29. On new advertising techniques, we await the Commission's draft Guidelines later this year, though we consider that the principle of separation is probably met by these techniques. Viewers do not need to be over-protected – technology will increasingly allow them to delete advertising (though not virtual advertising), and they can make their views known on the intrusiveness of such advertising, including banners, according to the programme content (eg sport or film). Furthermore, in our view, a large proportion of viewers are capable of knowing, without visual or acoustic guidance, when they enter the interactive environment, but we accept that, as elsewhere in the Directive, especially Articles 22 and 22b, there is a strong case for promoting media literacy. The less precise and detailed the Directive's regulatory provisions become, and the more co-regulatory regimes based on general principles are promoted, the greater the need for media literacy strategies. The UK has given this responsibility, in its new legislation, to OFCOM. We are supportive of the Mediasmart initiative, sponsored by the advertising industry and the free air time donated by broadcasters, and look to them to work with educationalists and OFCOM in further developing the scope of their literacy package.

(d) **Theme 4: Protection of minors and public order: the right to reply**

30. The Commission's Discussion Paper (part 1) specifically acknowledges that "it is up to the national authority to define the criteria, including in respect of violence and pornography, according to which it is determined which programmes seriously impair the development of minors and therefore shall not be broadcast." The actions of the Commission are limited to "control of proportionality of the measures taken". This goes to the heart of the measure of appreciation, on social, moral and cultural grounds, provided for in Article 22. To date, the UK as the receiving Member State of direct-to-home foreign satellite pornography channels, has made 6 proscription orders, which have the objective of affecting the marketing of the channels in the UK. We also intervened, in the EFTA Court, on the side of Norway in its successful action against a Swedish (cabled) broadcaster. The Commission supported all these actions.

31. The Commission asks about new technical and commercial developments, and co or self-regulation. The UK has taken the clear view that internet services should not be regulated in the same way as broadcast services. We believe that citizens

expect different things of different services, and, in addition, most people expect minimal regulation of the internet. This includes Video-on-Demand (VOD) services which are not linear-streamed movie and general channels for general reception by the public. The VOD industry has offered, and the Government has accepted, a system of self-regulation based on a Code of Practice. This will be operational by the end of this year. And, of course, it is obvious that provisions in the Directive such as quotas could not and should not apply. This would make as little sense as regulating all bookstores to carry x% of European, or national language content, even if purchasers never purchased these works. It may be worth considering, in a recital, whether MS should encourage involvement of consumer organisations in any monitoring process.

32. The UK has had no problems with regulation under Article 22a, incitement to hatred, though as more non-European channels are licensed in the EU, with different cultural appreciations of where the boundaries lie, regulators will have an educative task in explaining what is expected in this area.

33. On the Recommendation on the protection of minors and human dignity, there is no need for further regulation. The Internet Watch Foundation (IWF) do a good job and this as is noted has been copied in most EU states: the Sexual Offences Bill will deal with on-line grooming – in other words the legal base in the criminal law for protection of minors already exists and voluntary measures, such as the IWF, offering moderated chat rooms etc does take care of the issues – such voluntary measures are more flexible and allow new developments to be controlled more quickly than further recommendations. But regular co-operative monitoring by the Commission is to be welcomed, as presently done.

34. The UK does not have specific statutory provision for a right of reply. It will continue to provide, in OFCOM, the existing powers of the Broadcasting Standards Commission for complaints concerning invasion of privacy and fair treatment of individuals or groups. Where a complaint is upheld, the broadcaster may be required to broadcast an apology, and/or give it due prominence in the Press and TV listings magazines.

(d) **Theme 5: Application (Related Aspects)**

35. The UK has experienced few difficulties with the current drafting of Article 2. The country of origin principle remains fundamental to the Directive, and gives legal certainty for Member States, broadcasters and viewers/consumers. The use of place of establishment as the key criteria for regulation must remain the most important factor in determining responsibility for jurisdiction. This will become increasingly important as broadcasters diversify the distribution of their programming across frontiers, for example tailoring to regional or linguistic markets.

36. The Contact Committee has proved itself a useful tool for inter-Member State discussion of various policy issues, and as an advisory Committee to the Commission, especially on Member States' Listed Events. It should continue. But the UK is unclear why the Commission considers co-regulation potentially to be a difficulty for the single market – the Contact Committee can of course be a forum for exchange of information and practice and this would be a useful agenda item.

37. While not completely opposing the creation of a committee of national regulatory authorities, and enhanced co-operation between them so far as the application of the Directive is concerned, the relationship of such a committee to the Contact Committee must be clear. It is for discussion whether the Contact Committee, as now happens, would be a sufficient forum, supplemented as the agenda requires by national regulatory authority representatives. There is considerable overlap already between policy issues and implementation on a practical level, and duplication in two committees may not be helpful.

(e) **Theme 6: Short extracts of events and other elements not covered by the Directive**

38. We have little more specific to add to our opening comments in para 10. This could become a problem with the increasing commercialisation of events, not just sports events, and exclusive rights buying. The problem undoubtedly involves the

fundamental principle of freedom to impart and receive information, in this case of a minimalist kind as news, rather than entertainment. But the TVWF Directive is probably not the right instrument to ensure that short extracts, and access to venues or signals for these purposes, are available, if any action at a European level is to be considered. The Copyright Directive already provides for short reporting. We are open, as we said in paragraph 10, to a recital which might relate to article 3a. The UK, a signatory to the Transfrontier Television Convention, has not found it necessary to take legal measures – which Recommendation 91(5) of the Council of Europe paves the way for - broadcasters in the UK co-operate where the showing of extracts on each other's programmes, including news bulletins, is concerned.

SCOPE

39. It has been apparent, in replying to several of the issues in these discussion documents, that a horizontal question of the future scope of any revised TVWF Directive has emerged. The UK considers that it is essential that future scope is examined as a separate and central issue. In this section of our reply we will elaborate on how we see the problems, now and in the future, and how we have dealt with them in our Communications Bill.

40. We have developed the concept of a "television licensable content service" as any service which is provided (whether in digital or analogue form) as a service to be made "available "for reception by members of the public" (defined elsewhere in the Bill) by being broadcast from a satellite, or distributed by an electronic communications network, and consisting of television programmes and/or electronic programme guides (or both). The service covered by a single licence will comprise not only what the Bill describes as a "main service" (which could consist either of television programmes or of an electronic programme guide, or both) but also such of the ancillary services and facilities provided with it as are "relevant ancillary services" and are not "two-way services". "Two way services" encompass services such as video conferencing. The term "relevant ancillary services" encompasses both services that are actually provided by the provider of the "main service" and those facilities which are no more than links to services provided by others. It is not intended to encompass any apparatus (such as a television set, a PC, or a set-top box).

A licensee is not held to be responsible for services which may be accessed from the “main service” unless he has general control over them.

41. Ancillary services that are not “relevant” ones are not to be covered by the licence for the main service (although some might be licensable in their own right, e.g. if they constitute a television licensable content service provided by someone other than the provider of the main service). To give some examples, say you are watching a wildlife programme on the “main service” i.e. a television channel in the conventional sense, albeit that it includes all the enhanced features to be expected from digital services. A menu might offer access to different camera angles: these would constitute “relevant ancillary services” which would be part of the licensed service. The menu might also give you access to additional factual information (provided within the broadcast stream) about the animals you are watching. That is expected to be within the scope of the licence too. But there might be a link (a “facility”) which might take you to a website. The fact that the link is provided would be within the licence (and so OFCOM might require it to be removed if it led directly to unsuitable material), but the website at the end of the link would neither be regulated nor within the licence of the “main service” as it would not be a service made “available for reception by members of the public”. Also outside the scope of the licence would be content that could be accessed from the “main service” but which is not under the general control of the provider of the “main service”, such as a television service provided by someone else but showing similar wildlife programmes. Other services, such as being able to order takeaway food, or engage in on-line banking, or participate in an on-line chatroom, would not be within the licence either. These are just examples, and everything would depend on the exact nature of the services and facilities offered and the circumstances in which they were offered.

42. The Communications Bill then sets out the services that are to be excluded from the definition of a television licensable content service. A service is not a television content service licence if it is broadcast by means of a television multiplex service or to the extent that it consists of a service which is authorised by a licence to provide a television broadcasting service, the licence to provide the public teletext service or a licence to provide additional television services. Nor does it meet the

description of a television licensable content service if it forms part only of a service provided by means of an electronic communications service or is one of a number of services that may be accessed through such a service where the purpose of the service provided by these means is not wholly or mainly to make available television and/or radio programmes for reception by members of the public. A service is also excluded if it is a two-way service (as defined previously). The aim of these provisions is, broadly, to maintain licensing obligations in respect of services which are or equate to broadcasting, while excluding Internet services such as web sites or web-casting, from OFCOM's regulatory powers. We exclude not only any website material provided as part of another service (for example, a website which is accessed via an ISP which also provides its own in-house content) but also material provided from a stand alone site, whether it be text, web-cast or video images. We exclude a service that is distributed to a single set of premises by an electronic communications network that is contained within the premises and is not connected to any external network. We also exclude a service that is provided for the purpose only of being received by persons who have an interest in receiving the service for use in their business or employment, such as stockbrokers or bookmakers.

43. Given the fast-moving, and unpredictable, technologies in this converging sector, rather than resort to primary legislation in the near to medium term future, perhaps up to 10 years, the Bill gives the Secretary of State a secondary order making power to amend what is, or is not, a TLCS. In making any modification, she must take into account the level of protection expected by the public as regards the content of television programmes and text services, taking into account the means of reception; the ability of the public – having been made aware of the contents of a forthcoming programme – to control what they watch; technical innovation; the financial consequences of modification; and the relative ease or difficulty of setting different levels of regulation for different services. This “future-proofing” and flexibility will allow for both minor and significant developments in broadcasting services to be kept under constant review.

44. The commercial terrestrial channels (3, 4, 5 and S4C) will continue to be licensed as at present, and the BBC will continue to broadcast subject to its Royal

Charter and Agreement with, the Government. The principles above, in relation to the boundary line between traditional services and new online services will apply to these channels.

45. We urge the Commission to address these difficult issues in further in-depth consultation with Member States and the industry, including the mobile telephone industry and Internet Service Providers. Convergence, both vertical and horizontal, is a reality in today's digital world, and will be all the more so by 2005, should the Commission consider bringing proposals for TVWF revision forward to the Council and Parliament.

f:\july03\15tvwf