

The Commission Proposal for a Modernisation of the Television without Frontiers Directive: Frequently Asked Questions

How will the modernised directive strengthen Europe's content industry?

The new directive would extend the benefits of the "country of origin" principle – which has helped Europe's broadcasting industry to flourish since 1989 – to new non-linear (on-demand) audiovisual services (in particular video on demand), so as to improve their prospects for commercial success. For such on-demand services, the "country of origin" principle would apply across Europe with a minimum of necessary harmonisation. This would allow audiovisual media service providers to offer audiovisual content complying with the laws of their own Member State for reception in other Member States, without having to vary this content to comply with the laws of each Member State concerned (e.g. differing rules on protection of minors). This is expected to create a level playing field for audiovisual media services in the European Union and to increase choice, diversity and investment in the European audiovisual media industry.

The Commission believes that lower entry thresholds for non-linear audiovisual services, will lead to a vibrant "audiovisual content without frontiers" industry that is strongly rooted in the EU. At the same time, the "country of origin" principle should enhance media pluralism and diversity, by opening up national markets to more competition from other EU countries.

Technological progress and changes in the market and users' behaviour (increased choice and responsibility) also call for more flexibility as regards advertising rules.

- First, relaxing rules on the insertion of advertising in TV programmes and daily advertising limits, as well as openness to new forms of advertising (such as split-screen, virtual or interactive advertising), would benefit not only advertisers but the whole audiovisual industry in Europe, by strengthening their economic base.
- Second, providing a clear legal framework for product placement would secure new revenues for Europe's audiovisual industry, help to boost Europe's creative economy and thus reinforce cultural diversity. Product placement is a reality on European TV screens today, but operates essentially to the benefit of non-European production and without viewers being informed. This is why the Commission feels that there is a need for clear rules set out in an EU directive. Consumers should have the right to know what kind of content they are watching. The goal of the new directive is therefore to enhance consumer information, while acknowledging that product placement is a form of advertising that could help the European audiovisual industry to become more competitive, especially vis-à-vis the USA. An independent study published in September 2005 found that product placement accounts for 1.7% of the total advertising revenues of free-to-air broadcasters in the USA and had grown by an average of 21% per year between 1999 and 2004¹.

¹ See the final report of the *Comparative study on the impact of control measures on the televisual advertising markets in European Union Member States and certain other countries*, pp. 60-61.

However, in Europe, unclear and disparate rules on product placement, or in some cases a lack of rules, have so far prevented audiovisual content producers from making use of this important source of financing, while clearly failing to protect consumers adequately.

Why does the Commission propose easing advertising restrictions for TV broadcasters?

Experience with the 1989 TV without Frontiers Directive suggests that the present advertising rules need to be made simpler and more flexible. The new directive, as proposed by the Commission, would remove some of the quantitative limits on advertising and greatly simplify the rules on inserting advertisements in TV programmes.

The current three-hours-per-day limit on advertising would be dropped, because in practice, no non-specialist TV channel in Europe comes near it, so it is clearly superfluous and incompatible with the principle of better regulation.

Insertion rules would be made simpler and more flexible by the new directive. Broadcasters, and not regulators, would be permitted to choose the best moment to insert advertising in programmes, rather than being obliged, as they are now, to allow at least 20 minutes between advertising breaks. The new directive nonetheless states that films, children's programmes, current affairs programmes and news must not be interrupted more often than once in every 35 minutes.

Broadcasters are not expected to misuse the extra flexibility offered by the proposal, because in a market in which the supply of audiovisual media content is growing exponentially, to do so would risk damaging their own economic interest – consumers would simply switch to other channels or other service providers. Ensuring viewers' comfort, and respecting right-holders' rights, is likely to prove a more effective way to compete.

To prevent any increase in the overall quantity of advertising, the 12-minute upper limit on all advertising in any given hour is maintained in the Commission proposal. This is a clear decision by the Commission to maintain the European audiovisual model which has developed well under the present TV without Frontiers Directive.

Will the new directive permit “US-style” TV with unlimited advertising breaks?

No. The new directive is intended to safeguard the specific character of European television and therefore provides for some qualitative and quantitative restrictions concerning advertising and commercial communications that may appear during programmes. The 12-minute upper limit on all advertising in any hour would stay. Insertion of advertising would still be subject to particular restrictions in programmes that need an enhanced protection such as films, children's programmes, news programmes, which, under the Commission proposal, could be interrupted by advertising only once every 35 minutes. Also product placement will, under the new directive, be subjected to the principle of identification, while being prohibited in some programmes such as news, current affairs and children's programmes and subject to the same qualitative restrictions or prohibitions as ordinary advertising.

The new directive retains obligations for broadcasters concerning independent and European production. These should safeguard the European audiovisual model.

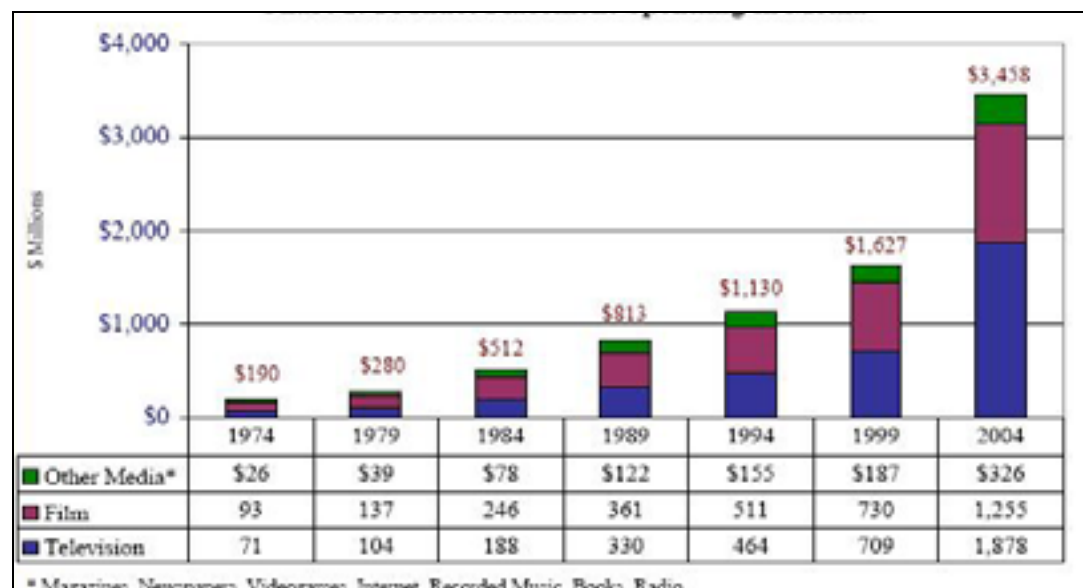
Why does the Commission propose for the first time rules on product placement?

Product placement is not addressed as such by the current TV without Frontiers Directive, which includes the principle of separation and the prohibition of “surreptitious advertising” applied to programmes for which broadcasters are responsible. Product placement is nonetheless common practice in independently produced works and feature films, without any appropriate consumer protection and without clear rules which would give investors in content certainty as to the law. In Europe, only a few Member States, e.g. Austria, have rules in place which define product placement and allow it under certain conditions.

Recent figures from countries that do permit product placement suggest that clear rules on it should help the European audiovisual industry to become more competitive, especially vis-à-vis the USA. An independent study published in September 2005 found that product placement accounts for 1.7% of the total advertising revenues of free-to-air broadcasters in the USA and had grown by an average of 21% per year between 1999 and 2004 (see chart)².

The new directive would lay down clear rules prohibiting product placement that misleads the consumer, but permitting it provided it is clearly identified as such at the start of the programme and subject to appropriate rules and safeguards for viewers’ essential interests, such as the exclusion of product placement from news, current affairs and children’s programmes.

Product placement spending in the US media



* Magazines, Newspapers, Videogames, Internet, Recorded Music, Books, Radio
Source: PQ Media LLC, March 2005

Today, product placement is already used in much content broadcast in European countries, in particular in cinematographic productions, US TV productions and sometimes also in other European TV productions. This is a result of the legal vacuum on product placement in some countries, which is plainly exploited by economic operators. This is why the new directive provides for a set of basic minimum common rules that would replace today’s patchwork of differing national ones for a type of commercial communication that is already in use. These common rules aim to improve certainty as to the law for operators and also to protect consumers, who today are confronted with product placement without proper information or safeguards.

² See the final report of the *Comparative study on the impact of control measures on the television advertising markets in European Union Member States and certain other countries*, pp. 60-61.

The main idea behind the proposal is to ensure that the presence of product placement in programmes is disclosed in advance to the consumer, not only to safeguard the consumer's interest but also to establish clear ground rules for the responsibility and editorial independence of the media service provider.

The common rules would prevent excessively intrusive and undisclosed product placement such as that sometimes seen in the USA, where product placement is not subject to any legislative restrictions and where it is used in programmes, including those for children, without any obligation to inform viewers. The Commission believes that its proposal would prevent such excessive use of product placement in Europe, since undisclosed product placement and product placement in children's programmes would be expressly precluded.

What are the "linear" and "non-linear" audiovisual media services that the Commission proposal talks about? Are there any examples?

The Commission proposal for a modernised TV without Frontiers Directive distinguishes between "linear" services (e.g. scheduled broadcasting via traditional TV, the internet, or mobile phones, which "pushes" content to viewers), and "non-linear" ones, such as on-demand films or news, which the viewer "pulls" from a network.

The linear/non-linear or push/pull distinction ultimately depends upon who decides when a specific programme is transmitted and whether schedules exist. Linear services are those "pushed" sequentially by broadcasters on the basis of a **time schedule**. Non-linear services are defined as "any audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a **catalogue** of content selected by the media service provider".

Today's TV broadcasting rules would apply to linear services in a modernised, more flexible form, whereas non-linear ones would be subject only to a basic set of minimum principles, e.g. to protect minors and prevent incitement to racial hatred. The differing degrees of regulation of content "pushed" by suppliers or "pulled" by users reflects differences in user choice and control and in the likely impact on society.

Linear and non-linear services / platforms³

Service/ platform	Analogue Terrestrial TV Analogue cable Analogue satellite	Digital terrestrial TV	Digital Satellite	Digital TV cable	IP services via broadband connections on ADSL or Internet	Mobile phone Internet Protocol streaming	Digital broadcasting to mobile phones Mobile phone
Traditional TV (linear service)	PSB ⁴ channels, free-to-air and some pay-TVs	PSB channels, free-to-air and some pay-TVs	PSB channels, free-to-air and pay- TVs	PSB channels, free-to-air and pay-TVs	IPTV : PSB channels, free-to-air and pay- TVs ⁵	PSB channels, free-to-air and pay- TVs ⁶	PSB channels, free-to-air pay TV channels ⁷
Pay-per- view (linear service)		Sport events, films and other events ⁸	Sport events, films and other events ⁹	Sport events, films and other events ¹⁰	Sport events ¹¹		
Video-on- demand (non-linear service)				Films, serials TV programmes, and music (concerts, clips) ¹²	Films, serials, TV programmes, sport events, music (concerts, clips, tracks), videogames ^{13,14}	News, “mobisodes” , reality shows, music and sport clips ¹⁵	News, reality shows, music clips

³ Source: European Audiovisual Observatory

⁴ Public service broadcasters

⁵ Main operators/services : 26 operators, almost all Telcos and ISPs, as of 12/2005 in 18 MS among which: AON (A), Belgacom (B), T Online (D), TDC (DK), Free, MaLigneTV (FR), Fastweb (IT), KPN (NL), Fast, Teliasonera (SW)

⁶ Main operators/services : SFR (FR), Vodafone (UK, D, GR,IT, NL, PO, ES, B, FR, A), Belgacom (B)

⁷ Not yet operational

⁸ Main operators/services: Mediaset (IT), Setanta (UK)

⁹ Main operators/services: Canal+, TPS (FR), Sky Italia (IT), BSkyB (UK), Premiere (D), Viasat (SW), Sogecable (ES)

¹⁰ Main operators/services: BSkyB, Telewest (UK), Premiere, Kabelvision, Tividi (D), UPC Chello (NL), ONO (ES)

¹¹ Main operators/services: Belgacom (B)

¹² Main operators/services: Telewest, NTL (UK),

¹³ Main operators/services: 35 services operational as of 12/2005 in most MS, among which: Telcos, ISPs, cable operators, broadcasters, specialised content providers, film archives, video publishers and Apple's iTunes Music store (FR,D,US)

¹⁴ Main operators/services: AON (A), Belgacom (B), T Online, Arcor, 4 friends (D), Svensk Filmindustri, Live Networks, Bredbandsbolaget (S), Imagenio (ES), Canalsatellite, TF1, TPS, Cinezime (F), Video Networks, World Cinema (UK), Fastweb, RAIClick, Telecom Italia, Tiscali (IT), Casema, RTLNederland, Tiscali (NL)

¹⁵ Main operators/services: Orange, SFR, Proximus, E-Plus, Cosmote, Endemol and some broadcasters

Which services does the proposal cover and which not?

	Audiovisual media service	Other services not covered by the proposal
Film, telefilms, serials on demand	X	
Sport events on demand	X	
Entertainment shows on demand	X	
Reality shows on demand	X	
Video reports of concerts and live arts performances on demand	X	
TV news reports on demand	X	
Advertising - other than text and still images - delivered in connection with on demand services mentioned above	X	
Advertising – pop-up clips other than text and still images– not delivered in connection with on demand services mentioned above		X
Video clips inserted in web-sites when the main purpose is not the delivery of audiovisual content but to deliver information on the activities (commercial and non commercial) of the site owner		X
Animated images inserted on press (newspapers, periodicals, agencies) web-sites – if of ancillary nature		X
Blogs for non-commercial purposes		X

Why does the Commission propose to have different rules for linear and non-linear audiovisual media services?

Traditional TV broadcasting rules need to be updated, in the light of experience, to accommodate technological progress and market developments such as new viewing habits. This includes modernising advertising and product placement rules where necessary.

By contrast, the Commission sees no justification for regulating audiovisual content supplied at the viewer's request ("pull content"), beyond safeguarding essential public interests such as protecting minors and preventing incitement to hatred. The differing degrees of regulation of content "pushed" by suppliers or "pulled" by users therefore reflects differences in user choice and control and in the likely impact on society.

The new directive also encourages co-regulatory regimes, particularly for non-linear services. These regimes must however be broadly accepted by stakeholders and provide for effective enforcement.

Have the Member States already rules in place on non-linear audiovisual services? Why could these rules create problems for the single market?

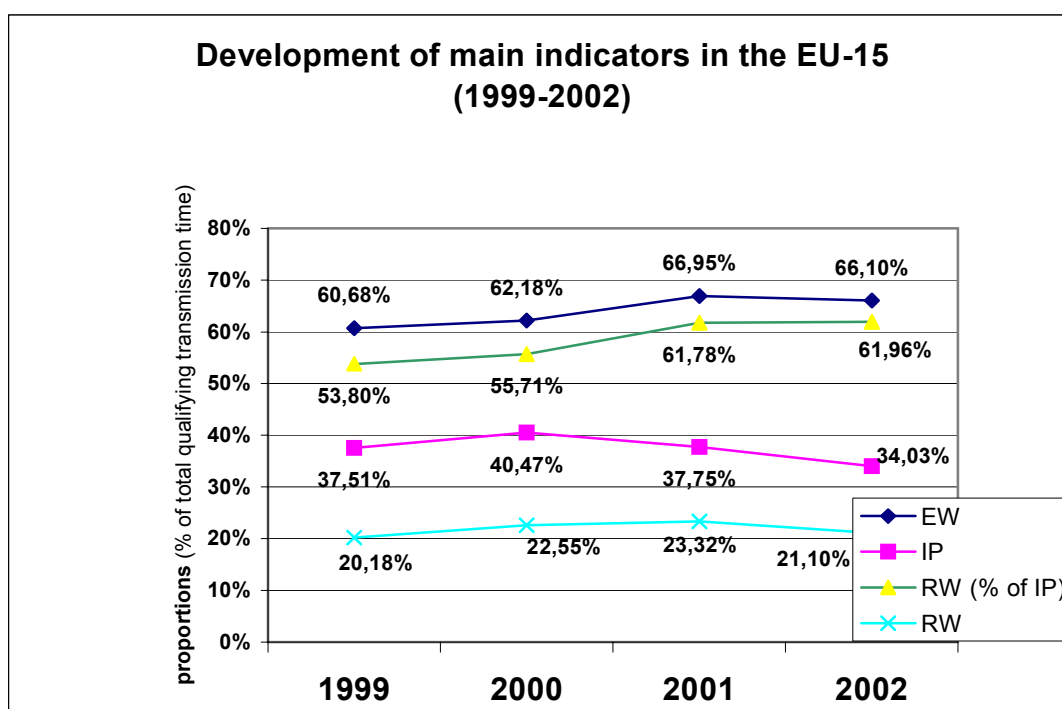
Most EU Member States already have rules protecting minors from harmful content and outlawing incitement to hatred. However, these are now to be harmonised EU-wide, so that audiovisual media service suppliers need only comply with the rules of the Member State in which they are established, and not with the disparate rules of all 25 Member States potentially receiving their services.

By removing the obligation to comply with differing national rules, the new directive will lower market entry thresholds for non-linear audiovisual service providers and hence stimulate the growth of a vibrant content industry strongly rooted in the EU.

How does the directive promote cultural diversity?

Promoting cultural diversity in the audiovisual media is often reduced to the simplistic question of whether or not imposing strict “content quotas” on broadcasters and other service providers is the right way to achieve this important aim. The current Directive enables EU Member States to impose certain “content quotas” in favour of European productions on traditional TV broadcasters “where practicable” and “by appropriate means”, and thus gives Member States a wide margin of discretion. Regardless of the option chosen by individual Member States, these “flexible quotas” for traditional TV have greatly stimulated European and independent content production and are today easily met by all 25 Member States.

An impact study on the current TV without Frontiers Directive suggests that there is no need to change either the majority share for European works or the minimum share for independent ones. These quotas already achieve their cultural aims.



EW European works (in relation to total qualifying transmission time)

IP European works made by independent producers (in relation to total qualifying transmission time)

RW (% of IP) Recent European works by independent producers (in relation to European works by independent producers)

RW Recent European works by independent producers (in relation to total qualifying transmission time).

Source: Sixth Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", as amended by Directive 97/36/EC, for the period 2001-2002, COM (2004)524, page 12

Given the different nature of non-linear services, and the differing degrees of user control, the European Commission has from the outset made it clear that “content quotas” for these services are certainly not the right instrument to achieve cultural diversity, and could even be counter-productive. The proposed new directive therefore only obliges EU Member States to ensure that providers of non-linear services promote access to European works, but this only where practicable, and by means left to the Member States’ discretion and to co-regulatory initiatives. The Commission neither proposes European content thresholds, nor attempts to specify how non-linear services should provide access to European works. The Commission believes that in most EU Member States, the dynamics of the audiovisual market itself, and in particular lower entry thresholds for non-linear audiovisual services, will lead to vibrant content industry also with strong roots in the EU.

Further instruments to promote cultural diversity in the new directive

To safeguard the integrity of the cinematographic films, the new TV without Frontiers directive would provide that cinematographic works may only be interrupted once in every 35 minutes.

The clearer product placement rules proposed by the Commission should help stimulate sources of funds for audiovisual production in Europe, thereby strengthening Europe's film industry. The modernised TV without Frontiers Directive would permit product placement, within an appropriate legal framework that safeguards viewers' essential interests such as the right to be informed and exclusion of product placement from news, current affairs and children programmes.

Will there be "quotas" for European content on the Internet?

Definitely not. The Internet is a global network in which it would be impossible to impose the availability of content from particular regions of the world. In the end, consumer demand will determine whether providers of non-linear audiovisual media services will want to offer more local and regional content. For such non-linear or video-on-demand services, the Commission proposal therefore says only that "Member States shall ensure that media service providers promote, where practicable and by appropriate means, access to European works within the meaning of Article 6." This is a strong political signal that on-demand services, like scheduled ones, should help to promote European productions and cultural diversity. However, this provision does not introduce "quotas". It neither sets thresholds, nor specifies means of implementation. The qualification "where practicable" gives Member States the flexibility they need to accommodate the specific characteristics of their respective national audiovisual markets and avoid subjecting emerging non-linear services to excessive regulation.

Why not just leave it with the eCommerce Directive?

The eCommerce Directive does not contain material content rules and currently leaves Member States the possibility to derogate from the country of origin principle. By providing minimum rules with regard to the protection of minors, hate speech, promotion of cultural diversity and advertising the proposal widens the fields harmonized by Community Law. It therefore builds on the eCommerce Directive in these fields for a specific sub-set of services i.e. audiovisual media services, which have a special impact on society and are characterized by their cultural dimension. For these services, the level of coordination of national rules is higher and the internal market more complete.

Why is the country of origin principle the cornerstone of the Television without Frontiers Directive? Are there remedies against its abuse?

The "country of origin" principle, which ensures that only one EU Member State has jurisdiction over any given media service provider, has been the cornerstone of the Television without Frontiers Directive since 1989 and the basis for all business plans for new services. Audiovisual media service providers need the legal certainty that they do not have to comply with 25 different national laws, but only with the legislation of the country where they are established.

The freedom of audiovisual media service providers to choose the Member State(s) in which they establish themselves is enshrined in the EC Treaty. Increasingly, they are making use of this fundamental freedom to supply new services within Member States and across frontiers. In January 2006 around 400 channels were available in the EU¹⁶ targeting specifically another market. But the mere fact that a service provider does not offer services in the Member State in which it is established cannot in itself be considered an abuse of this principle.

The country of origin principle could be said to be abused only if the audiovisual service provider's choice of establishment could be shown to have been made for the purpose of fraudulently avoiding national rules that would otherwise have applied to it. The European Court of Justice has consistently held that Member States retain the right to take action against service providers that clearly abuse the country of origin principle and the freedom of establishment. Until now, Member States that were convinced that a specific service provider had abused this freedom had to initiate a cumbersome and often very time-consuming infringement procedure.

The new directive would enable Member States to take action against a broadcaster that abuses this fundamental freedom and sets out a streamlined infringement procedure with tight deadlines under the supervision of the European Commission. It will henceforth be easier for Member States to take legal action against any audiovisual service provider that abuses the freedom of establishment, while the European Commission will safeguard the single market in this procedure.

How can Europe be better protected against third country broadcasts inciting hatred?

Already under the existing Television without Frontiers Directive, third country broadcasters must comply with European rules, and notably those on respect for human dignity, non-discrimination and protection of minors, if their broadcasts can be received in Europe and if they use either a European satellite system or an up-link situated in one Member State. If they do so, the competent Member State can, as a last resort, ban a broadcast if it infringes European rules and order the satellite or the up-link operator to close down the broadcast in question.

In practice, the current European rules mean that Member States, and principally France and Luxemburg, have to monitor a huge number of third country programmes because of the fact that most of these programmes use either Eutelsat or Astra. Experience with the TV without Frontiers Directive suggests that the responsibility for monitoring third country programmes should be divided more equally among Member States and that the advent of digital satellite broadcasting has made it impossible for a satellite operator to shut down one specific channel. This is because digital television channels are no longer carried individually but are grouped together in a multiplex. Satellite operators can only close down the whole multiplex, which would punish a number of other channels that comply with the rules.

The Commission therefore proposes technical changes which will share the task of monitoring third country programmes more equally among several Member States and thus guarantee effective monitoring, and if necessary, control. The Member State that has the technical responsibility for closing down a specific channel will be the one responsible for doing so. Procedures have already been put in place to improve the exchange of information between regulators.

Banning television channels or other audiovisual media may of course only ever be justified by very serious violations of the principles of our democratic, pluralistic and open society.

¹⁶ European Audiovisual Observatory, Yearbook 2005

What does the Directive do in the field of media pluralism?

The European Union is committed to protecting media pluralism as well as the right to information and freedom of expression enshrined in Article 11 of the Charter of Fundamental Rights. Important measures to ensure media pluralism at Community level are included in the Television without Frontiers Directive and are strengthened in this amending directive.

The impact study made in preparation for the proposal for the new directive¹⁷ showed that measures to promote European and independent productions have had a considerable positive impact: for example, European works by independent producers account for 1/3 of transmission time and roughly 50% of all European works. This is an important independent source of content and therefore an important contribution to media pluralism. The new directive includes new rules for all audiovisual services with respect to access to European works.

The new directive also requires Member States to guarantee the independence of national regulatory authorities. An "independent regulatory authority" must not be part of the actual structure of governmental administration, and must have at its disposal an apparatus that does not serve any other body. The proper exercise of independent regulatory powers is vital to ensuring pluralism. These powers include the administration of the broadcasting sector (e.g. awarding broadcasting licences), supervision (e.g. programme monitoring), and rule-making (e.g. codes of practice).

Does the new Directive distinguish between rules for public and for commercial broadcasters?

No. The EC Treaty and all EU media rules – including the present directive and the proposed new one – leave it to the Member States to define the remit of public service broadcasters and to choose the model of financing the activities of public service broadcasters which fall within this remit. It would thus be for the Member States to decide whether to allow their public service broadcasters to make use of the enhanced flexibility the new directive would provide regarding advertising.

Have stakeholders been consulted on the Commission proposal?

Yes, very widely and intensively. The proposed new directive takes account of input from an intensive EU-wide consultation, with a first consultation in 2003 and a second one launched in July 2005 (see [IP/05/908](#)), to which representatives of the audiovisual sector, telecom operators, internet service providers, consumer organisations and other stakeholders all contributed. The results of these consultations have been included in an extensive impact assessment that is published together with the proposal for the new directive.

See the contributions to the 2003 public consultation at:

http://ec.europa.eu/comm/avpolicy/reg/twvf/modernisation/consultation_2003/index_en.htm

See the contributions to the 2005 public consultation at:

http://ec.europa.eu/comm/avpolicy/reg/twvf/modernisation/consultation_2005/index_en.htm

¹⁷ Study on the impact of measures concerning the promotion of the distribution and production of TV programmes (Community and national) provided for under Article 25 (a) of the Directive on television without frontiers

http://europa.eu.int/comm/avpolicy/stat/studi_en.htm.

SIXTH COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", as amended by Directive 97/36/EC, for the period 2001-2002
http://europa.eu.int/comm/avpolicy/regul/twf/art45/art45-intro_en.htm

Has the European Parliament already expressed views on the need to modernise the Television without Frontiers Directive?

Yes, the European Parliament has taken a very active role in the review of the present TV without Frontiers Directive

Call to rework the TV without Frontiers Directive

In a resolution adopted on 4 September 2003, the European Parliament called for a complete overhaul of this directive to take account of technological developments and changes in the structure of the audiovisual market.

See European Parliament resolution on Television without Frontiers (2003/2033(INI)) adopted by EP on 4 September 2003

Report of 25 June 2003 (PE 312.581 A5-0251/2003) on Television without Frontiers (2003/2033(INI)), Committee on Culture, Youth, Education, the Media and Sport (Rapporteur: **Roy Perry**)

<http://www.europarl.eu.int/omk/sipade3?PUBREF=-//EP//NONSGML+REPORT+A5-2000251+0+DOC+PDF+V0//EN&L=EN&LEVEL=1&NAV=S&LSTDOC=Y>

Call to promote independent European production and plurality

Presenting Parliament's own-initiative report of 21 June 2005, Rapporteur **Henri Weber** said that the Commission should maintain at least the present minimum standards for independent and European productions when revising the TV without Frontiers Directive. Mr Weber asked for measures to prevent broadcasting from becoming entirely commercial and for minimum requirements for plurality.

See European Parliament resolution on the application of Articles 4 and 5 of Directive 89/552/EEC ("Television without Frontiers"), as amended by Directive 97/36/EC, for the period 2001-2002 (2004/2236(INI)) adopted by the European Parliament on 6 September 2005

Report of 21 June 2005 (PE357.689) on the application of Articles 4 and 5 of Directive 89/552/EEC (the "TV without Frontiers" Directive), as amended by Directive 97/36/EC, for the period 2001-2002, Committee on Culture, Youth, Education, the Media and Sport (Rapporteur: Henri Weber)

<http://www.europarl.eu.int/omk/sipade3?PUBREF=-//EP//NONSGML+REPORT+A6-2005-0202+0+DOC+PDF+V0//EN&L=EN&LEVEL=4&NAV=S&LSTDOC=Y>

Further information on the Commission proposal to modernise the TV without Frontiers Directive is available at:

http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm