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**GREEN PAPER ON THE PROTECTION OF MINORS AND HUMAN DIGNITY IN  
AUDIOVISUAL AND INFORMATION SERVICES**

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(presented by the Commission)

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## INTRODUCTION

This Green Paper sets out to examine the challenges that society faces in ensuring that two specific issues of overriding public interest i.e. protection of minors and of human dignity, are adequately taken into account in the rapidly evolving world of audiovisual and information services. The transition from a broadcast world to an environment where conventional television will exist alongside on-line services and indeed hybrid products creates a host of opportunities. The full potential of such developments will depend on society as a whole striking the right balance between freedom of speech and public interest considerations, between policies designed to foster the emergence of new services and the need to ensure that the opportunities they create are not abused by the few at the expense of the many. Certain facets of these issues require European, indeed global, solutions. Others remain a matter for individual states or for individuals themselves. The Commission believes that it is legitimate and necessary in this framework to analyze the situation as a whole, in order to examine the added value that each level of government should play, while paying special attention to policy initiatives at European Union level with due respect for the principle of subsidiarity.

The issues studied - the protection of minors and of human dignity - are currently high on the political agenda. They are identified in the first annual report of the Information Society Forum, adopted in June 1996, as being among the priorities for legal protection. They also have consistently been dealt with - by national and Community policies - as issues of overriding public interest. Legal and others measures in this field have naturally been designed as a function of the characteristics of traditional electronic media (broadcast television and radio) which are centralised in nature and instruments of mass communication. The new emerging services have two fundamentally different characteristics - they are decentralised and they are closer to individual than to mass communication. Even though the actual content of such services will sometimes be the same - a film, a news bulletin, a documentary - these different characteristics have to be taken into account when designing policy. This Green Paper therefore describes the evolution of audiovisual and information services, analyzes current legislation and policies at national, European and international level and the implications of the development of new services for these policies as far as is relevant for the two issues under study. The kinds of policy options examined are various and comprehensive, ranging from regulation and self-regulation through awareness and educational measures to the development of parental control systems.

The purpose of this Commission Green Paper is to stimulate debate on a medium- to long-term basis. It is being presented at the same time as the Commission Communication on "Illegal and harmful Content on Internet". The two documents are fully complementary both as regards timing and scope. The Communication puts forward short-term measures required to deal with specific Internet related issues that go beyond the field of protection of minors and human dignity. The Green Paper, besides its longer term and consultative nature, covers the specific subject matter of protection of minors and human dignity in relation to new audiovisual and information services in general. Both respond to requests from the European Parliament and Council for an in-depth examination of European public policy issues related to the development of new services.

In this respect the Commission would like to underline that a number of policy initiatives have already been launched, or are under examination, that deal either specifically, or incidentally with related public interest issues. For example, the Commission

Communication on "Services of General Interest in Europe" contains a section on broadcasting in which it is pointed out that general interest considerations in this field basically concern the content of broadcasts and are linked to moral and democratic values, such as pluralism, information ethics and protection of the individual. Intellectual property is covered in the Green Paper on Copyright and Neighbouring Rights in the Information Society. The Commercial Communications Green Paper covers *inter alia* public interest issues in relation to advertising and sponsorship. A Directive has been adopted on the protection of individuals with regard to the processing of personal data. The "Television without frontiers" Directive, which is in the process of being revised, provides coordinated Community rules in a number of fields, including the protection of minors. The proposed Directive on "Regulatory Transparency in the Internal Market for Information Society Services" will facilitate Community coordination of future regulatory activity and the pursuit of public interest objectives that are worthy of protection.

Finally, yet other issues flowing from the development of new audiovisual and information services - such as those related to cultural and linguistic diversity - have already been the subject of several recent policy initiatives (such as the MEDIA II, INFO 2000 and Multilingual Information Systems programmes). The Commission will monitor the achievements of these initiatives in the light of their objectives and will come forward in due course with an up-dated assessment of the situation and of any need for further policy initiatives.

## SUMMARY

The fight against the dissemination of *content offensive to human dignity* and the *protection of minors against exposure to content that is harmful to their development* are of fundamental importance in enabling new audiovisual and information services to develop in a climate of trust and confidence. If effective measures to protect the public interest in these fields are not rapidly identified and implemented we run the risk of these new services not reaching their full economic, social and cultural potential.

*Chapter I* of this Green Paper identifies those aspects of the development of new audiovisual and information services that are relevant for the protection of minors and of human dignity and analyzes the categories of content that may give rise to problems. *It underlines the need not to confuse problems that are different in nature, such as child pornography, which is illegal and subject to penal sanctions, and children accessing pornographic content for adults, which while being harmful for their development may not be illegal for adults.* Solutions have to be designed to take account of the type of content in question.

They also have to be adapted as a consequence of the evolution of the service environment. New television services, such as pay-per-view, provide *greater individual choice*. They are evolving away from the mass media model, where the viewer's choice is between watching a programme or not, towards a model that is closer to publishing i.e. where the viewer selects his or her programme from a wider choice. On-line services take this evolution further towards the *individual communication model*. In geographical terms distribution networks are *less national and increasingly global in nature*, Internet being a world-wide network of networks. Moreover, new types of content are emerging. A traditional television programme that is watched from beginning to end is linear in nature whereas *interactivity* allows one to navigate through alternative scenarios. *Hybrid forms of content* are coming into existence, for example combining games, advertising and information in new ways.

The development of new services requires a *flexible framework*, notably in regulatory terms. A functional analysis of the characteristics of each new type of service is required in order to identify new solutions. Any new risks inherent to the nature of new services have to be carefully evaluated. Concerns about the protection of minors and of human dignity in relation to new emerging audiovisual and information services justify vigilance on the part of public authorities and citizens alike. However, the problem should not be overstated - *the difficulty often resides more in the characteristics of new services as compared to traditional media than in their content.*

*Chapter II* provides an analysis of existing legal and constitutional arrangements at European and national level. It points out that national arrangements in Europe are all set against the background of the fundamental rights enshrined in the European *Convention of Human Rights* (ECHR) which are incorporated as general principles of Community law by Article F.2 of the Treaty on European Union. In particular, Article 10 ECHR guarantees *the right to freedom of expression*. It also provides that the exercise of this right may be subject to certain limitations for specified reasons, including the protection of health or morals and the prevention of crime. Accordingly, freedom of expression is nowhere absolute in the European Union and is subject to restrictions. The case law of the European Court of Human Rights has developed the *principle of proportionality* the crucial test of conformity of any restrictive measures with the fundamental principles laid

down in the ECHR. Europe therefore has a basis for a common approach - the principle of freedom of expression and the test of proportionality. Beyond this common basis the *actual regimes in the Member States vary greatly and reflect differences in cultural and moral standards.*

In general terms, the new services can create specific *new problems with regard to the enforcement of legal provisions.* An example is the increased difficulty of determining *liability* where there are several different operators involved in the communications chain (network provider, access provider, service provider, content provider). Such difficulties are more acute when the different elements of the chain are in different countries.

This Chapter then goes on to examine the problems related to the *protection of minors* against harmful, but not necessarily illegal, content such as adult erotica. In some Member States, the principle of protection of minors is incorporated into general provisions, whatever the media involved, which forbid the supply to minors of material likely to harm their development (but which may be legally accessed by adults). Other Member States have provisions that are media specific. In all cases, the implementation of measures to protect minors requires the identification of ways of ensuring that minors do not access harmful material while allowing adults access. *Recent technological developments can provide new solutions through greater, parental control, both in the television (v-chip) and on-line (PICS) environments.* In both cases, content rating is a key part of the system. The new technical possibilities are more limited in the television than in the on-line environment, but both have the *advantage of offering "bottom-up" rather than "top down" solutions* that obviate the need for prior censorship and *increase the potential effectiveness of self-regulation.*

*Chapter III* analyzes the situation at the level of *the European Union* both with regard to Community law and to cooperation in the field of justice and home affairs. The *freedom to provide services* is one of the four basic freedoms guaranteed by the Treaty. Restrictions are possible for overriding reasons of public interest, such as the protection of minors and of human dignity, but are subject notably to the *proportionality test.*

In the fight against illegal content, *cooperation between the Member States in the field of justice and home affairs is identified as having a fundamental role to play given the international character of the new services.* Through such cooperation the Member States will be able to more effectively counter illegal use and content. Moreover, internal coherence will put them in a better position to work towards world-wide solutions.

Various options for *improving cooperation between national administrations and with the Commission* in both the Community and justice and home affairs frameworks are explored (systematic exchange of information, joint analysis of national legislative provisions, establishment of a common framework for self-regulation, recommendations for cooperation in the field of justice and home affairs, common orientations for international cooperation). The potential for *encouraging cooperation between the relevant industry sectors* is also evaluated (codes of conduct, common standards for rating systems, promotion of PICS). Possible user awareness and media education measures are also put forward for debate.

Building on the Commission's first policy options presented in the Communication on Illegal and Harmful Content on the Internet, *Chapters II and III* both identify *a series of*

*questions* for further debate on issues the Commission considers as key for defining future policy actions. They are, in order:

**Question 1:**

*Taking account of what is technically feasible and economically reasonable, what should be the liability of different operators in the content communication chain, from the content creator to the final user? What types of liability - penal, civil, editorial - should come into play and under what conditions should liability be limited?*

**Question 2:**

*How should the test of proportionality of any restrictive measures be applied? Inter alia, should any arbitration or conciliation mechanisms at European Union level be envisaged? If so, what sort of mechanisms?*

**Question 3:**

*How do we determine the right balance between protection of privacy (including allowing users to maintain anonymity on the networks) and the need to enforce liability for illegal behaviour?*

**Question 4:**

*Should one give priority to a regulatory or a self-regulatory approach (possibly backed up by legislation in the latter case) as regards parental control systems? What measures would be required, inter alia at European Union level?*

**Question 5:**

*In what cases should systematic supply of parental control systems be envisaged (according to service type or other criteria)? Should any obligatory regime be envisaged? If so, in what form and to which operators should it apply? What are the essential functions that such systems should provide?*

**Question 6:**

*How can decentralisation of content rating be implemented, catering for the need to respect individual, local and national sensitivities, where audiovisual and information services are transnational?*

**Question 7:**

*What elements of standardisation would allow content ratings to be developed in a coherent way in Europe, in particular in the case of digital services (standardisation of types of information to be supplied, of encoding and decoding of such information, etc.)?*

**Question 8:**

*In what ways should administrative cooperation be implemented in the European Union? How and in what institutional framework should it be formalised?*

**Question 9:**

*What should the priorities be at European level and at international level? In particular, should one give priority to developing solutions at European Union level and then promoting them at international level or should this be done in parallel? What are the most appropriate international fora for international cooperation (G7, OECD, ITU, WTO, UN or bilateral relations)? How should this international cooperation be formalised?*

This chapter will identify the main problems arising from material in audiovisual and information services which are of relevance to the protection of minors and human dignity.

### 1. The protection of minors and human dignity

Whatever the weight given to freedom of expression, the protection of minors and human dignity has always been a fundamental concern of media regulation. The appearance of new media in no way alters the need for that protection.

The arrangements made to protect minors and human dignity may vary from country to country and from time to time. But it is important to distinguish two types of problem relating to material:

- Firstly, *access to certain types of material may be banned for everyone, regardless of the age of the potential audience or the medium used*. Here it is possible, irrespective of differences in national legislation, to identify a *general category of material that violates human dignity*, primarily consisting of child pornography, extreme gratuitous violence and incitement to racial or other hatred, discrimination, and violence.
- Secondly, *access to certain material that might affect the physical and mental development of minors is allowed only for adults*. These measures should not be confused with other objectives of general interest, such as consumer protection, which might also help to protect minors (notably in terms of advertising, where exploitation of their credulity is to be prevented).<sup>1</sup> The aim is therefore limited to preventing minors from encountering, by accident or otherwise, material that might affect their physical and/or mental development.

The issues are sometimes confused for one reason or another, but it is essential to maintain the distinction between these different questions: they are *different objectives* which raise *different problems* and call for *different solutions*. Clearly, the measures required to enforce a total ban are different from those needed to restrict access by minors or to prevent chance access by adults.

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<sup>1</sup> For example, in the context of Community law relating to broadcasting (Directive 89/552/EEC), the two objectives are clearly distinguished:

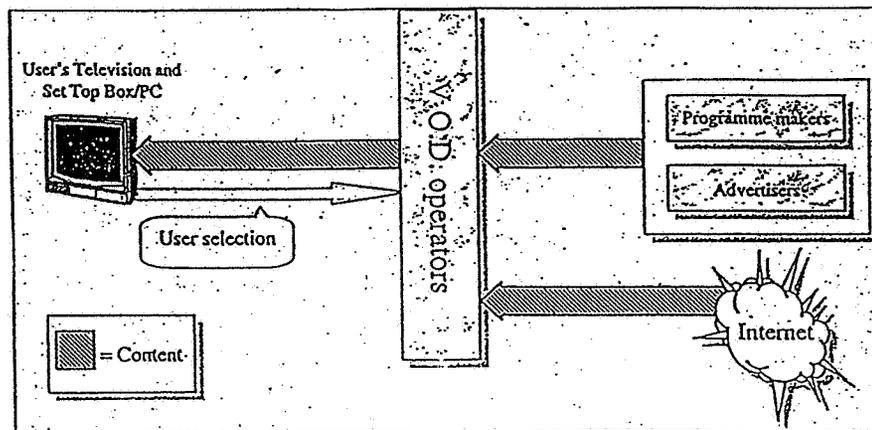
- rules for the protection of minors apply to all programmes, including advertising, an advertisement, like any other type of programme, may not contain material that is likely to seriously impair the development of minors (Article 22);
- rules for the protection of consumers applicable to advertisements specifically outlaw all exploitation of minors' credulity (Article 16).

## 2. The changing context

The emergence of new audiovisual and information services radically changes the context of protection for minors and human dignity (see Annex II).

### 2.1 Television: from mass media to editorial model

Digital broadcasting is likely to give a spectacular boost to the number and range of services: each digital cluster comprises or will comprise several dozen services, such as pay-per-view (PPV) and near video on demand (NVOD). Video on demand (VOD) and a whole range of new transactional services (from films on demand via interactive games to home banking) will gradually be introduced, although it is still too early to say exactly how this will happen or what form it will take (infrastructure, means of communication, type of content, etc.).

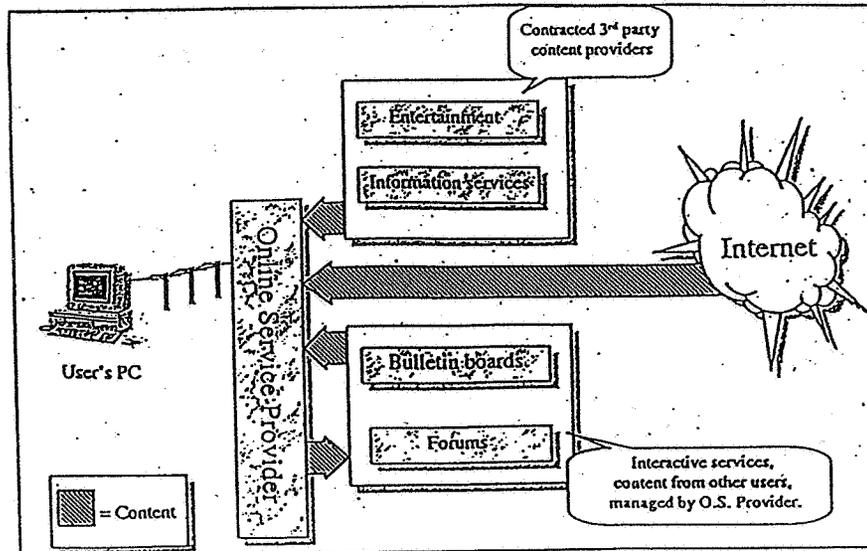


*This trend marks the transition in the world of television from a "mass media" approach to one which increasingly resembles the editorial model:*

- shortage of frequencies is no longer an obstacle to the proliferation of services;
- services diversify and their impact is related to the total number of services available;
- the viewer has a wide range of choice among clearly identifiable services and types of programme.

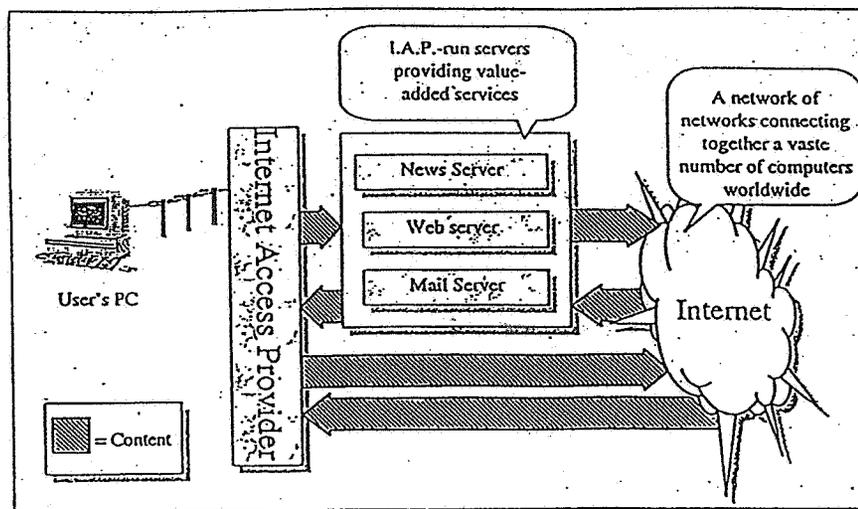
### 2.2 On-line services: from the editorial model to a new model of communication

The development of "proprietary" on-line services, such as CompuServe or America on Line (AOL), and above all the exponential growth of the Internet are seen as the forerunners of a mass market for on-line services.



On-line services are electronic communications systems which offer paid-up subscribers a range of services (electronic mail, information services, games and discussion groups or chat lines) accessible via the telephone network using a modem and a computer. In addition to the long-standing Bulletin Board Services (BBS), proprietary commercial services are expanding rapidly in the United States and making their appearance on certain European markets. The closed architecture of these networks ensures a level of security for transactions which has enabled commercial services to take off.

The basic logic of on-line services clearly follows the editorial model: material is edited and made accessible to the public on individual demand. But *a new model of interactive communication* is emerging via certain resources of on-line services and the Internet in particular:<sup>2</sup> *each user becomes a potential supplier of material. This unique model defies any simple analogy with existing media and traditional forms of telecommunication. It has to be considered on its own terms.*



<sup>2</sup> See Communication on Harmful and Illegal Content on the Internet.

### 2.3 From national services to worldwide networks

The appearance of special-interest services and pay channels has increased the cross-border circulation of television broadcasts, even if these services mainly target a single language area. The growth of digital television, by freeing the services from the traditional constraint of shortage of frequencies, will make it possible to develop highly specialized services, some of which will not be economically viable on a national market alone. These services will have to exploit niche markets on a transnational level in order to attract a large enough audience.

Given the state of the technology, it is hard to picture VOD systems on an international basis. In the longer term, however, the development of VOD systems might come to follow on-line services.

On-line services already have an international dimension via the major proprietary networks such as AOL and CompuServe. Each time this type of service becomes established in a new country, the entire network expands and all subscribers are able to communicate with one another and access the same material.

The Internet is already a global network, potentially accessible in almost every country in the world. Moreover, the specific structure of the Internet makes it virtually impossible to isolate a particular geographical area.

*This shift from national services to worldwide networks presents a major challenge to the protection of minors and human dignity. It calls for careful consideration of the means to be deployed and the appropriate level of action to ensure that European principles relating to the protection of minors and human dignity are taken into account.*

### 2.4 The emergence of new types of material

The *linear model* intrinsic to televised material (each programme is viewed from beginning to end) is giving way to a *more complex architecture* within which navigation between items is freer and the user can interact with the material (e.g. the new interactive media such as CD-ROM, CD-I and DVD).

Clearly identified material (documentary, news, advertising, films, etc.) are merging into *new hybrid forms of material* that are difficult to label: the same item may combine advertising, news and a game element without it being possible to isolate the different components.

And in the digital world, *material can increasingly be manipulated*: it can be distributed and modified easily on a wide variety of media and services. Computer-generated images can offer a virtual world and insert subliminal material, which is a source of new ambiguities in relations with reality.

These trends raise a series of questions. How to check the accuracy of the information (false messages substituted for the original, false firms offering false services or goods)? How to defend the various rights that go with the name, the image and the reputation of a person or firm? What will be the long-term societal impact of hybrid material combining the real and the virtual worlds? These questions reflect new long-term risks that are more

difficult to assess, especially in relation to the physical and mental development of minors. They will have to be identified and analyzed carefully.

## **2.5 The incubation period: new risks and opportunities**

This new environment has by no means stabilized yet. Now, however, the common language of digital technology makes it possible to envisage *various forms of convergence* at the level of terminals (television, computer or others), infrastructures (hertzian, telecommunications, cable or satellite networks) or the services themselves.

Throughout this long incubation period, these new services will only be able to develop in a *flexible environment* - particularly as regards regulatory measures - which can easily adapt to the rapid changes in the industry. The various convergence scenarios and the numerous opportunities created by interactivity make it more difficult automatically to apply traditional distinctions between types of service (television/computer, private communications/public communications, point-to-point/point to multi-point) and to assimilate the new services to the existing media. *We now have to examine carefully the different functions offered by each new service in order to identify its relevant features.*

*Against this background of rapid change, we must assess the new risks which are emerging for the protection of minors and human dignity. We must also weigh up the many possibilities for monitoring the material offered by the audiovisual and information new services.*

## **3. The extent of the problem by type of services**

The nature and scope of the problems involved in the protection of minors and human dignity vary according to the type of service.

In some countries erotic programmes are broadcast late at night on the *hertzian television channels*, and pornographic material is shown on *pay channels*. *Encrypted channels* devoted exclusively to pornography are still a relatively minor phenomenon in Europe. On the other hand, the question of violence on television, which is much more difficult to regulate, is the subject of debate in many countries. It is also likely that PPV, NVOD and VOD services will offer some erotic and/or pornographic material and will be less affected by the debate about violence, particularly if users are correctly informed about the exact nature of the programmes on offer.

*On-line services* offer a series of commercial sites aimed at adults containing material such as erotic or pornographic photographs available at a price. These "published" sites are clearly identifiable. Despite the closed nature of the proprietary networks it is also possible to find all the other types of material in interactive applications (discussion groups) or via electronic mail.

As can be seen from the Communication on Harmful and Illegal Content on the Internet, the Internet undoubtedly carries all of the controversial types of material (ranging from child pornography to incitement to racial hatred, via all kinds of violent or other abusive material). The controversial sites are often identifiable and the fact that deliberate steps

have to be taken to obtain the information (via addresses or search tools) means that it is virtually impossible to come across unwanted material "by accident".

*The importance of questions relating to the protection of minors and human dignity in the audiovisual and information services is hardly surprising. Genuine problems are emerging which more than justify the attention of the public authorities and ordinary citizens. However, the novelty lies more in modes of communication which defy comparison with existing media than in the material itself. It is unlikely that the new services carry more contentious material than the traditional media have to date. But the new services make this material more visible and relatively more accessible. An understanding of the operation of each service would therefore seem to be essential to determining the appropriate responses.*

## CHAPTER II RULES AND ENFORCEMENT MEASURES APPLICABLE TO PROTECTION OF MINORS AND HUMAN DIGNITY

### 1. Common general principles

Before considering what rules and enforcement measures applicable to protection of minors and human dignity, it must be emphasized that they are all subject to two fundamental principles that are inherent in any democratic society - freedom of expression and respect for privacy (see Annex III).

#### 1.1 The principle of freedom of expression

Freedom of expression is secured by a range of international Conventions, of which the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") is both the most sophisticated and a vital reference for the European Union. All the Member States are parties to the Convention and, with the exception of the United Kingdom, have established freedom of expression as a principle of constitutional status in the legal systems.

Although the Convention is not strictly binding on the European Community, its content has been incorporated into its legal order by Article F(2) of the Treaty on European Union and by cases decided by the Court of Justice of the European Communities relating to the general principles of Community law.

But the principle is never an absolute one. Freedom of expression may be restricted by the State, though the possible restrictions are circumscribed by a very precise set of criteria: *to be considered necessary in a democratic society, the measure must meet a real social need and be effective without being disproportionate in the restrictions it imposes. The assessment will require the proportionality test to be applied.*

#### 1.2 The principle of respect for privacy

The principle of respect for privacy has the same status as the principle of freedom of expression. It is secured by Article 8 of the Convention, and restrictions are allowed on much the same terms as in the case of freedom of expression.

Restrictions on the principle would be possible (notably to identify and punish private communications for criminal purposes), though once again the proportionality test must be passed.

*There is a European common core, constituted both by the Convention and its uniform interpretation by the European Court of Human Rights and the incorporation of general principles of law in the Community legal order. Yet the common core is by no means the same thing as a set of common rules. Be that as it may, however, the principles are still most significant: in the absence of common rules, Europe at least has a common approach to assessing rules that limit the freedom of expression or the right to privacy. That method - the proportionality test - must be taken as a powerful factor for convergence between the Member States as regards the legal treatment (or self-regulation) of questions*

*relating to the protection of minors and human dignity in audiovisual and information services.*

## 2. The rules and resources deployed in the national context

It is clear from an analysis of national regulations and other measures relating to the protection of minors and human dignity just how wide the gaps separating the Member States' cultural and legal traditions are (see Annex III). But it is possible to identify broad patterns and specific problems.

### 2.1 Protection of human dignity

The first type of restriction imposed by the provisions of all countries aims to prohibit outright certain kinds of material considered as intolerable both for the individual and for the community at large and as going to the very roots of society and, in particular, human dignity.

All the Member States have outright prohibitions on certain kinds of material. There are generally heavy fines and prison terms, in the general criminal law or in specific enactments, to enforce the *prohibition on producing, distributing, importing and advertising such material*. By their general character, these prohibitions apply to all media and services, including those that emerged after the time of the enactment. The addressee's and user's ages are immaterial.

Prohibitions on general categories of material detrimental to human dignity, such as *material that is obscene, contrary to sound morals or indecent*, exist in most Member States. Sometimes the terms are defined by the legislation; elsewhere, their meaning falls to be determined by the courts.

Given all these factors, it would appear possible to identify certain types of material which are generally prohibited in the Union.

The material to which the most unanimous ban applies in the Union is *child pornography* (in the form of photos, photo-simulations and animated material). The World Conference on the Sexual Exploitation of Children held in Stockholm recently drew attention to the problem of distribution of such material via communications networks and called firmly for possession to be made into an offence.

General concepts (obscenity, sound morals) also encompass *violent pornography* (including material involving non-consenting adults) and zoophilia as being widely prohibited.

A further category of material subject to outright prohibition in a significant number of countries is *incitement to racial hatred or violence (or both)*. The terms used and the degree of precision of national legislation vary widely, but there is evidence of a common objective, which is to combat all kinds of material that directly or indirectly incite to

hatred, discrimination or violence against persons or groups of persons on grounds of the race, nationality, skin colour, sex or religion.

The differences between national rules and their lack of transparency makes it more difficult to apply existing national rules to international services and networks and involve the industries in question at European level. Moreover, they can generate disproportionate barriers to the free movement of services in the Community and make it harder to defend shared values in international fora.

In view of this, the Commission acknowledges the fundamental importance of cooperation between the Member States in the field of justice and home affairs (see Chapter III, point 2). Common definitions of what ought to be treated as unlawful are needed, and criminal, judicial and police cooperation between the Member States needs stepping up.

Once prohibited material has been defined, the Member States must enforce the prohibitions, by identifying and punishing offenders. New problems arise with the implementation of prohibitions when the new audiovisual and information services are involved: where services are centralized, it is possible to identify an operator so that the rules can be discussed and responsibility for the application allocated, but *responsibilities are difficult to allocate in the case of decentralized services as there are so many stages involved - from initial loading to access by the end-user* (see Communication on Illegal and Harmful Content on the Internet).

The responsibility of a user loading illicit material on to the network and the release from responsibility of the operators who merely carry it seem clearly accepted. But the question of the responsibility of intermediate stages (notably where material is stored, even temporarily, in readable format) is far from settled. The point is to ascertain what is technically feasible and economically viable and to observe a balance between protection of freedom of expression and privacy, on the one hand, and the protection of minors and human dignity on the other.

*And because communications networks are now global, the scope for application of national legislation is restricted.* Where decentralized services on international networks are concerned, controversial material can rapidly be relayed to other servers to circumvent restrictions. Apart from the risk of large-scale delocalization of servers towards the less strict countries, this mobility also raises the problem of updating black lists of questionable sites or material. It may be that blocking a site that carries illicit material will turn out to be disproportionate if all the services and material accommodated on the same server are blocked as a result.

A number of practical cases have generated a wide debate pending the emergence of a coherent body of case law. Some Member States are devising regulatory solutions, but the initial response to the practical difficulties has been in the form of self-regulation by the operators (see Communication on Illegal and Harmful Content on the Internet).

*These isolated national solutions come up against visible limits, and the development of a coherent approach at European Union level would facilitate application of national law while avoiding disproportionate obstacles to the transfrontier development of services in the internal market.*

Building on the initial guidelines set out in the Communication Illegal and harmful Content on the Internet, the approach could be focused on the following questions:

- 1 *Bearing in mind what is technically feasible and economically reasonable, what responsibilities should be attributed to the various people involved in communicating the material – from the author to the final user (what types of responsibility – criminal, general legal, editorial – and under what circumstances should they be exonerated from their responsibilities.*
- 2 *What measures are needed to promote transparency in the provision of services, particularly in framework of contractual relations between service providers and material providers?*
- 3 *How can the right balance be achieved between the protection of privacy (including allowing users to operate anonymously on networks) and the need to attribute blame for illegal behaviour?*

## 2.2 The protection of minors

In some Member States, the general principle of the protection of minors takes the form of *provisions of criminal law banning the supply to minors of material that may be harmful to their development* but which is lawfully available to adults. These provisions are of general application: they apply regardless of the manner in which the material in question is supplied to the minor. In Member States which do not have general rules of this type, the same sort of protection is afforded by *rules applying specifically to the individual media*.

*Any system for protecting minors needs a reasonable way of ensuring that minors do not normally have access to material which could damage their physical or mental development, while at the same time allowing adults access to such material.*

### 2.2.1 Controlling access by minors to questionable material

Rules governing access by minors to certain types of material depend very much on the type of service. Despite certain similarities between the world of broadcasting and that of on-line services, we shall study these two areas separately to simplify the layout (see Annex IV).

#### a) Broadcast services

With conventional television, the *time of transmission of programmes* can be scheduled in such a way as to protect minors: potentially harmful programmes may be transmitted only late in the evening, when children are presumed not to be watching. Technically, this "watershed" system can be applied to any television service, but it will not always necessarily correspond to the logic of tomorrow's television. Some private and public broadcasters have also developed, usually on a voluntary basis, a *system of symbols* to

inform viewers of the nature of the programmes broadcast. Various logos are used to classify programmes potentially harmful to minors.

The new broadcasting services offer new solutions for the protection of minors. *The conditional access inherent in all pay-as-you-view services offers a wide range of possibilities for controlling access by minors:*

- firstly, subscription is in itself a means for parents to check that the service they choose does not contain material liable to upset their children;
- secondly, the privileged relationship between the subscriber and the pay-per-view service has often led the services involved to develop a consumer information policy on the programmes offered which includes advice for parents;
- finally, a variety of technical features are sometimes offered to facilitate parental control; this could be a simple locking system allowing parents to prevent access to programmes, for example in their absence, or a system for giving access to programmes (which are normally scrambled) only by means of a personal identification number (PIN), special card or credit card. In the case of adult services, this type of system would enable parents to ensure that they alone have access to programmes.

The emergence of *technical methods of parental control* has led to an extensive debate, particularly on whether or not they should be used for unscrambled television. Based on the Canadian example and the interest that it generated in the United States, the possibility of linking a systematic classification of content to a parental control mechanism attracted special interest in the European Parliament and the Council in the course of the review of the Television Without Frontiers Directive.<sup>3</sup> The question was also debated in several Member States. The various debates on this system have quickly highlighted not only the problems of the implementation of the system (notably as regards classification of material) but also a more fundamental problem that has not yet been settled

The industries concerned have also recognized the importance of the protection of minors and are developing practical solutions. Electronic guides for navigating through the wide range of television programmes will soon be available on the market and will offer various possibilities in terms of parental control. Originally designed to assist and automate the programming of video recorders in a multi-channel environment, these electronic guides will be able to decipher a wide range of information about programmes, including whether they contain material that could pose a problem for minors.

In the field of *digital television*, the use of a decoder and the need for electronic guides to cope with the large number of programmes available provide two opportunities for developing devices for providing the viewer with information and controlling content. In the initial stages, pressure on the price of digital decoders has not so far made it possible to incorporate this dimension. As the market develops, however, and if it seems to meet the consumers' needs, this type of function could be introduced at a reasonable cost.

#### **b) On-line services**

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<sup>3</sup> Directive 89/552.

Unlike broadcast services, on-line services do not lend themselves to a segregation of material based on the time of broadcast. All available material can be consulted at any time. Moreover, material is accessed on an individual basis (choice of a specific item) at a time selected by the user. Access to sensitive material will therefore rarely be accidental. In this specific context, the question of the protection of minors takes the following form: how can adults be offered a maximum freedom of expression while ensuring that minors are not exposed to material which is likely to harm their physical, mental or moral development. Possible ways of protecting minors will vary according to the degree of openness of the networks.

\* **Closed networks**

*Video-on-demand systems*, at their current stage of development, have a number of features which can be used to protect minors.

Operators are clearly identifiable and relatively few in number. When they do not offer material themselves they have contractual links with information providers. This structure makes it possible to install a *transparent system of responsibility for the material shown*. While it is clearly out of all proportion to ban all material which could be harmful to minors from such services, it is perfectly reasonable, in cooperation with the operators concerned, to work out ways of protecting minors effectively:

- *identification or classification of controversial material* by means of electronic programme guides (for example, identification of a space reserved for adult entertainment);
- *proof of age* on payment for or on access to the programme (using a bank card or a personal identification number);
- possibility of *opting out* of certain categories of programmes at the user's request (the user would then only have access to part of the material available);
- *parental control devices* preventing access to certain categories of programme.

Similarly, in *proprietary on-line services*, the *editorial content* (material provided by the service itself or provided on the basis of a contract between the service and the information providers) is similar in some ways and therefore offers similar solutions. The size of the network plays an important role here, however: it could be difficult, on a worldwide network, to find solutions which would be acceptable in all the countries covered by the service.

\* **Open networks**

The protection of minors becomes more difficult on open networks where every user is a potential information provider. On the *proprietary networks or on the Internet*, thousands of items are created, consulted and exchanged via facilities permitting varying degrees of interactivity between users which require the intervention of various intermediaries between the information provider and the users accessing it.

*Given the threat of joint liability, notably criminal liability, for distribution of material harmful to minors, the industry has spontaneously developed a series of mechanisms for the protection of minors.* These mechanisms can be broken down according to the level at which they operate: the level of information providers, access providers or the user.

Only systems developed by the user offer a truly comprehensive solution enabling parents to enjoy full access to Internet (or a proprietary on-line service) while controlling or restricting access by minors. They are all based on software the security of which depends substantially on the level of sophistication of the product.

In addition to the prior identification of users, which is common to all systems, various other functionalities are proposed:

- *restrictions on computer use* enable parents to limit access by children to times when they are present;
- *memory storage of navigation on the networks* (sites accessed, messages exchanged, etc.) enables parents to monitor the use their children actually make of services;
- *systematic filtering of material* allows controversial material to be intercepted automatically. The first generation of systems of this type operates mainly on the basis of key words and the identification of certain types of material (images). This limits the effectiveness of the protection (a few key words may not be sufficient to determine the scope of material which could shock minors) while imposing considerable limits on access to harmless material;
- *blocking sites on a selective basis* on the basis of a labelling system allowing material to be filtered by suitable software.

All services may be adapted to incorporate control devices, notably parental control. However, such systems are not yet available on all services under development and existing systems are not as secure as they might be. Exploration of the potential in this field offered by all digital services should be a priority. In view of the potentially transnational nature of all of these services, the European Union is concerned by all aspects of such developments.

4 *Should the approach taken in the area of parental control devices be based on legislation or on self-regulation (possibly supervised)? What rules should be introduced, particularly at Union level?*

5 *In what cases (types of service or other criteria) should parental control devices be incorporated in a service automatically? Should this be compulsory? If so, what form should it take and which operators would be affected? In these different cases, what are the essential functions which the device should perform?*

### 2.2.2 Labelling of material

At first glance, the identification of material which could be harmful to minors presents a basic problem: firstly, a consensus does not necessarily exist, even in medical circles, as to what is likely to affect the moral or physical development of minors; secondly, the term "minors" does not cover a uniform group and it is doubtful whether children of four have the same problems as adolescents of 15.

These two problems lead in practice to a *wide variety of national classifications* introduced for certain media (especially films) which are *often incompatible*. In the services context, this diversity has repercussions for the circulation of the material concerned.

To combine the use of the new means of controlling content with the free movement of services assumes a *trend away from centralized classification systems towards decentralized labelling systems which take better account of differences in attitudes*. The urgency of this development varies according to the nature of the services.

a) **Broadcasting services**

In the absence of parental control facilities, broadcasters have to base their scheduling on a centralized classification operated by the broadcaster in accordance with more or less detailed rules and recommendations.

In the context of the development of electronic programme guides and navigation systems, ways can be found that will respect national sensitivities in transnational services:

- information on the programmes offered can be differentiated according to the country served (for a given service available in countries A and B, different classifications might be used, e.g. A in country A and B in country B, for the same programme);
- the classification and labelling of programmes might be decentralized (the service sets up a classification and labelling structures in each country served).

b) **On-line services**

Video-on-demand and proprietary on-line services can also classify the material they offer themselves (or via contracts with other information providers). While it is not yet systematic on the proprietary services, user information on the potentially harmful nature of certain material for minors is becoming more common.

The open structure of the Internet, on the other hand, as well as the user-friendly and highly interactive applications of the proprietary services, raise the question of the classification of material in radically different terms. The variety of ways of publishing material and the fact that each user is a potential publisher makes it necessary to filter the material that is available. Three different types of filter have been developed.

- **Black list** filtering aims to block access to sites identified as problematic in view of the material they distribute (nudity, violence, sex, etc.); black lists are difficult to update.
- **White list** filtering authorizes access only to pre-determined sites; access to material is heavily limited.
- Filtering based on **neutral labelling** gives users access to information on material loaded by suppliers or third parties on the basis of their own selection criteria.

A combination of these various forms of classification enables the user to make up an operating environment that is generally safe as regards Internet access by minors. But only the generalized introduction of the neutral labelling filtering system would make it possible to regulate the question comprehensively.

As can be seen from the Communication on Illegal and harmful Content on the Internet, PICS (Platform for Internet Content Selection) offers an open global standard to make this neutral labelling possible. For European Union purposes, PICS has the decisive advantage that it offers a very flexible framework for classifying and indexing material and enables the same material to be classified under different labels supplied by different third parties and containing different types of information, so that it can have regard to differing national, regional and local sensitivities. A large number of filtering systems already incorporate the PICS system (PICS compatible) but the real challenge is still to reach a critical mass of sites and labelled content.

For all services operating according to the individual consumer demand principle, encouraging material suppliers and third parties to label the material they make available is a priority for the harmonious development of control of material in general and parental control in particular.

- 6 *How can the labelling of material be decentralized in the case of transnational services so as to reflect the diversity of national, local and personal sensitivities?*
- 7 *What standardization efforts are needed to ensure the coherent development of material labelling at European level, particularly for digital services (standardization of the types of information supplied, coding and decoding of this or other information)?*

### 2.3 Media education

The revolution which has taken place in the audiovisual and information services, from unscrambled general-interest broadcasting to the new mode of communication offered by the Internet, implies a need to learn a whole new approach to the audiovisual media (see Annex IV).

Parents and children must learn to use the new communication tools. They need to be warned of the new risks involved and also of the protection facilities available. Information, awareness-raising and education are the keys to effective protection of minors and to establishing the climate of confidence on which the development of the new services depends.

In this context, the initiative on Learning in the Information Society<sup>4</sup> should help spread new approaches to familiarizing young people with these questions.

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<sup>4</sup> COM(96)471 final, 25.1.1996.

### CHAPTER III THE EUROPEAN UNION CONTEXT INSTRUMENTS AND PRIORITIES

Although being in principle a matter for the Member States, the question of the protection of minors and human dignity in the electronic services cannot fail to have ramifications at European Union level, and the Community institutions have expressed the importance they attach to the protection of these general interests on several occasions.<sup>5</sup>

From the point of view of Community law and the instruments it provides in this area, there are two aspects which merit particular attention:

- firstly, the principle of free movement of services in the Community presupposes the removal of unjustified barriers and, in some cases, the harmonization of national legislation;
- secondly, the Union Treaty lays down a procedure for cooperation in the field of justice and home affairs which could be applied to certain aspects of the protection of minors and human dignity in the new electronic services.

The Commission believes that in many areas, cooperation with national authorities and the relevant industries and international cooperation are the priority lines of European Union action.

#### 1. Principle of free movement of services

Freedom to offer services is one of the four fundamental freedoms governing the establishment and operation of the single market.

The development of new broadcast services (digital television, pay-per-view, near-video-on-demand) is subject to the Television without Frontiers Directive, which lays down common rules for the protection of minors and human dignity and gives effect to the principle of freedom to provide services (see Annex III). Its principles are based on the general-interest unscrambled broadcasting model, and it will probably need to be tested on proportionality lines as its implementation will have to be modulated in the case of the new services. But neither the fundamental principle that the law of the sending country applies, nor the special procedure for control by the country of reception for the purposes of the protection of minors and human dignity, should not be called into question.

*The Commission, together with the representatives of the Member States, will review the operation of the relevant provisions of the Directive, particularly as they apply to new forms of broadcast services.*

The current amendments to the Directive will supply a suitable opportunity for cooperation with the Member States (Contact Committee) and the Commission would enjoy a dual remit: to pay special attention to this aspect in the periodic review of the operation of the Directive and, in liaison with the authorities of the Member States, to

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<sup>5</sup> See the Joint Declaration of the European Parliament, the Council, the Representatives of the Member States and the Commission of 11 June 1986 against racism and xenophobia, which is certainly the most solemnly worded to date.

investigate the advantages and drawbacks of other means of allowing parents and teachers to control the programmes that minors can watch.

While the free movement of broadcasting services in the Community is secured by the Television Without Frontiers Directive, the transfrontier movement of other audiovisual and information services is covered by the general rules of the internal market, and particularly the freedom to provide services.

The Member States are entitled to take non-discriminatory measures where justified for overriding reasons of the public interest. Measures of this type would therefore be legitimate provided they were strictly proportional to the aim pursued and that there were no other less restrictive measures of equivalent effect available. What we find here, therefore, in the context of the freedom to offer services, is a proportionality test of the type highlighted in relation to freedom of expression.

**Whether regulation or self-regulation is the solution, the Commission must ensure that the measures adopted are not discriminatory and that their application is in proportion to the objective pursued.<sup>6</sup>**

*In the light of this principle, this framework should be considered a goal to be attained progressively (in keeping with the pace of development of the services) and by the appropriate methods. The Commission is of the view that it is too early, at this stage of development of the new services, to make specific proposals, especially of a regulatory nature, at Community level.*

## **2. Cooperation in the field of justice and home affairs**

Introduced by virtue of the Treaty on European Union,<sup>7</sup> *cooperation in the field of justice and home affairs has a fundamental role to play as a channel for addressing various aspects of the protection of minors and human dignity in the new electronic services, more particularly the application of criminal penalties for certain types of content.*

As the definition of offences varies from one country to another, all reprehensible acts are not necessarily punishable in all Member States. As the audiovisual and information services are international in scope, the authors or suppliers of material may abuse the situation by supplying material in countries where it is considered unlawful from others where it is lawful. Even where the legislation of the relevant country prohibits certain material and requires a prosecution to be brought, the author or supplier of the material may be outside the criminal law's jurisdiction and not amenable to pursuit by the enforcement authorities, confined within national territorial limits.

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<sup>6</sup> If regulatory measures are opted for, the proposal for an instrument on transparency in the internal market for information society services (COM(96)392) will provide a fundamental means of securing balance in the Community between the protection of general interests such as the protection of minors and human dignity and the free circulation of electronic services.

<sup>7</sup> Title VI of the Treaty on European Union contains provisions on cooperation in the field of justice and home affairs.

Clearly, therefore, there is a need for *closer cooperation between Member States to effectively combat illegal material and practices in the new technologies*. In general terms criminal, judicial and police cooperation between Member States needs stepping up. Greater coherence in the approaches taken by the Member States would also ease cooperation with third parties.

The Union Treaty provides the instruments for such cooperation in justice and home affairs. *The political agreement between Justice and Home Affairs Ministers*, meeting in Dublin on 26 and 27 September 1996, to reinforce police cooperation in Europol to combat paedophilia and trafficking in children and women and to begin work on minimum legislative standards in matters of child abuse, are a recent example;

Other forms of cooperation could also be considered both on legal matters (cryptography on networks, common approach to remailing, international extradition agreements, etc.) and practical aspects (for example, training the police authorities to use computers and electronic networks and exchange of information on the treatment of criminal cases linked to the use of the new electronic services, etc.).

### **3. Priority lines for cooperation in the European Union**

To facilitate the emergence of coherent solutions at Union level, and without prejudice to the short-term measures proposed by the Commission in its Communication on Illegal and harmful Content on the Internet, the Commission considers it important to highlight certain areas for cooperation.

#### **3.1 Administrative cooperation**

Cooperation between the relevant national authorities is a priority if a coherent Union framework is to be laid down for the protection of minors and human dignity in on-line services (from video-on-demand to the Internet). Cooperation should focus on the following points in particular:

- \* *The exchange of information* on current developments (specific problems, case-law, self-regulation, draft legislation, etc.) as a way of developing Community expertise on these problems.
- \* *A comparative analysis of national legislation and its implementation* to encourage the Member States to introduce common minimum standards regarding illegal material.
- \* *The drawing-up of recommendations and guidelines for cooperation in the fields of justice and home affairs*. Without prejudging the work programme for cooperation in justice and home affairs, these specific priorities for new services could be taken into account in other work, which will often have a broader scope (measures to combat racism and xenophobia, trafficking in women or sexual abuse of children for commercial purposes, etc.).
- \* *The definition of a common framework for self-regulation in Europe*, assuming that self-regulation is accepted as appropriate. This framework will have to include:

- the *objectives to be pursued* as regards the protection of minors and human dignity, which will constitute the basic conditions of self-regulation;
- principles concerning the *representation of industry* at European level and *decision-making procedures*;
- a *timetable* for the drawing-up of a *code of conduct* and specific protective measures by the relevant industries.

\* ***The drawing-up of recommendations and guidelines for international cooperation***, the object of the exercise being to identify shared values and principles to be defended in international bodies, on the basis of work carried out at Union level.

### 3.2 Cooperation with the industries

The various industries concerned have a key role to play in developing and implementing solutions to the problem of protecting minors and human dignity. It is therefore vital that they be mobilized as far as possible and organized effectively at European level. The ability of these industries to speak with one voice through genuinely representative bodies will be crucial.

The main tasks which industry should work on are:

- *drawing up a code of conduct* and concrete measures within a framework defined by the cooperation between national government departments;
- identifying areas where there may be a need for *common standards on the labelling of material*;
- *promoting the PICS standard or equivalent systems* with a view to reaching - as quickly as possible - a critical mass of labelled material and navigation systems and/or parental control devices which are mutually compatible.

### 3.3 Cooperation on informing users and raising their awareness

There are two medium and long-term objectives here:

- ensuring that users of the new electronic services (in particular parents and minors) are aware of the *specific risks* involved and that they use *existing methods of protection* effectively;
- encouraging *associations and grass-roots organizations to become involved in the process of labelling material* (labelling by third parties);
- encouraging *consumer associations* and individual consumers *to become involved in market surveillance*;
- encouraging *parental awareness* of their responsibility for *monitoring their children's activities*.

The measures to be implemented in this context should be examined in detail. At Union level the Commission proposes that work be carried out in stages, concentrating on the following priorities:

- *a study* of current initiatives (assessing, in particular, how effective they are) and *the sharing of information on good practices*;

- *cooperation* with all parties involved (governments, the educational community, consumer groups, the relevant industries, etc);
- establishment of an *action plan* centred on the support of Community initiatives which provide real value-added; identification of common messages and transnational initiatives (information and awareness-raising campaigns, production of teaching materials)
- *research* into the establishment of a user-friendly information society. This will be among the priorities of the Fifth framework Research Programme.

#### 3.4 Promoting the access of minors to the new electronic services

The Commission will study the possibility of taking this priority into account in existing Community programmes on education and on support for industries producing audiovisual material. It will also encourage mutual information and the sharing of good practices in the relevant networks at European level.

The importance and variety of the forms of cooperation to be used to develop suitable national, Community and international responses are such as to raise the following questions:

- 8 How can administrative cooperation be applied at European Union level? Must it be formalized? If so, within what institutional framework?
- 9 How can work be linked at European and international level? That is to say, should solutions be developed at European Union level before being promoted at international level or should both courses of action run parallel? Which are the most pertinent vehicles for international cooperation (G7, OECD, ITU, WTO? Or bilateral contacts? How can this international cooperation be formalized?

#### CONCLUSION

The decentralized services, and primarily the Internet, merit the main attention and urgency where the protection of minors and human dignity is concerned. It has become clear here that, faced with the limits to purely national solutions and the difficulty and of devising and applying worldwide solutions, the European Union has a fundamental role to play. But the potential for transnational development of the decentralized services is such that common or at least compatible solutions are worth seeking in the European Union.

Looking beyond the initial short-term measures set out in the Communication on Illegal and harmful Content on the Internet, the aim of the guidelines proposed and the questions asked in this Green Paper is to help create the conditions for the establishment of a coherent framework for the protection of minors and human dignity in audiovisual and

information services in the European Union. The Commission hopes to receive a large number of contributions along the following lines:

- comments on its analysis of the present situation and additional information on current developments (legislation, self-regulation, technical advances, etc.);
- comments on the relevance of the guidelines and proposals set out here;
- practical answers to the various questions raised.

Contributions should be addressed no later than 28 February 1997 to:

European Commission  
Directorate-General X  
Mr Paulger  
Unit X.D.3  
rue de la Loi 102, Room 5/23  
B-1049 Brussels

e-mail: [gregory-paulger@dg10.cec.be](mailto:gregory-paulger@dg10.cec.be)

ANNEXES

**PREPARATORY WORK**

Two main types of preparatory work were carried out for this document:

Firstly, the Member States were asked to reply to *a questionnaire on the protection of minors and human dignity in the context of the development of services in the information society*.<sup>1</sup> All of the Member States responded favourably to this consultation process. The analysis of the replies, supplemented by a meeting of representatives of the Member States<sup>2</sup> and additional contributions from several Member States, all confirm the need for a debate at European Union level. The problem is in fact being studied or debated in most of the Member States, and these questions are often high on the public agenda. Although national approaches may vary, a consensus is emerging on the need to take account of the Community and international dimensions.

Secondly, with a view to the preparation of this Green Paper, the Commission commissioned a series of studies on the protection of minors and human dignity in the information society.<sup>3</sup> These cover the regulatory, economic and technological aspects of the question in the 15 Member States, Canada, Japan and the United States. Frequent reference will be made in what follows to these studies, a summary of which may be obtained from the European Commission.

In addition, numerous informal contacts with economic operators and other interested parties have enabled their views to be taken into account as well.

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<sup>1</sup> Questionnaire sent to the Member States in October 1995.

<sup>2</sup> Representatives of the national competent authorities met in Brussels on 12 July 1996.

<sup>3</sup> These were carried out by Hydra Associates, London.

## ELECTRONIC SERVICES

1. Glossary\* **Digital broadcasting**

Digital broadcasting is a new form of broadcasting programmes, differing from the traditional, analog form. Images are converted into digitized data (using a digital technique now common to broadcasting, telecoms and data-processing). Compression of the resultant data (by special algorithms) greatly narrows the spectrum needed for their transmission.

In practice, several clusters of digital television services have emerged or are in preparation in Europe.

\* **Pay-per-view**

Pay-per-view (PPV) services offer viewers the possibility of selecting from the contents of a broadcasting schedule and paying only for what they actually view. These are broadcasting services in that distribution is triggered by a universally-available service (even though it may be accessible only to viewers possessing the requisite receiving equipment); the viewer's decision is technically confined to determining which portions of the encrypted programmes he will decode and then actually view. This is a point-to-multipoint service.

\* **Near video on demand (NVOD)**

The principle of NVOD is much the same as with PPV, but the consumer's selection is extended by the fact that the material is distributed in parallel at short intervals of time.

\* **Video on demand (VOD)**

VOD offers consumers a whole range of transactional services from films on demand via tele-banking to tele-shopping. The consumer has the possibility of selecting the programmes of their choice from a catalogue of permanently-available programmes. Like all truly interactive services, this is actually a telecommunications service in that the distribution of the programme is triggered by the viewer's individual connection. This is a point-to-point service.

\* **Videotext**

The Télétel network which was launched in France in 1984 is the most highly developed videotex system in the world. Over two-thirds of the French population have access to the network via a specific terminal (Minitel) and can access some 25 000 different services, many of them transactional.

\* **"Proprietary" on-line services**

The market in proprietary on-line services is dominated by three North American operators: AOL, with 4.5 million subscribers worldwide in 1995, CompuServe (3.7 million subscribers) and Prodigy. CompuServe is the most well-established service in Europe, with 500 000 subscribers in 1995 and a target of 1 million in 1996. AOL has launched a service in Germany and the United Kingdom in partnership with Bertelsmann. Microsoft Network is also developing services aimed specifically at European markets. Finally, Planet Internet (controlled by KPN - a telecommunications operator in the Netherlands) is developing a European strategy.

\* **Internet**

The Internet is more difficult to define. It is effectively a worldwide network of computers which can communicate with one another thanks to a series of common protocols. Created in the United States for military purposes, then taken up by the university and scientific community, it is only in the past five years that the Internet has become a worldwide network open to the general public. Estimates of the number of Internet users worldwide vary from 30 to 50 million, and growth everywhere is exponential. The Internet is undergoing a rapid evolution. Although still primarily used for data search and electronic mail, it could become the medium for numerous commercial services.

The Internet is described in detail in the Communication on Harmful and Illegal Content.

2. **The new audiovisual and information services and their environments**

Type of architecture	Users	Intermediaries	Infrastructure and networks	Multimedia services and material
Digital TV	Terminal: TV + set-top box		Satellite, cable, hertzian	Material exclusively put out by broadcasters Mainly VIDEO, SOUND
VOD system (closed architecture)	Terminal: TV + set-top box		Proprietary broad-band network	Services and material put out under control of VOD system operator TEXT, FIXED IMAGE, VIDEO, SOUND
Proprietary on-line services (closed architecture, highly interactive services)	Terminal: PC + modem		Proprietary network	Services and material put out under control of proprietary service operator Material loaded by users (e-mail, BBS, chat-lines) TEXT, FIXED IMAGE, VIDEO, SOUND (sound and animated image in development)

<b>Internet (open architecture)</b>	<b>Terminal: PC + modem</b>	<b>Host servers, Access providers</b>	<b>Network of non proprietary networks</b>	<b>Services and material "edited" (WWW); Material loaded by users (home-page, WWW, e-mail, BBS, chat-lines) TEXT, FIXED IMAGE, VIDEO, SOUND (sound and animated image in development)</b>
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**RULES APPLICABLE TO PROTECTION OF MINORS AND HUMAN  
DIGNITY**

**I. GENERAL PRINCIPLES**

**1. Principle of freedom of expression**

Article 10 of the European Convention on Human Rights reads:

*"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

It is incorporated into the Community legal order in two ways:

- Article F(2) of the Treaty on European Union reads: *"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member State, as general principles of Community law";*

the European Court of Justice has acknowledged the relevance of the principle of freedom of expression as declared by Article 10 of the Convention and reckoned it among the general principles of Community law. In Case C-260/89 *Elliniki Radiophonia Tileorassi* [1991] ECR I-2925 it held:

*"With regard to Article 10 of the European Convention on Human Rights ... it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories ... The European Convention on Human Rights has special significance in that respect ... It follows that ... the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed".*

In the Member States, the principle is of constitutional status (though not in the United Kingdom, which has no written constitution):

***National Freedom of Expression Provisions***

	Source of <i>national</i> provisions	Media/types of expression covered	Limits to right
Austria	Constitution - Article 13	Spoken or written, print or pictorial representation	<i>Ex post</i> legal control
Belgium	Constitution - Article 19 (& Article 25 for press)	All expression and all media	<i>Ex post</i> legal control
Denmark	Constitution - Section 77	All media	<i>Ex post</i> legal control
Finland	Constitution - Article 2 Section 10	All media	<i>Ex post</i> legal control; prior control is allowed where the protection of children is imperative
France	Declaration of the Rights of Man (constitutional text) - Article 11	All media	Depends on the particular medium - its technical restraints and "influence"
Germany	Constitution - Article 5	Speech, writing and pictures	<i>Ex post</i> legal controls, in particular laws aimed at protection of youth and personal dignity
Greece	Constitution - Article 14	The press	<i>Ex post</i> control of material that either insults Christianity or other known religions, insults the President, compromises national security or which is obscene
Ireland	Constitution - Article 40.6.1	Expression of convictions and opinions	Restrictions are allowed to protect public order or morality (blasphemy, indecency) and the authority of the state
Italy	Constitution - Article 21 Section 1	All media	Restrictions based on public morality grounds
Luxembourg	Constitution - Article 24	Oral expression and the press, though interpreted more widely	<i>Ex post</i> legal control
Netherlands	Constitution - Article 7	Press and broadcasting, and other media to a somewhat lesser extent	<i>Ex post</i> legal control; non-press and non-broadcast media may be censored for persons under 16
Portugal	Constitution - Article 16	All expression	<i>Ex post</i> legal control
Spain	Constitution - Article 20	Thoughts, ideas and opinions through any medium	Laws based on rights of honour, privacy, self-image and protection of minors
Sweden	Constitution - RF Section 1; TF Chapter 1 Section 1; YGL Chapter 1 Section 1	RF - general; TF - press; YGL - film and television, possibly online media	RF - legal control "acceptable in a democratic society"; TF and YGL - <i>ex post</i> legal control based on protection of minors, violence, racial hatred
UK	-	-	-

Source: Hydra

In practice, the Member States attach varying degrees of importance to the principle of freedom of expression, depending on their cultural and legal traditions. Some consequently have a general prohibition on any form of central control over the media and thus give pride of place to self-regulation. In others, State protection of public morality and minors entails advance censorship of different kinds.

The effect of the relative paucity of cases and the duration of proceedings in the ECHR is that its decisions are of persuasive authority for national legislators rather than a direct means of securing the protection of the freedom of expression.

Both the cases and the academic writers acknowledge the dual dimension of the principle: it secures both the freedom to express and impart ideas and information and the freedom to seek and receive them. In the context of on-line services, it applies both to the service and to its users. Frontiers are immaterial.

The European Court of Human Rights (ECHR) has confirmed that the freedom of expression extends not only to ideas and information generally regarded as inoffensive but even to those that might offend, shock or disturb.<sup>1</sup>

But the principle is never an absolute one. Freedom of expression may be restricted by the State, though the possible restrictions are circumscribed by a very precise set of combined criteria that have been clearly enunciated by the ECHR:<sup>2</sup>

- they must be prescribed by the law (transparency, to the exclusion of the arbitrary);
- they must be necessary, that is to say they must meet a genuine social need and respect the values inherent in a democratic society;
- they must pursue legitimate objects that are defined exhaustively; these include the protection of public health and morals, which are of particular relevance to the protection of minors and human dignity.

It will be readily understood that the main difficulty lies in defining the *necessary* nature of a restrictive measure that is prescribed by law or pursues a legitimate objective. It is not enough for a measure to appear useful or reasonable. Its mandatory character can be deduced only from a detailed analysis of its effectiveness and the extent of the interference. The test is one of the proportionality of the restriction.

One final point regarding Article 10 in the context of on-line services: the provision in the first paragraph for the possibility of requiring licensing for certain activities (broadcasting, television and cinema) has to be interpreted in the light of the Article taken as a whole<sup>3</sup> and therefore of the principles behind it. It follows that the enabling provision cannot be used as a ground for unwarranted restrictions on freedom of expression that fail the proportionality test.

Internationally, the UN Covenant on Civil and Political Rights also provides democratic countries with a common basis. Article 19 enshrines the principle of freedom of expression:

- "1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally or in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain*

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<sup>1</sup> *Handyside v United Kingdom* (1976).

<sup>2</sup> *Handyside v United Kingdom* (1976); *Sunday Times v United Kingdom* (1979).

<sup>3</sup> ECHR: *Groppera Radio* (1990), *Autronic* (1990) and *Informationsverein Lentia* (1993).

*restrictions, but these shall only be such as are provided for by law and are necessary:*

- (a) for respect of the rights or reputations of others;*
- (b) for the protection of national security or of public order (ordre publique), or of public health or morals."*

Article 19 of the Universal Declaration of Human Rights of 10 December 1948 likewise upholds the principle.

The differences in sensitivities and values are more marked between countries in different continents than between the countries of Europe. The principle of freedom of expression enshrined in the First Amendment to the United States Constitution has a far wider practical impact than the corresponding principle in Europe.

The protection for speeches that incite racial hatred by the First Amendment clearly illustrates the difference between the impact of the principle in America and in most European countries: in a judgment given in June 1992 (*RAV v City of St Paul*), the Supreme Court held that an expression of racial hatred was not punishable as the hatred was addressed simply at an ethnic community. It could be condemned only if there was a clear and immediate risk of actual damage.

The First Amendment, incidentally, has been taken to protect a whole series of non-verbal expressions, including setting fire to the national flag, exhibiting works of art and displaying slogans on T-shirts.

## **2. The principle of respect for privacy**

Article 8 of the European Convention on Human Rights reads:

- "1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others."*

## **II. NATIONAL RULES**

### **1. The diversity of national legal and cultural traditions**

The diversity is visible in the first place in the institutional structures that allocate powers and jurisdiction between the central and local tiers of government. Member States with a federal structure or various forms of regional autonomy have to allocate powers in a way that is not necessary in a centralized state. In some media-related matters, the former have to respect varying local sensitivities to varying degrees.

Secondly, it is visible in the differing weight attached to case-law and legislation respectively, and also in the importance of the role played by the jury in criminal courts and civil courts.

Thirdly, it is visible in the relationship between regulators and their client industries, notably in the encouragement given to self-regulation.

And fourthly, it is visible in differing sensitivities in matters of morals and morality. The reactions of public opinion are often the determining factor where the protection of minors and human dignity is concerned, and they reflect deep-seated cultural differences. By way of illustration, there is a wide gap between the Nordic countries, which are tough on violent material but easy-going where sexually-explicit material is concerned, and the Latin countries, tough on sex but less so on violence.

Regarding the protection of minors and human dignity, the diversity is often such as to make summaries and comparisons more than arduous: the practical response to a given general approach will vary from country to country, and even from region to region within the same country.

Divergencies (and the lack of transparency) in national rules on the outright prohibition on production, distribution and in some cases possession of certain material generate several major difficulties in relation to transnational services.

\* **Outright prohibitions on certain material**

In the implementation of such rules *the relevant authorities and courts retain some room for discretion*:

- there may be a general definition of prohibited material to be interpreted case by case in the light of social values prevailing at the relevant time and in the relevant place - by way of example, legislation prohibiting obscene or indecent material may be applied in different ways, depending on the moment in time and the country, and some prohibitions addressed to the press have been extended by the courts to all media generally;

**General categories**

Country	A	B	DK	D	E	EIR	F	GR	I	L	NL	P	S	SF	UK
Absolute prohibition of a general category of material	O	O M		H		O M		O M	O M	O				O	O M

O: obscene material prohibited

M: material contrary to sound morals and indecent material prohibited

H: material detrimental to human dignity prohibited

- prohibited material may be defined more tightly (violent pornography, incitement to hatred, etc.) but the definition will have to be applied in a particular context;

## Incitement to hatred, discrimination and violence

Country	A	B	DK	D	E	EIR	F	GR	I	L	NL	P	S	SF	UK
Hatred, discrimination, violence	X	X	X	X		X	X			X		X	X	X	X

- with a few exceptions (such as child pornography in some countries), possession of prohibited material rarely constitutes an offence, on account of the protection afforded to private life. Supplying it to others, or intending to do so, is more commonly required<sup>4</sup>;

## Child pornography

Country	A	B	DK	D	E	EIR	F	GR	I	L	NL	P	S	SF	UK
Child pornography prohibited	S	S	S	S	S	G	G	G	G	G	S	G	S	G	S

G: general prohibition (obscenity, indecency, etc.)

S: specific prohibition (child pornography, protection of children against sexual abuse, etc.)

- artistic and scientific works are generally excluded;
- some provisions, though still in force, are not enforced in practice.

The result of these factors is a *general lack of transparency* in provisions imposing outright prohibitions, which makes it difficult to identify a common core of European rules and values.

### \* Rules applicable in certain non-member countries

In the area of international services or networks, all national legislation is naturally relevant. There are countries outside the European Union where there is little democracy and where the lack of respect for freedom of expression results in attempts to prohibit or drastically curtail access to new services, and, on the other side of the coin, there are countries where the absence of any real control creates a "paradise" for the circulation of material which is generally prohibited. Moreover, apart from general principles such as those laid down by international conventions or charters, particularly in the framework of

<sup>4</sup> Behind this facade of unanimity, there is a debate on the grounds for the prohibition and the scope of the prohibition. Where the prohibition is interpreted as a constraint on freedom of expression, it is confined to production, import, transfer and possession for transfer to others. But where it is enacted to prevent child abuse and protect minors against such sex offences, it extends to possession of material, which may accordingly be seized and the offender may be punishable.

The Stockholm World Congress against the sexual exploitation of children for commercial purposes called for tougher national legislation and stricter enforcement, notably by extension of the prohibition of child pornography to cover possession.

Incidentally, the age of sexual majority varies from country to country.

the United Nations, widely varying value systems throughout the world often result in very diverse regulatory structures.

However, this Green Paper is confined to three non-member countries: Canada, the United States and Japan. In terms of general bans, the situation in these three countries is broadly as follows:

*Canada* has a general ban on the production and distribution of all child pornography and obscene material. This covers all forms of excessive exploitation of sex and any combination of sex and crime, horror, cruelty or violence. Furthermore, incitement to genocide or hatred of particular groups is prohibited, as is the intentional dissemination of false information.

*The United States* has a general ban on child pornography<sup>5</sup> and obscene material, operating at both Federal and State level. The ban on obscene material applies essentially to sex-related photographic and video material. On the other hand, the First Amendment (constitutional principle of freedom of speech) can also be applied to speeches inciting hatred or discrimination, provided that they do not constitute an immediate danger to people or goods.

*Japan* also operates a total ban on the distribution and possession of obscene material for the purpose of sale. But the implementation of the ban relies mainly on codes of good practice established by the industries concerned, and can vary considerably from one region to another. Finally, neither the possession of such material for private use nor the production of obscene material for export is illegal.

### 3. Differences in the rules applying to various media

As well as outright bans, various considerations have resulted in the development of specific regulatory systems for each medium.

#### 3.1 Differences in rules

As well as material on which there is an outright ban, there is also the question of material for which production and distribution is, in principle, authorized. Therefore, various objectives of general interest have resulted in the development of specific restrictions:

- the protection of minors against material which might harm their physical or mental development is an almost universal objective. It can also be linked to the notion of children's rights, as enshrined in the United Nations Convention. While parents have primary responsibility in the field, public authorities and the industries concerned have also traditionally played a decisive role. In one form or another, the protection of minors gives rise to a series of restrictions relating to the distribution of material which is, moreover, entirely legal;

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<sup>5</sup> Which, in some States, also covers the possession of child pornography for private use.

- the desire to protect sensitive people - the "average citizen" - against coming across material which might shock them, and, hence, to restrict access to such material to those who specifically wish to have it, entails certain restrictions on its distribution;
- the scarcity of certain media (Hertzian frequencies) has made it necessary for a third party to handle their allocation and the definition of criteria to take account of public interest. Such criteria traditionally involve restrictions on the type of material likely to be distributed by such media.

These three objectives of general interest are not always clearly expressed or distinguished in national legislation, but they have largely been the basis for the development of different rules for different media. Complying with these objectives implies that the aspects peculiar to each medium must be taken into account, particularly as regards the following characteristics:

- the perceived impact of the medium: images, particularly moving images, are traditionally believed to have a greater impact than words;
- its presence in society: more attention is paid to the television in the corner of every room and the telephone in every hallway than to other, less common media;
- the degree of consumer choice offered by the medium: this depends both on the number of suppliers of material for a particular medium, the variety of material on offer, the amount of information available on the material, and, above all, the access methods for such material.

In practice, the objective consideration of these different characteristics by the regulatory authorities is sometimes upset by less rational considerations. Occasional tragic incidents periodically bring to the fore the question of the media's influence on the development of violent or abnormal behaviour in society. In such cases, the violence of the public reaction, widely relayed in the press, sometimes prompts hasty accusations and disproportionate responses from the relevant authorities.

### 3.2 The established media

Despite the sometimes sizeable differences from one Member State to another revealed by a detailed study of regulations and other measures which exist at national level, it is possible to establish a rough profile of the rules which apply to the established media.

#### 3.2.1 Publishing

Publishing appears to be the medium least subject to restrictions on freedom of expression. Even where there are rules on the material used,<sup>6</sup> checks are usually carried

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<sup>6</sup> As well as general bans and rules for the protection of minors, the rules on material used relate mainly to journalistic ethics (accuracy and objectivity of information, protection of privacy, respect for personal image, etc.). Moreover, legislation in some countries repeat certain general principles (relating to public morality, obscenity, non-discrimination, etc.) in texts specifically concerning the press.

out after publication.<sup>7</sup> Furthermore, there is also little in the way of self-regulation, except for the codes of ethics for the press and particularly for journalism.

On the other hand, several Member States (DK, ES, FR, GR and SF) have introduced registration of publications, compulsory checks by publishers on the material they publish, and even specific forms of liability which depart from the rules on liability in the ordinary law (FR, PT, SF). Such measures on transparency and/or liability allow disputes to be settled more easily.

Moreover, Germany has a system of classification of publications which may cause harm to minors: a judicial federal authority establishes an official list of such publications, and access to these works is subsequently prohibited to minors. The material targeted usually consists of immoral publications, or those which contain violence or pornography, incite people to crime, defend National Socialism, attack human dignity or encourage the use of drugs.

The general situation seems to reflect many of the most important characteristics of publishing:

- publishing is, in essence, the medium of free expression and the press, and plays a particularly decisive role in the working of democracies;
- anyone can publish something - the only constraints are financial - and this relative ease of access to publishing ensures a great diversity of publications;
- access to the published word requires an active choice on the part of the consumer, and it is relatively easy to keep contentious publications out of reach of minors.

### 3.2.2 Cinema and video

As a means of artistic expression, the cinema enjoys a large amount of freedom of expression. In all Member States, measures to protect minors include a compulsory or voluntary system of film classification which sets the recommended or required age at which children will be allowed to see films in the cinema. Although they have a common objective, these systems are very different<sup>8</sup> and their implementation reflects the differences in sensitivities of national film classification boards.

The classification of videos and other audiovisual products (CD-Rom, video games, etc.) is much less advanced, but, where it exists, tends to be based on the model of the cinema.<sup>9</sup>

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<sup>7</sup> Among the Member States, there are two exceptions to the principle of post-publication verification: in Ireland, the Censorship of Publications Board prohibits the publication of material which is indecent, obscene, pro-abortion or too concerned with subjects relating to crime. In France, Mayors or Prefects can seize a publication in the interests of public order.

<sup>8</sup> The simplest classification systems consist of only two categories of film (suitable or unsuitable for minors), and only those films for which a classification of "suitable for minors" is being sought need undergo the classification procedure. In other countries, there are various classifications according to age. In some cases, classifications within the category of "suitable for minors" exist only to guide parents. In such cases, minors accompanied by adults may be admitted to films which are not recommended for their age group. In other cases, it is up to the cinemas themselves to ensure that classifications are respected by checking the age of customers.

<sup>9</sup> However, there are some differences between the two: the label may be purely for information,

### 3.2.3 Television broadcasting

Material broadcast on television is subject to stringent regulations. In the various Member States, there are various methods of making the rules and ensuring they are obeyed:

- most of the Member States have legislation to protect human dignity and public morality;
- systems whereby individual authorizations are issued to broadcasters (often accompanied by specifications setting out precise rules) exist in most Member States and are a powerful method of control (violation of the rules could lead to the withdrawal of the authorization);
- self-regulation is also highly developed, whether it be a system which is an integral part of the operation of the public service, or a private initiative on the part of broadcasters;
- monitoring authorities, with varying levels of power and resources, have also sprung up in most Member States.

Apart from these general points, there are clear differences in the operating conditions enjoyed by broadcasters, which range from the application of rules similar to those for publishing (DK, NL, S), to precisely regulated systems with systematic checks.

While the type of material which causes problems is more or less the same in the various Member States (nudity/sexuality, gratuitous violence, incitement to discrimination or to hatred), differences in sensitivity can be detected in the practical application of the rules in the different Member States.

The rules applying to television have often been justified on the basis of its wide distribution, and enforced using the rules on the granting of frequencies (as they are so scarce).

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as there may be no obligation on the establishment renting or selling the videocassettes to check them; self-classification is highly developed in the video industry, either as a complement to, or as a replacement for binding regulations.

### 3.2.4 Audiotex and videotex services

#### \* audiotex

Services accessible by telephone (audiotex and discussion forums) should, in principle, be given a high degree of protection, in terms of freedom of expression, because of the traditionally private nature of telephone communications. However, the development of services of a sexual nature has caused problems in relation to the protection of minors<sup>10</sup> which has given rise to specific measures. These services are treated differently, depending on whether they are added-value telecommunications services (billing by the communications operator) or direct pay services (by credit card or subscription).

In the first case, public action, and self-regulation in particular, depend on the cooperation of telecommunications operators, which constitute an interface between the providers of clearly identified services and the consumer:

- it has been possible to insert certain clauses on good practice into contracts between telecommunications operators and service providers. Failure to comply with these could result in a refusal to carry the service;
- certain types of service have been clearly identified by a specific numbering system;
- telecommunications operators have had to offer consumers opt-outs (making certain types of services inaccessible on their telephone), opt-ins (for which an explicit application for access to particular services must be made), blocking of certain numbers on request, or access only on the basis of a personal identification code.

In the second case, the absence of an intermediary between the consumer and the service has resulted in more liberal arrangements: in most cases, the need to use a credit card or any other means of direct payment has been considered a sufficient guarantee of the protection of minors. In some cases, however, a licence requirement has allowed a code of practice to be imposed on such services.

All the countries which have implemented a regulation in relation to national telephone services,<sup>11</sup> in one form or another, have noted an increase in the use of foreign services. Attempts to subject these services to the same rules as national services have come up against both technical and diplomatic hurdles.

#### \* Videotex

Videotex services have never really become mainstream consumer services except in France and Germany, which explains the lack of specific measures in other countries.

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<sup>10</sup> In practice, in the majority of Member States, the main problem caused by added-value telecommunications services is the protection of consumers who complain that their telephone bill has gone up unexpectedly. It is, therefore, difficult to balance the twin objectives of consumer protection and protection of minors in certain legislative instruments or self-regulation systems.

<sup>11</sup> For example, Greece applies a total ban on pornographic services, which is clearly aimed at more than just the protection of minors.

In France, the law provides only for a system of declaring telematic services, but the telecommunications operator (France Telecom), under the supervision of the *Comité de la Télématique Anonyme*, implements the recommendations defined by the *Conseil Supérieur de la Télématique*. Various rules on the material are inserted in the contracts concluded with service providers, and opt-out and opt-in mechanisms are available for different categories of service, clearly identified by a specific numbering system.

In Germany, a Treaty between the Bund and the Länder (the Btx Treaty) sets the general rules for the provision of videotex services, while the telecommunications operator (Deutsche Telekom) has developed a system of self-regulation which is incorporated into its contracts with service providers.

\* **Self-regulation in the international context**

Both audiotex and videotex services have given rise to self-regulation initiatives at European and international levels.

The Guidelines for the Supervision of Transfrontier Audiotex and Videotex Services of 1994 were prepared under the auspices of the European Association of Information Industries by telecoms operators and service providers. At the international level, the Code of Practice of the International Telemedia Association (1995) pursues the same objectives.

One of their common fundamental principles is that the law of the country of reception must be observed.

**3.3 New services**

The legal situation for new services is not yet very clear and is still being debated in many Member States.

Digital television and new broadcasting services (pay-per-view, near video on demand) are covered by legislation relating to television. However, certain characteristics of the new services may be taken into consideration, depending on the flexibility of the national system.

For example, in the United Kingdom, the Independent Television Commission (ITC)<sup>12</sup> has already recognized that broadcasting services no longer form a homogeneous whole in view of the new choices available to consumers: a more flexible system than that applied to public access television has already been applied to pay channels.<sup>13</sup> Moreover, the ITC has declared that it is ready to lift the constraints on programme scheduling, on an experimental basis, provided that alternative measures can be used to control access by minors.

The arrangements for video on demand are much less clear. Member States feel that it would be more appropriate to cover these types of services using the legislation on

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<sup>12</sup> United Kingdom broadcasting monitoring organization (with the exception of the BBC).

<sup>13</sup> These services freed from the obligation of showing family programmes from 2000 hours onwards (instead of 2100) and from 2200 onwards may broadcast programmes which would not normally be authorized on public access channels.

broadcasting<sup>14</sup> or telecommunications services. In some cases, a combination of the two may be possible.<sup>15</sup> In any event, at this stage, the debate centres more on deciding on the responsible authorities than on the type of rules to be applied. Moreover, certain temporary legislative instruments have been introduced to facilitate the development of pilot schemes pending decisions on the specific needs of these new services.

On-line services and the Internet are not subject to any general regulation or self-regulation in the Member States.<sup>16</sup> General rules apply, but have yet to be tested in specific cases. The only attempt at the regulation of the Internet's on-line services, which took place in the United States, illustrates particularly well how fraught with difficulties the question is.

The specific problems posed by the new services (notably the decentralized and highly interactive services, are considered in the Communication on Harmful and Illegal Content.

### **III. TELEVISION WITHOUT FRONTIERS DIRECTIVE**

The protection of minors is one of the fields coordinated by the Directive. There are also a number of rules governing respect for human dignity.

#### **1.1 Protection of minors**

The system for the protection of minors is based both on common rules (Art. 22) and an exceptional procedure (Art. 2(2)).

Article 22 provides for a modulated regime distinguishing the degree of danger that programmes might raise for minors:

- some programmes are prohibited: *"Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence"*;
- others may be broadcast subject to certain precautions: *"This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts."*

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<sup>14</sup> For example, in France, the legislation for "audiovisual communications" evidently cover VOD, as does the Broadcasting Act in the United Kingdom.

<sup>15</sup> In the case of the United Kingdom, the VOD system tested by British Telecom in Ipswich was licensed as a telecommunications system and was registered for control of material by the ITC.

<sup>16</sup> In France an Act of 26.7.1996 requires providers of access to the Internet to give their customers parental control options. Furthermore, Internet self-regulation initiatives are currently under development in various Member States.

The decisive criterion is therefore the extent to which broadcasts may impair the development of minors. Its assessment is left primarily to the discretion of the Member States. The terms "pornography" and "gratuitous violence" are in this context merely illustrations of the type of content which may be considered likely to seriously impair the development of minors and are not covered by any common definitions.

Article 2(2) further allows the Member States to suspend retransmission of broadcasts:

*"Member States may provisionally suspend retransmissions of television broadcasts if the following conditions are fulfilled:*

- (a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22;*
- (b) during the previous 12 months, the broadcaster has infringed the same provisions on at least two prior occasions".*

In such an event, a specific procedure exists whereby an attempt is made to arrive at an amicable agreement before the suspension of retransmission is authorized under Commission supervision, on the basis of an assessment of the conformity of the measures taken with Community law (proportionality).

This procedure has been implemented on only two occasions, in both cases at the behest of the United Kingdom, in relation to encoded satellite broadcasts of hard-core pornography. In the most recent case (XXXTV), in November 1995, the suspension measures taken by the United Kingdom (legal ban on the sale of decoders and decoder cards and on the promotion of the station in question) were deemed consistent with Community law by the Commission in a formal opinion.<sup>17</sup>

## **2. Protection of human dignity**

The Directive (Article 22(2)) lays down a general prohibition on incitement to hatred:

*"Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality."*

The procedure laid down in Article 2(2), which can be applied in the event of the infringement of this provision, has never been implemented on these grounds.

## **3. Amendment of the Directive**

On the whole, then, this method of harmonizing national legislation, accompanied by a redress procedure for the receiving Member State, has worked well in the familiar television environment. As regards the protection of minors, the common position adopted by the Council on 11 June 1996 makes no changes to the substance of Articles 22 and 2(2). It does, however, serve to clarify some terms and strengthen others.

Article 22 has been split into two separate paragraphs in order to clarify the difference in approach according to whether programmes are likely to seriously impair or, more simply,

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<sup>17</sup> C(95)2678 final, 3 November 1995.

impair the physical, mental or moral development of minors. An additional subparagraph stipulates that:

*"Furthermore, when such programmes are broadcast in unencoded form, Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration."*

Moreover, a new article introduces a twofold obligation for the Commission:

- it must attach particular importance to the application of the rules on the protection of minors and human dignity in its periodic report on the application of the Directive;
- it must, in liaison with the competent Member State authorities, "carry out an investigation of the possible advantages and drawbacks of further measures with a view to facilitating the control exercised by parents or guardians over the programmes that minors may watch".

Furthermore, the procedure provided for in Article 2(2) has been slightly amended, particularly to provide for a formal Commission decision on the compatibility with Community law of national suspension measures taken against stations which have infringed the rules on the protection of minors and human dignity.

Given the great store it sets by the protection of minors and human dignity, the European Parliament is likely to make amendments to this article at second reading on the basis of the amended proposal.

## TECHNICAL AND OTHER NON-REGULATORY PROTECTION MEASURES

### 1. Parental control devices applied to television broadcasting

Canada has been a pioneer in this field: in the 1990s the Conseil de la Radiodiffusion et des Télécommunications (CRTC) launched a strategy to curb violence on television. From the outset this strategy has been shaped by five guiding principles:

- collaboration based on the principle that violence on television is a cause of psychological problems among children;
- protection of children and not censorship of adults;
- concentration on gratuitous or idealized violence without involving eroticism or other moral considerations;
- involvement of all those concerned: broadcasters, advertisers, producers, parents, teachers and specialists in mental health;
- adoption of a dual perspective, one short-term and one long-term.

In more practical terms, the strategy is based on a raft of complementary measures:

- codes of conduct worked out with the industry;
- classification of programmes;
- anti-violence or "V" chip<sup>1</sup>;
- information campaign to increase public awareness, and media education programme.

In terms of the relative importance of these different measures in the overall strategy, the Canadian authorities believe that the first three account for a mere 20% of the answer (with the V-chip accounting for 10%), the main thing being to change attitudes in the long term through information, awareness-raising and education (80%).

The United States, which has been involved with this Canadian initiative from a very early stage, has up to a point adopted the same approach: the Telecommunication Act was amended to require TV manufacturers to incorporate the anti-violence chip into their products. Since then, the industries involved have been working on the introduction of a programme classification and encoding system which should be operational by January

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<sup>1</sup> The anti-violence chip is a technical device developed by Professor Tim Collins at Simon Fraser University, Vancouver. This microchip, incorporated in a television set, a cable selector or a decoder, reads the classification code of each programme. The viewer can programme this chip to block the signal of programmes with a classification which exceeds the level considered acceptable for that family. Thus, if the viewer selects the violence level V3, programmes coded V4 and V5 will not appear on the screen. Programme classification codes could be applied to aspects other than violence as required (nudity, sex, bad language, etc.). It should be noted that the expressions "anti-violence chip" or "V-chip" relate directly to this Canadian proprietary system. We therefore prefer, in relating to a broader concept, to refer to parental control systems or devices.

1997. The Children's Programming Act also requires broadcasters to make an effort to broadcast children's programmes.

In Europe, as in the USA, the debate at once centred on whether a parental control system should be imposed, whether at national or Community level, before the objectives of a system of this type have been clearly established.

On the general philosophy of the system, the main arguments propounded in Europe can be summarized as follows:

- *Supporters* of the system point out that it does away with programme censorship *a priori* and offers every parent the opportunity to control their children's access to television according to their own set of values, even in their absence; this type of system would therefore allow broadcasters greater freedom of expression while respecting the individual values and child-rearing philosophy of parents. What is more, no-one has pointed out the advantages of such a system for cross-border services if it could be used to replace sometimes incompatible regulations.
- *Opponents* of the system point out the dangers of a complete transfer of broadcasters' responsibilities to the parents: firstly, the system could be used to justify slippages in broadcasters' schedules; secondly, not all parents are willing or able to exercise the responsibility that this system would place on them. As this is a system designed for use with unscrambled services, many minors could thus be exposed to programmes harmful to their development.

This basic controversy shows how relatively little attention has been paid in Europe to the Canadian experience, since the CRTC defined and limited its strategy precisely to avoid this clash of principles. In Canada, the anti-violence chip was considered neither as an end in itself nor as a universal panacea capable of resolving all problems single-handed. The two most important elements of the Canadian approach are still the identification of a specific objective and the definition of a long-term strategy. Even the CRTC views the anti-violence chip as no more than a gizmo which would be useless if the awareness-raising campaign failed to bear fruit within a time span of ten years or so.

In addition to the debate on the philosophy of parental control, various practical difficulties have been highlighted.

- The adoption of a common system by several broadcasters implies a common and systematic classification of all programmes broadcast. The introduction of a common system raises the question of responsibility for classification, supervision and possible penalties (a central authority or self-regulation by the operators). This question grows in complexity as the number of broadcasters concerned increases, and culminates in the question of cross-border operation.
- The quantity and diversity of programmes to be classified raises a great many questions on how to evaluate the impact of certain material according to context (e.g. violent images shown on the news) or whether it is actually possible to classify certain programmes (a live debate can lead to unexpected remarks or behaviour).
- Making a parental control device compulsory for television sets would require a lengthy transitional period depending on the rate of renewal of existing sets. Moreover, old sets often end their life in children's rooms. The choice of a specific device would concentrate technological innovation in this particular field,

depriving consumers of solutions which might have been better suited to their needs.

- Finally, the introduction of this type of system would create relative economic uncertainty, since audience ratings, on which the economy of broadcasting financed by advertising is largely based, would be undermined to some extent by the difficulty of analysing the use parents would actually make of the device.

These various problems are not unsurmountable, since Canada and the United States have decided to tackle them, but it must be said that, in the Member States which have discussed this matter, the compulsory introduction of parental control devices has been rejected in favour of other types of action.<sup>2</sup> The debate in Europe, launched by the European Parliament, is still going on.

Consumer electronics manufacturers are particularly concerned by the development of parental control devices. The EACEM<sup>3</sup> in particular has adopted very clear positions on this matter. It recognizes the advantages of developing systems to provide parents with better ways of controlling what children watch and consequently supports any initiative on the classification of material, including compulsory measures. On the other hand, it points out that the imposition of one particular technical device would be counter-productive, notably because a single specific technology cannot be the best option for every system for processing and labelling material now or in the future, and because a large number of formulas are possible depending on the way in which parents wish to use the information offered by the classification of material.

## **2. Parental control devices applied to on-line services**

While the proprietary on-line services and some information providers have always been conscious of the need to protect minors from certain types of material, the threat followed by the enactment of special legislation in the United States has turned the whole question upside down.

The Telecommunication Act, signed by President Clinton on 8 February 1996, introduced a number of rules on material circulating on electronic networks.<sup>4</sup> In substance, these rules made it illegal knowingly to provide indecent or manifestly shocking material to minors via electronic computer networks.

The industry reacted in two ways:

- first, a coalition of publishers, material providers, access providers and civil liberties associations, attacked the legislation, claiming it violated the First Amendment (freedom of expression), and having the Act invalidated by the Philadelphia Federal Court of Appeals;

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<sup>2</sup> In France, the CSA asked non-encrypted broadcasters (private and public) to develop common classifications and identifiers for programmes which could be harmful to minors and a code of conduct for television news programmes.

<sup>3</sup> European Association of Consumer Electronics Manufacturers.

<sup>4</sup> Attached to the provisions on the V-chip, these rules are now known as the Communications Decency Act (CDA).

- then it stepped up its efforts to find an alternative solution to legislation as soon as the Bill appeared.

The basis for the invalidation of the Act was primarily the fact that, as there was no reasonable way in which information suppliers could ensure that no minor would have access to it, the Act would require them to censor all indecent material despite the fact that adults had a constitutional right to access it.<sup>5</sup>

Control mechanisms have been developed at different levels.

The mechanisms used *at the level of information providers* are as follows:

- insertion of a warning page alerting the user to the potentially controversial nature of the site or the material he wishes to access; this is intended more as information than protection, the risk being that it will be more of an incentive than a deterrent, particularly for minors;
- pre-access age check: the information provider states the conditions for access to the material in a cover page. Many of the commercial sites require a variety of guarantees in the form of written requests for access (by e-mail or post) or payment by credit card. Some companies are also trying to centralize this process, particularly so that non-commercial sites can benefit: on payment of a modest sum by credit card, the user receives a personal identification code giving him access to all the affiliated sites;
- putting the material offered on special servers (cache-based systems): in this case an operator creates a closed network giving access only to certain material selected from all the information available on the Internet. This approved material can be classified and differential access given on the basis of personal identification codes. Although the choice of material is limited to what has been approved, this type of system provides a high level of security. It is particularly used for providing cable and school access to the Internet.

It is not the place of *access providers*, who seldom if ever provide material themselves, to introduce systematic controls on information. They may, however, be required to help control illegal material by blocking pre-identified sites (black lists). Apart from the problems created by the difficulty of constantly updating these lists and the risk of withholding access to legitimate material, it is clear that this type of measure would not solve the specific problem of protecting minors (it would require the systematic blocking of material which adults must be able to access).

On the other hand, some access providers can offer restricted access (for minors, for example) by using various filters, blocks or preselection of sites. This is an additional service which requires special investment and must be distinguished from the straightforward provision of access.

At *user level*, there are various parental control systems:

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<sup>5</sup> "A wealth of persuasive evidence ... proved that it is either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting of on-line material which adults have a constitutional right to access."

### *Comparison of the features offered by different software packages*

	Cyber Patrol*	CYBERSitter	Internet Filter*	Net Nanny	NetShepherd	Parental Guidance	SNAG	Surfwatch
Price	\$49.95	\$39.95	\$40.00	\$39.95	Free	?	n.a.	\$49.95
Blocking by site	yes	yes	yes	yes	yes	yes	yes	yes
Blacklist update frequency	weekly	daily	none	twice-monthly	-	-	-	monthly
Update cost	\$39.90 p.a. (first six months free)	free	-	free	-	-	-	\$5.95 per month
Ratings compliant**	PICS, SafeSurf, RSACI	VCR, PICS, SafeSurf, RSACI	-	PICS, SafeSurf	Net Shepherd Global Ratings Bureau, PICS	McKinley Group	-	PICS, RSACI
Update cost	-	-	-	-	\$5.95 per annum for NSGRB	?	-	-
Filtering options	-	keywords or file types	keyword	keyword or file type	PICS-based	-	keyword (no automatic blocking)	keyword
List/filter Editing	yes	yes	yes	yes	-	yes	yes	no
Usage monitor	no	yes	yes	yes	-	yes	yes	no

\* - more limited but free versions of the software are available.

Source: Hydra

### **3. Media education**

Most of the different aspects of media education are relevant to the protection of minors and human dignity in the new services.

Schools still need to provide more encouragement for the acquisition of skills in the use of new tools, especially involving computers. The most appropriate method of media education is still the hands-on approach. However, parental enlightenment is also crucially important. What is the point of a parental control device if the parents have to ask their children to instal or programme it? Education in the visual image would serve to develop a critical attitude in adolescents and a new type of demand as regards the quality and diversity of audiovisual content. Furthermore, this type of education would produce long-term effects enabling future generations of parents to perform their child-rearing responsibilities more effectively. Measures to improve parental awareness and information as to the various types of harm to which their children may be exposed are an inevitable corollary to their increasing level of responsibility.

There is recurring debate on these issues in educational circles in all the Member States, and experiments and research are being run on a sporadic basis, notably at local levels. Efforts to increase adult awareness and involvement in media education are much less developed, there are a number of measures which offer themselves as possible examples:

- In the Netherlands, the Kinderkast, a non-governmental organization, has the task of increasing awareness of various aspects of the child/television relationship. This organization performs a variety of activities: production of newsletters, teaching materials for children, parents and educators, research into children's viewing habits, monitoring of television programme schedules, etc;

- In Spain, the Ministry for Social Affairs has published an awareness booklet on the place and use of television and the new services in the home;<sup>6</sup>
- In the United Kingdom, the National Council for Educational Technology advises measures to help teachers and pupils to take advantage of the new technologies. It has published various papers on the new communications networks, most notably a schools booklet on the problems of pornography on the Internet suggesting various initiatives which schools could take in this area;
- In the United States, the National Center for Missing and Exploited Children and the Interactive Services Association have published a joint booklet entitled "Child Safety on the Information Superhighway", intended to help parents to understand the nature of on-line services, the Internet and BBS.

Apart from the organization of a few European-scale meetings on these various facets of media education, the exchange of information and good practice and the establishment of networks on the European or world scale are still in their infancy.

#### **4. Promotion of high-quality material intended for minors**

In some Member States, analysis of the relationship between the media and minors has resulted in the improvement of the programme supply for minors being deemed a priority. In view of the difficulties specific to the production and distribution of such programmes (How should programmes be adapted to different age groups? How are programmes intended for a segment of the population which has not yet the status of solvent consumers to be funded? How are outlets to be found for these niche programmes?), the public authorities and/or the operators themselves have devised policies for the promotion of high-quality programmes.

These policies mainly concern cinema and television. In the field of on-line services and the Internet, everything still remains to be done to promote the development of high-quality sites for minors. The classification and labelling of contents adapted to minors (particularly in the form of white lists) is a first step in this direction. Other forms of encouragement on the lines of those introduced for other media could also be appropriate.

#### **5. Promoting parental control systems and the labelling of material**

The development of filtering systems based on labelled material meets in full the preconditions for genuine responsibility on the part of parents and teachers: it provides as much information as possible on the material available so that access can be selected automatically using control devices, on the basis of the family's own criteria (children's age, sensitivity and educational choices). These tools, which are vital in a decentralized services environment, could also prove a useful adjunct to other systems in centralized services.

This type of system can be applied in practice only by following certain steps:

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<sup>6</sup> "¿Qué Miras?, ¿Qué Haces? - La familia, las niñas y los niños ante la televisión y las nuevas pantallas."

- information must be supplied on the material in question (classification/labelling);
- this information is enclosed as a message with the material (coding);
- the message is transmitted as a substitute for access to the material (transmission);
- the message is read by a control device (decoding);
- control devices are supplied to users.

Classification/labelling of material, irrespective of the media or networks transmitting it, is clearly a priority: without it there is no point in developing solutions for the other stages in the process. To ensure perfect compatibility of the various sources of labelling, it would be useful to define common categories (nudity, sexuality, violence, bad language, etc.) or a set of age-groups.

The next three stages (encoding, transmission and decoding) are neutral. However, they do raise the question of the compatibility of labels from different sources and the proliferation of control devices (hardware or software) designed to use them. It is important here to secure the greatest possible degree of compatibility on the basis of non-proprietary open standards.

The provision of control devices raises two separate issues: the first concerns their development and production by industry and the second their marketing and supply to users.

The spontaneous development of a wide variety of parental control systems for the Internet and other services shows that industry can very quickly come up with systems which take into account users' needs and the general environment of available services. Measures to promote standardization and the labelling of material as outlined above can only reinforce this tendency and bring product prices down. However, any attempt to define or prescribe a specific system would run the risk of placing an artificial barrier on promising developments.

The marketing and supply of parental control devices to users raises more complex questions. In services where parental control devices are the only effective means of protecting minors, they should automatically be supplied - or offered - to users. However, these automatic supply arrangements must not interfere with competition between different types of device, which is an inherent guarantee of progress in the systems offered.