

Christian Büttner

Similarities and Differences: Which Principles Guide Film Classifiers in Europe?

— An Analysis

Europe is moving closer and closer together. In many areas of daily life where consensus has yet to be achieved, thoughts are increasingly turning towards ways of harmonising discrepancies in administrative practice. This has also been the case for quite some time now in the area of child protection and the media and the various procedures used to classify cinema films. Today, there are still major national differences in the way in which individual films are rated according to the danger they pose to minors. Indeed, film classifications can often deviate so much from country to country that it seems that such decisions are based less on general, scientifically founded principles than on certain concepts about childhood and adolescence. How else might such differences be explained and justified, when each and every country claims to be pursuing the same objective, namely the protection of children and young persons?

Closer observation of the image of childhood and adolescence underlying individual legislation in this field rapidly reveals the lack of a uniform concept, together with any resulting common standards to protect the young. Instead, this depends very much on the individual country and its specific culture. The aim of this paper is to elucidate the varying images of childhood and adolescence implicit in the arguments put forward in the European debate on the protection of minors against harmful media content.

This attempt to reveal the precise concepts of childhood and adolescence that lie behind national child protection legislation is based on a series of interviews conducted from 1998 to 2001 for the journal *tv diskurs* by Joachim von Gottberg, Vera Linß and Claudia Mikat with various European representatives working in this field. Each interview focused on the question of how national legislation to protect minors against harmful media content 'functions' in a particular European country. In other words, the interviewees were questioned on a topic that did not explicitly invoke the concepts of childhood and adolescence. All information regarding these concepts is therefore implicit and, as such, enables further interpretations on the national differences in this legislative field above and beyond the interviewees' responses to questions concerning organisational issues.

All remarks expressed in the interviews on the subjects of childhood, adolescence and the responsibility for the education and upbringing of children were evaluated from a *German perspective*. At the same time, we would emphasise that this paper represents merely an initial approach towards this topic rather than a scientific, systematic treatment thereof. It is

by no means our intention to infer any causal connection between a country's concept of childhood and the legislation it employs to protect minors against harmful media content. Instead, our concern is to determine how the various cultural presuppositions in this field can be put to work in a more transparent manner in the future debate on European legislation concerning child protection and the media.

A National Comparison

In *Great Britain* the young are assumed to be highly impressionable, with limited self-control and lacking emotional strength¹. Hard sanctions are used to punish violent behaviour amongst the young in England: 'Between 10 and 12 percent of young persons have been detained at least once for a short space of time in a youth custody unit for a violent offence. However, this is also because there is a greater tendency to lock up offenders in England....' In English society there is a fear that the young might identify with 'inappropriate behavioural models' and thereby be encouraged to commit criminal acts. Such an attitude can be seen as paternalistic and an incapacitation of the young. In other words, it is the responsibility of the lawmakers to decide what is good or what is bad and dangerous (good boy/girl, bad boy/girl).

From a German perspective, the approach to the representation of sexual acts is also conservative: 'It is clear that Great Britain is much more conservative than the rest of Europe where sex scenes are concerned....' For example, vulgar expressions and nudity are usually censored, and sex is something that 'should take place under the bedclothes'. The aim here is that the young *should* 'be *brought up* to engage in sexual activity in a responsible manner'. Young people are not expected to develop their own position on this subject on the basis of their own experience or the impressions they have gathered from watching films. Instead, the state does this for them. There is little confidence in the ability of parents to exercise an effective influence on their children in questions of education and upbringing. This, it is felt, can only be guaranteed by a state-controlled supervisory body. As far as younger children are concerned, there is a belief that films containing realistic representations of troubling scenes from their own experiences, such as divorce or domestic violence, can have a deleterious impact.

¹ von Gottberg, J., Streng bei Gewalt – großzügig bei Sex [Strict on Violence — Permissive with Sex], in: *tv-diskurs* 10/1998

Sweden

Society in *Sweden*² would appear to have a different understanding of childhood and adolescence (von Gottberg 1998b): 'If a 12-year-old goes to see a film classified for the over-15s, it is not he or she but rather the cinema owner who has violated the law.' In other words, it is the responsibility of the 12-year-old to decide whether or not to see such a film — there is no threat of legal consequences to prevent the young from access to certain media or to sanction such an act should it take place. The following statement provides further indication of how little trust the Swedish place in a paternalistic approach to education and upbringing: 'And if a 15-year-old buys a DVD, where's the problem? Do you think that a 15-year-old wouldn't buy the DVD if it were only available to the over-18s?' The attitude in Sweden is that the bulk of the responsibility lies with the parents: 'It may well be problematic if a 10-year-old sees [...] pornography. But isn't that really a problem for the parents? Ultimately, it is they who can control what their child watches on television. If they allow their child to see such things, then that's their decision.' It's therefore the duty of parents to educate their children to use the media in a responsible way. As such, parents have the opportunity to adopt an individual approach to upbringing and to develop a strategy tailored to the child, instead of the authorities regulating everything right down to the finest detail. Films containing pornographic scenes are generally given an over-15 rating, as most minors under this age are considered to have not yet gained any sexual experience. The view here is that the under-15s 'may well be unable to cope with pornographic scenes and therefore have problems with them'.

Denmark

In *Denmark*³ much importance is attached — as in Sweden — to the responsibility of the individual: 'In Denmark, we believe that the responsibility lies elsewhere. It's not a question here of everyone being able to see anything. What we want is for the individual to take responsibility for his or her own actions.' And this process starts at a very young age. Children should 'choose for themselves, make their own decisions. And I believe that they know very well what they may or may not watch.' Children therefore need to learn at an early age how to deal with their own anxiety or fear in a constructive way. For example, there are films classified for the over-sevens — which merely constitutes a recommendation and in effect means no age restriction at all — that 'may well contain elements that could scare small children. It is our belief, however, that it can also be a positive thing to frighten children

² von Gottberg, J., Streng bei Gewalt – großzügig bei Sex [Strict on Violence — Permissive with Sex], in: *tv-diskurs* 10/1998

³ Linß, V., Ab 15 Jahren darf man alles sehen ... [From 15 Onwards, You Can Watch Anything...], in: *tv-diskurs* 7/2000

to a certain degree. After all, the experience of being afraid is something that has to be learnt, and this in turn helps children to develop the skills required to watch films.' At the same time, efforts are made to respect the individuality of each child: 'We know that children develop in very different ways and that they come from a range of cultural backgrounds.'

France

From a German perspective, the *French*⁴ attitude towards minors seems rather liberal at first sight. Closer consideration, however, reveals an ambivalent picture. On the one hand, children of any age whatsoever are considered capable of distinguishing between reality and fantasy in film representations. In France, films that ostensibly do not provide the young with any real reference to their own lives — films such as *Rambo*, for example — are released without any age restrictions: 'We do not believe that French children personally identify with the heroes of such films. French children have a lot of distance to this kind of film violence. We therefore don't consider such films to be harmful.' In other words, the ability to distance oneself from such scenes of violence — which are regarded as unrealistic anyway — is posited as a fixed personality trait characteristic of the French youth in general. As such, it is assumed that the French youth possess a kind of 'cultural immunity' to American films: 'American films containing violent scenes can normally be released without age restrictions or with an over-12 rating, since the violence represented has no connection to the real lives of young people in France.'

On the other hand, it is also assumed that the youth in France possess an 'immature' side. When it comes to films that provide parallels to their own lives, they're credited with much less ability to understand and deal with such content: 'We consider it problematic when a film presents a violent reality that is very close to the actual lives of young French people' (p. 7); 'We're very strict about films that show suicide. That's a major topic in France, because we have a very high suicide rate among teenagers' (p. 7); 'If a film refers to the existential problems of young people and offers solutions that we consider dangerous' (p. 8), then that film will only be released for the over-16s. In contrast to Sweden, it is exclusively adults who decide what is dangerous or not for young people. In this respect, the young are seen as immature and considered incapable of dealing in a suitable manner with negative aspects of their lives. Similarly, there is no firm position adopted on the question of the role or responsibility of parents, unlike in Sweden, Denmark or Spain, where this is particularly emphasised.

⁴ von Gottberg,, J., Hartes Gesetz mit weichen Kriterien [A Hard Law with Soft Criteria], in: *tv-diskurs* 7/1998

Portugal

In *Portugal*⁵ parents play a more important role than the state in the protection and upbringing of the young. For instance, the age restrictions issued by the film classification board only apply when children and young persons go to the cinema without parental accompaniment: 'Even a film with an over-16 classification may be viewed by younger children when they are accompanied by their parents.' Parents are seen as best able to judge which films will make excessive demands on their children, which ones they will understand and which ones are suitable for a child's particular stage of development: 'The philosophy in Portugal is that parents should be responsible for the upbringing and development of their children. This is not the state's responsibility'; '...in the final analysis, it's up to the parents to decide how they approach film classifications'. Parents in Portugal exercise such a large influence on what films their children see that the young are actually well protected despite the lack of rigorous checks on viewer age at cinema box offices: 'My impression is that families take care to ensure that their children don't go to see films that are not released for them.' At the same time, children and young persons are credited with the ability to recognise representations of violence for what they are and to digest them accordingly. As such, there is an assumption that the young are responsible and psychologically stable enough to be able to defend themselves against any such bad influences.

Spain

The *Spanish*⁶ image of children and young persons appears once again to be strongly determined by a belief in the ability of the young to act in a responsible manner. It is down to 'the decision of the individual viewer whether he or she wishes to see a film or not'. Film classifications in Spain are all of a non-binding, advisory nature and do not entail any sanction ('...we only issue recommendations', the only exception being the 'X — adults only' rating for films that glorify violence or, most particularly, contain pornographic scenes). As such, it is up to the younger generation to decide at their own discretion which films they want to watch. In this respect, the freedom of the individual — and the young are not excluded here — seems to be an issue of central importance and something to be defended at all costs: 'Prohibitions always curtail somebody's freedom, and that's something to be avoided.'

The 'particularly recommended for children' category provides positive guidance for parents and helps them shape the way they raise their children. Rather than defining strict limits, the

⁵ von Gottberg, J., Auf die Eltern kommt es an [It's up to the Parents], in: *tv-diskurs* 1/2000

⁶ Mikat, C., Ein Plädoyer für die Freiheit [A Plea for Freedom], in: *tv-diskurs* 4/2000

purpose of child protection legislation in Spain is therefore 'to strengthen the process of education and upbringing at school, to increase the information available to families and to initiate positive trends...' (p. 10). In the Spanish approach, young people are urged to live freely and adopt a positive attitude towards life — which is not a position compatible with prohibition: 'Ultimately, the important thing is whether someone knows how to live or not. We shouldn't be setting out to proscribe things right from the word go — banning something is the very last resort. Instead, we should be teaching people how to live. And in the interim, our job is to provide guidance on what films and television people should be watching....'

As in Portuguese society, the Spanish do not automatically assume that representations of violence have a negative impact: 'As long as audiences know for certain that the people committing the violence are the bad guys, then such scenes don't have any negative effects.' Accordingly, there is no felt need to create an artificial, violence-free zone for children in the cinema: 'There's a lot of violence around anyway, but we still get on with our lives. It's the same with films, and 13-year-olds are already capable of handling quite a lot.' In other words, films also provide the young with an opportunity to gain experience of such aspects of life. Indeed, children of an even younger age are credited with the ability to handle such topics: 'Children today know that it's a normal feature of society that some people are homosexual or live as single parents.'

Ireland

The *Irish*⁷ approach emphasises the role of the parents. As a result, many children's films are only released for general viewing with a 'parental accompaniment' certificate. It is felt that 'parents should assume a responsibility here. They are best able to judge what's appropriate for their children and what isn't [...]. Ultimately, it's the parents who must decide.' At the same time, representations of violence are not always considered harmful to children: 'I don't consider violent scenes as dangerous on principle. After all, violence is a part of life as well.'

As in countries such as Denmark or Spain, the Irish believe that young persons should be given an opportunity to confront such topics. However, a sharp line is drawn when films are seen to present violence in a positive way or as worthy of imitation, or when an act of violence involves the use of everyday objects (knives etc.) instead of tanks, for example, or machine guns. Such films are then only released for the over-18s. A certain ambivalence is evident here. On the one hand, violence is recognised to be a part of everyday life, and the representation thereof is not necessarily seen as harmful. On the other hand, the violence that children are most likely to encounter often involves the use of everyday objects such as a knife. Yet it is precisely the representation of this type of violence against which children

are to be protected. In the final analysis, this is a similar situation to the one in France, where the young are thought to be more capable of coping with “abstract” forms of violence (‘I have fewer scruples about films with Arnold Schwarzenegger, where people shoot with machine guns but nobody dies.’). Violence is more of a worry than nudity (‘...people in the nude don’t automatically pose a threat’). However, when nudity also involves sexual contact, a film will usually receive an over-12 rating or higher — ‘depending on the detail of the sex scenes’.

In Ireland there appears to be a similarly nationalistic/patriotic viewpoint to the one in France. For example, films that ‘sympathise with the IRA are considered dangerous’: ‘I’m much more critical about films of this kind.’ And with respect to James Bond films, the following view was held: ‘Perhaps I’m slightly influenced by the fact that the actor currently playing James Bond is an Irishman. After all, there aren’t many Irish stars, and viewers should be given the opportunity to see the few that we have.’

Childhood and Adolescence in Europe

The images of childhood and adolescence that emerge from the interviews vary in individual aspects. Great Britain, for example, occupies an exceptional position in assuming that the young are immature and lack sufficient emotional strength. Whereas other European countries seem to have a more trusting relationship to the young — if to differing degrees — and to credit them in general with enough maturity to deal with certain kinds of films, young people in England are quite clearly accorded less independence. However, this analysis requires elaboration, especially with respect to France, given its ambivalent attitude in this area.

The concept of childhood and adolescence inferred from the interview with the English interviewee corresponds to other views on this subject as recorded in the relevant literature⁸. The worry that the younger generation might be led astray — by the media, for example — is deeply rooted in English society. It is felt that there is a fundamental link between youth and crime. In general, the young are held to be aggressive and to possess a criminal energy. Even the ‘government and police, religious leaders and other public figures continually refer to the alleged link between young persons, the media and crime, despite the fact that such a connection has seldom been verified’ (p. 119).

In France, on the other hand, independence appears to be valued very highly. It is something that should be acquired as soon as possible, and the young are encouraged accordingly.

⁷ von Gottberg, J., The Official Censor of Film, in: *tv-diskurs* 4/2001

⁸ Sanger, J., Vorstellungen über die Jugend im Vereinigten Königreich, in: Büttner, C./Crans, C./von Gottberg, J./Metze-Mangold, V. (Hg.): *Jugendmedienschutz in Europa*, Gießen 2000

The literature on the subject of childhood and adolescence in France repeatedly emphasises this aspect. For example, parents encourage their children to adopt elementary forms of independence from a very early age onwards⁹. Full-time day care for the very young, removed from the family, is also normal in France.

Indeed, most French parents send their children to nursery school, which places them in the role of a pupil and sets them off on the road towards the future world of life and work at a very early age¹⁰. For French parents, it is important that their child should be encouraged to do well at school from an early age onwards and then finish with the best possible results¹¹. As such, the child's elementary welfare is often subordinated to the parents' wish for high educational achievement and an optimal schooling environment.

On the other hand, it is also said that French parents have difficulties in handling conflicts with their children. Rather, they often seem to want to distance themselves from a responsibility for bringing up their children. Indeed, they are even accused of being incapable of assuming authority¹². According to education professionals in France, 'Children find it unbearable to be at home, often because their parents don't really know what to do with them and regard them as an intolerable burden. By the end of the holidays, parents will say: "That's it. I can't stand another weekend".'¹³ Perhaps this is also a reason why in the interview with Paul Chevillard, he doesn't once address the issues of the parental role and parental responsibility.

The European Debate

Conducting a European debate on child protection and the media presents a challenge not only on organisational but also on cultural grounds. This is because it concerns a highly sensitive topic involving to a certain extent 'hidden' prejudices about other cultures. Views on the protection of minors against harmful media content, along with the concepts of childhood and adolescence that these imply, touch upon questions of cultural, national and even personal identity. As long as the focus remains fixed on organisational issues, however, the ethnocentric content of such views remains partially concealed. Naturally, ethnocentricity

⁹ Müller A./Müller H.: Eltern sein in zwei Ländern (Erfahrungsbericht), in: Varro, G./Gebauer, G. (Hg.): Zwei Kulturen – eine Familie. Paare aus verschiedenen Kulturen und ihre Kinder am Beispiel Frankreichs und Deutschlands, Opladen 1997

¹⁰ Büttner, C./Brougère, G., Das Wohl des Kindes ist das Wohl seiner Erzieher, in: Büttner, C./Elschenbroich, D./Ende, A. (Hg.): Kinderbilder – Männerbilder. Jahrbuch der Kindheit (Band 10), Weinheim 1993

¹¹ Boyer, R., Die Freizeit von Schülern der Sekundarstufen I und II, in: Büttner, C./Crans, C./von Gottberg, J./Metze-Mangold, V. (Hg.): Jugendmedienschutz in Europa, Gießen 2000

¹² Jehel, S., Zur Situation der Jugend in Frankreich – eine Bestandsaufnahme, in: Büttner, C./Crans, C./von Gottberg, J./Metze-Mangold, V. (Hg.): Jugendmedienschutz in Europa, Gießen 2000

¹³ Büttner, C./Brougère, G., Das Wohl des Kindes ist das Wohl seiner Erzieher, in: Büttner, C./Elschenbroich, D./Ende, A. (Hg.): Kinderbilder – Männerbilder. Jahrbuch der Kindheit (Band 10), Weinheim 1993, p. 98

also determines this analysis and the original interviews themselves. The questions were posed on the basis of a German interest, and the underlying conception of childhood and adolescence was elaborated from a German perspective. If, for example, a Portuguese interviewer had asked the same questions, the result would have quite possibly been completely different. Perhaps a Portuguese interviewer wouldn't even have posed the questions in the same way as was the case in the interviews analysed here. Finally, we also lack a description of the German concept of childhood and adolescence!

The images of childhood and adolescence that we have developed on the basis of our own experience can all benefit from an outside perspective. This is true not only for the subject of child protection and the media. Looking at one's own point of view through the eyes of another can help turn an ethnocentric position into a relative one, not least when there is a recognition that other cultures are equally diverse as one's own¹⁴. In Germany, too, certain films can attract quite different judgements, and even different classifications from individual examiners. The dialog with people from different cultural and social backgrounds can create a unique opportunity to discuss one's self-image and the image of the other and thereby reach the same kind of common understanding that film examiners have to achieve when they come from completely different sections of the German population. It is this kind of a cross-cultural dialog that first enables a deeper analysis and understanding of national limitations.

In the attempt to move towards common standards in a field such as child protection and the media, it is therefore important to be aware of one's own personal context and cultural position, i.e. one's loyalty towards a particular culture and sector of society — for example, a specific generation or a certain lifestyle. A constructive intercultural discourse therefore requires self-reflection, empathy and a willingness to integrate — and this applies to one's own country as well. It is much easier to understand and assess someone's arguments if you are familiar with that person's — and your own — cultural background, philosophy of life, norms, world-view and also, in this case, concepts of childhood and adolescence.

For all the importance of acknowledging varying cultural backgrounds, it is also crucial not to overrate national and cultural differences. Problems can arise, for example, when discussion partners cling to their respective affiliations as a pretext for refusing to reveal their deeper motives¹⁵. When disagreements over substantial issues are conducted within such a framework, there is always a danger that the discussion will descend to a battle between competing examiners or countries in which neither party is prepared to give way or

¹⁴ Bennett, M., In the wake of September 11, in: Leenen, W. R. (Ed.): Enhancing cultural competence in police organizations, Münster (Waxmann) 2002, p. 23-42

¹⁵ Lesbet, D.: Begegnungen, in: Varro, G./Gebauer, G. (Hg.): Zwei Kulturen – eine Familie. Paare aus verschiedenen Kulturen und ihre Kinder am Beispiel Frankreichs und Deutschlands, Opladen 1997

appreciate the other's position. Such a situation is not exactly conducive to reaching a compromise.

Integration can only succeed in a bilateral or multilateral process. In the encounter between different opinions and cultures, the question is always whether this leads to a genuine process of exchange, in which cultures learn from one another, act accordingly and create something new and different; or whether it is merely a formal operation that leaves the existing positions essentially the same. Perhaps such a process will also pave the way towards a common cultural identity — a European identity, towards which we will soon be heading on the constitutional level. And, in the final analysis, such a process will also involve a confrontation with the concepts of childhood, adolescence, parenthood and the state — and, not least, with the issue of child protection in Europe.

10th European Conference of Film Classification 2003, Berlin, 3-5 Sep. 2003

National Youth Protection and the European Union's *Appetite* for Regulations – An Overview

Alexander Scheuer

Ladies and Gentlemen,
dear colleagues,

I feel honoured to speak at the 'anniversary' occasion of this important gathering of European experts. It was rather easy to accept the invitation, because the topic – which will in some way be at the heart of your discussion today – is very interesting.

A Few words on the Institute of European Media Law (EMR)

The EMR was established in 1990 as a private and independent research institute; its main office is located in Saarbrücken; there exists a small liaison office in Brussels. The Institute focuses on the main issues of media and telecommunications law. Its 5 fields of activity cover legal studies, conferences, publications (EMR-series, IRIS), consultancy/information services (databases), and research. German media authorities, commercial and public service broadcasters are the main institutional members. Recently, the focus of activity was on the following topics: Access to digital TV broadcasting over satellite; the application of the TWF-Directive's advertising regulations in several EU-Member States; Co-regulation in electronic media; and, Prospects for a well-balanced dualistic broadcasting system.

Introduction

Preparing my presentation today has not proven to remain free of all difficulty. – As you all know, the issue at stake is quite complex. For many reasons, promoting the idea of greater European harmonisation in the sector of youth protection is rather hazardous; you have been highlighting the relevant arguments *against* a more uniform regime in past discussions already.

One small element of earlier discussions that I would like to mention in the present context relates to some of the fundamental questions: What is a child? Which age is required to consider a young person an adolescent – no longer a child, not yet an adult?

When asked whether the European Community would actually show a significant degree of appetite *in favour of* additional regulation or, more generally speaking, action, I would say that the answer depends, as it does in ordinary life, on whether a delicious or, moreover, a delicate issue is at hand.

What dishes have already been served? Suffice here to simply name the TWF-Directive, the eCommerce-Directive, the Recommendation on the protection of minors and human dignity

on the Internet, and the Communication on certain legal aspects relating to cinematographic and other audiovisual works¹.

State of origin principle – free circulation

When agreeing on the terms of the TWF-Directive, in particular in respect of the principles of state-of-origin control and free circulation in the Internal Market, the Member States were enabled to accept the supervision exercised by other countries over the broadcasters established there. It was deemed both necessary and sufficient because the minimum criteria had been harmonised beforehand. Mutual recognition or mutual trust was rendered applicable.

First, this allowed for the media policy in France, for instance, to have no reason to believe that media enterprises in the UK would achieve competitive advantages over their domestic players simply because the latter's legal framework would be less restrictive or their broadcasters' practice would not be scrutinised the same way as it was done by the CSA.

In addition, all Member States sort of made a promise: they undertook not to differentiate between those programmes that were offered to a resident audience and those targeting viewers abroad. Therefore, in principle, it would have become less attractive for those providing audiovisual services over e.g. satellite to do 'forum-shopping'. I.e. to establish the centre of the activities in a Member State which would exercise the least control with regard to e.g. advertising regulation or youth protection principles.

Thirdly, the efforts to secure a level-playing-field even went further: Under the Transparency-Directive Member States are obliged to notify to the Commission planned national legislation, among others, as far as Information Society services are concerned. The aims of such procedure are to avoid increasing disparity in national regulations through the introduction of additional laws. This involves that no distortion in competition should arise from one Member State treating e.g. video-on-demand services in an identical way as broadcasting while others might offer less strict regimes such services must obey to.

New approaches?

However, these basic approaches followed by numerous acts of Community legislation and, within the media sector, also by the eCommerce-Directive, have very recently been questioned. Interestingly, concerns raised by the competent Irish minister², heading for EU presidency in the first half of next year, deal with the protection of minors issue. He deems inadequate that broadcasters, established in one Member State but specifically (or even exclusively) targeting the audience of another Member State, have no obligation to respect the set of rules applicable to services on the latter's territory.

Harmonisation / Co-ordination vs. Uniformity

What is harmonisation good for? Generally speaking, it being implemented will often lead to that Member States will be deprived of invoking reasons of special national interest they consider indispensable. This, certainly, is no value *per se* – said effects of harmonisation have to be judged against the diminishing of barriers to a proper functioning of the internal market.

¹ http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdf/cincom_en.pdf

² Press release, 20 August 2003, www.dcmnr.ie

So, harmonisation is mainly used in order to achieve a minimum set of common understanding. This covers both the necessity of measures upheld in the interest of public policy and the suitability of available instruments.

While the notions of harmonisation and co-ordination are frequently used as synonyms, the Treaty on the European Community is also not giving the impression that the implementation of the different words in the Treaty text follows a stringent pattern. Therefore, it has been suggested that, in general, both terms would have the same meaning. However, what is apparently meant when concerns are formulated against Community action in view of divergent national laws or administrative provisions, is a threat of a *uniform model* being imposed. As has been described in detail by *Mr. Wallander*, a uniform approach might face considerable opposition because it is – if not necessary in rather exceptional cases – mainly not suited to take sufficiently into account what kind of national peculiarities exist. Especially as concerns our subject matter, different cultural backgrounds throughout Europe have a decisive impact on what measures are deemed necessary and, where appropriate, by which institution they should be effected.

Harmonisation may be implemented through different levels of intensity. The more fundamental certain divergences in national provisions are (fundamental meaning that they significantly hamper the exercise of fundamental freedoms or that they distort competition), the more likely that in a first step minimum standards are employed so as to allow for the subsequent application of the concept of mutual recognition. *Co-ordination* points somewhat to a concept that accentuates or relies on procedural rules, thus allowing for a greater margin of independence from developments elsewhere – except where dysfunctional effects would occur.

Even harmonisation in the field of criminal law has become a European (Union) reality. You will recall that the prohibition of child pornography and its distribution over different media has become such a case which is also relevant in the framework of the Council of Europe's activities.

Existing differences

Is harmonisation of national youth protection regimes needed? The principal condition for Community action would be that there are significant differences in national laws and/or practices. A study prepared by Olsberg SPI on behalf of and recently published by DG Education and Culture lists four main factors which lead to a heterogeneous picture of protection of minors in the media in Europe: There are differences between:

- Member States;
- Different kind of media (Film, Video, DVD, broadcasting (TV movies, shows, news or documentaries), games, and the Internet);
- Systems applied (whole range of factors: number of age groups, labelling, legal framework, state institutions, co- or self-regulation, etc.);
- Standards (objectives, understanding of the role of youth protection measures, soft-criteria).

One example: films

These differences seem to be quite fundamental. By way of exemplification and as far as my understanding of film classification goes, I would like to present how I perceived the way the issue is generally dealt with:

1. There is an initial decision that films should be analysed for the purpose of having an idea of its content and way of presentation in order to prepare a judgement on its implications for the protection of minors. In many cases, a decision is also taken in view of the competent body that should be entrusted with such task.
2. Secondly, what may be seen as the main common factor, the film is watched.
3. Then, often a decision is taken as to whether the audiovisual work would be in breach of criminal law provisions, and, if this the case, its distribution shall be forbidden, it may be indexed. Probably, the film will not be suitable for adolescents under the age of 18. Provided that there are no reasons for such findings, it will be subsumed under a given age category. If I am correct, in many cases said evaluation is based on the manner in which the film deals with such issues as the portrayal of sex or violence, to what extent the viewer might be put into a state of fear, how the drug problem is dealt with, and, whether there is unacceptable language. The handling of these issues is reflected against what is understood as acceptable for a young viewer according to his age. Sometimes, or even increasingly, the possibility of parents or guardians accompanying the minor is taken into account.
4. So, the oeuvre is classified which means that its content has been assessed and it was put into a category – in some cases this is done by also giving a content-related label or indication, the logos or pictograms. There are rules in place which, in a fourth step, are providing guidance on how the film may be distributed or shown.

Certainly, you will have in mind many shortcomings of this sort of model description, exceptions that are made, different approaches being followed, not only in your country but also in others. What about the inclusion of video films (or DVDs) ? What about Belgium where there is either under 16, or over? What about the underlying factors leading to a given age classification?

Nevertheless, I wanted to trigger your attention towards what in my opinion seems to be the most crucial question despite of all differences in regulatory frameworks, practical outcome or the importance attributed to parental control: I presume it is the **link** between the categories of age groups available and the potentially harmful content of an audiovisual work, game or else. Most likely, this is no news for you. However, I think it represents the motivation both for the sceptics against more common rules and results as well as for the perceived difficulty any Community action in this field will be confronted with.

While refraining from any proposal, I already would like to make one remark at this stage: Age categories do not seem to enjoy an invariable status or eternal character, they have been changed, new groups have been introduced, the aspect of parental control has been taken into account when allowing for a derogation from age groups – provided a guardian is accompanying the child.

Additional aspects

1. There are linkages between different forms of media distribution, ratings for cinema or video may have an impact, either *de iure* or *de facto*, for broadcasting; ratings for video or computer games may show significance for making available games on the Internet; and the ratings for cinema showing or TV broadcasting may be decisive for using the Internet as an alternative mode of distribution.
2. Different instruments have been applied in view of the medium used, and, in addition, the distribution mode has implications for the rating process as well. With cinema, it is control of access; as regards traditional TV, watersheds, tonal or visual warnings and, in particular in the digital environment, technical means of access control have been implemented. For video or DVDs it is the point of sale or rental where some control is exercised. Concerning the conveying of broadcasting-like content over the Internet or other forms of new media, technical control measures are under discussion. Is there yet a clear picture of how to deal with Internet games? What measures will prove appropriate in times of convergence and digitalisation and what will be their impact both on national regimes as well as on the handling of transfrontier cases.
3. To what extent differ the ‘fundamentals’ of youth protection policies? Besides stressing the importance of responsibility assumed by those making products or services available, concepts like parental control (family viewing for TV, PG/A for cinema), and media literacy have increasingly become topical. How to deal with divergent understandings of how much of a basic confidence the public attributes to the children?
There are large differences, as you all are aware, between the instruments applied, i.e. whether state regulation is appropriate, e.g. for cinema and TV. What would be the role for co-regulatory systems as regards TV, for instance, providing for a wide range of different programme categories (films, sport, shows, news, documentaries etc.)? Probably, even voluntary agreements can prove sufficient, like for games (PEGI) or Internet content (ICRA).
Again, the exercise of mirroring the instruments applied against the basic concepts of youth protection followed will show that there is a high level of interdependence which may not allow for a shift in the regulatory approach in short term.

That, definitively, are most relevant differences!

Common objectives?

Are there any generally accepted standards or common objectives available as well? If there are, who should care about who does what, how many age categories are available, how much of a ‘discount’ one will offer if parental guidance is at hand?

Still, at the core of the common concern lies the welfare of the youth which is a genuine value. However, additionally, the positive effects on society as a whole are relevant as well. Most of the countries seem to agree that as a general rule, minors should not be confronted with content that could be harmful to their mental or physical development. As regards TV broadcasts, at least, pornography and gratuitous violence have been considered unacceptable in a legally binding form (Art. 22 (1) TWF-Directive).

Apparently, national rating processes keep showing considerably differing results. These may become less significant the more a constant exchange of views is secured. To keep such

process ongoing and to intensify the debate, both on a cross-media and a European level, represents, too, a common objective.

Thresholds for the European Community to take action

The ECJ has recently established several criteria in order to determine whether or not any Community action aimed at eliminating barriers towards, on the one hand, the free movement of persons or the free provision of services, and, on the other, towards the proper competition would in effect be suited to improve the functioning of the Internal Market. The decision I will refer to concerned the Tobacco Advertising Directive (98/43/EC).

Conditions for harmonising measures

As has already been outlined, the most important criterion is built by a two-fold condition: There must be (i) considerably important (existing or expected) divergences in national regulation that (ii) lead to obstacles to the exercise of the fundamental freedoms or the competitive functioning of the Internal Market. (Arts. 3 lit. c), h), 47 para. 2 and 95 TEC)³

The legal basis for Community action, either under Art. 95 or under Art. 47 together with Art. 55 TEC, has to be understood as providing for the necessary instrument *in order to* achieve the aims of an Internal Market – it must be interpreted in a *functional manner*. Therefore, any measure has to follow the objective of eliminating barriers to the free provision of services, for instance.

“[...] harmonisation measures which impose considerable restrictions in the public interest should not invariably be regarded as seeking to reduce trade in the sector concerned. The entitlement of the Community legislator to impose such restrictions, even to the point of prohibiting trade in certain products, *in parallel pursuit of broader free movement goals* and of some other public interest” has been accepted by the ECJ.

However, not every measure is legitimate. Community legislation will be controlled by the ECJ, in this context in application of a test⁴: It is examined whether there exists a *real link* between harmonisation and the improvement in the Internal Market situation⁵.

³ “The issue of competence must instead be resolved by assessing the Directive's compliance with the objective requirements of the internal market, having regard, in particular, to the concrete internal market benefits claimed for the measure. In the case of the Advertising Directive, such benefits are invoked by the Community legislator exclusively in respect of the tobacco advertising and sponsorship sector and the media employed in that sector. As the Directive imposes, effectively, a total ban on economic activity in that sector, and does not harmonise national rules governing those relatively minor areas where tobacco advertising is not prohibited, it cannot be said to facilitate the free movement of goods or the freedom to provide services, or to remove distortions of competition, in the sector in question. It is, therefore, invalid having regard to the requirements of the legal bases employed by the legislator.” Conclusions AG Fennelly, dated 15 June 2000, joint cases C-376/98 u. 74/99, Germany v Parliament and Council et al., Rec. 58.

⁴ Aimed at coping with the “[...] risk transferring general Member State regulatory competence to the Community if recourse to Article 100A to adopt harmonising measures *in the interests of undistorted competition* were not subject to some *test of the reality of the link between such measures and internal market objectives*.” Conclusions AG Fennelly, dated 15 June 2000, joint cases C-376/98 u. 74/99, Germany v Parliament and Council et al., Rec. 86, 89 (emphasis added) with reference to ECJ, case C-359/92, Germany v Council, [1994] ECR I-3681. “I would conclude that the contribution by a given measure to the equalisation of conditions of competition in the sector which is supposed to benefit thereby should be specific to that sector, however widely drawn, and should not be merely incidental. It follows that Community rules whose sole effect in a given sector is to prohibit the relevant business activity cannot be

When the Community measure is designed to address future obstacles resulting from the disparate development of national laws, those impediments have to be rather likely and the legal act has to be suited for them not to emerge⁶.

Provided that the measure fulfils these conditions it may even foresee rules which ensure that no circumvention of illegitimate action by market participants is possible⁷.

The measure will not be accepted if “[t]he effects of such advantages on *competition* are, however, *remote and indirect* and do *not* constitute distortions which could be described as *appreciable*.”⁸

Means and level of a harmonisation approach

Mainly, the Community legislator will opt for a directive as the most suited instrument. It allows to give the Member States a larger margin of appreciation how best to achieve, in their respective national legal system, the goals defined or outlined in the EC instrument. Full harmonisation is less often used, however, this does not exempt the EC legislation to be quite concrete in some cases, as with total bans of certain activities.

Olsberg findings: the market (legal and economic) situation today and tomorrow

The Commission’s consultants have put an emphasis on differentiating between the situation as it presents itself today and the challenges of tomorrow. The study suggests that for the time being the existing differences between countries and media platforms would not construe

said to equalise conditions of competition *in that sector*, whatever may be its effects on competition in some related field.” Ibid., rec. 91. (original emphasis)

“In order to determine whether a Community measure pursues internal market objectives, a two-stage enquiry is necessary. First, it must be ascertained whether the preconditions for harmonisation exist, that is, disparate national laws which either constitute barriers to the exercise of the four freedoms or distort conditions of competition in an economic sector. [...] Secondly, the concrete action actually taken by the Community must be consistent with the establishment and functioning of the internal market. This involves review of how the Community legislator attempted to reconcile the central requirement of provisions like Articles 57(2) and 100A that measures adopted thereunder facilitate free movement or equalise conditions of competition in a specific sector with its duty to take into account public-interest factors which may militate in favour of a highly restrictive approach to certain economic activities.”

“It has been suggested, especially by the Commission, that this essentially raises the question whether a measure is *appropriate*, or *opportune*, which is a question of *proportionality* rather than of *competence*.” Ibid., rec. 93, 94. (emphasis added)

⁵ “If a *mere finding of disparities* between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.” ECJ, joint cases C-376/98 and 74/99, *Germany v Parliament and Council* e. al., judgment dated 5 October 2000, rec. 84, 86, 100, 109. (emphasis added)

⁶ “It is true, [as the Court observed in paragraph 35 of its judgment in *Spain v Council*, cited above,] that recourse to Article 100a as a legal basis is possible if the aim is to prevent the emergence of *future obstacles to trade resulting from multifarious development of national laws*. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.” Ibid.

⁷ “Admittedly, a measure adopted on the basis of Articles 100a, 57(2) and 66 of the Treaty may incorporate provisions which do not contribute to the elimination of obstacles *to exercise of the fundamental freedoms* provided that they are necessary to ensure that certain prohibitions imposed in pursuit of that purpose are not *circumvented*.” Ibid.

⁸ Ibid.

obstacles for the provision of services or for an effective competition. Nevertheless, they pointed to the mere amount of probably relevant content that appears to put forward arguments in favour of self-regulation (Film – TV-programmes – Games – Internet). This should, however, not be construed as to neglect the states' responsibility for the protection of minors – hence, my sympathy for a co-regulatory approach.

Elements of 'encouraged' harmonised action

The consultants at Olsberg have made several recommendations for Community action:

- Encourage countries to use common descriptive rating criteria in their rating practices;
- Ensure the exchange of good practice between different media platforms;
- Encourage the development of cost-efficient and time-saving procedures through the exchange of best practices (including the promotion of accessible databases of rated films and efficient online rating procedures);
- Consider methods of content evaluation other than the current ex ante system, attention should be paid to a greater extent to ex post control mechanisms;
- Encourage the role of co- and self-regulation;
- Encourage the inclusion of civil society;
- Educate consumers in view of a shift in regulatory approaches.

Elements for discussion

There are probably answers needed for, i.a., the following questions: How to ensure best practise in youth protection? What is the particular role of state institutions and self-regulatory bodies, respectively, when it comes to a narrowing down of divergent ratings in Europe? Who is more likely to be entrusted with a task of securing that a certain corridor of estimations will be reached more often in future?

In my opinion, the starting point for better regulation in a European context would be to address the possibility of common criteria that allow for comparable descriptions of audiovisual content. Based on such model, the assessment of films, programmes etc. would be left to the national authorities or institutions, thus enabling them to take cultural specificity into account.

As I have already indicated, there appears to be room for an agreement of age groups.

In addition, if the ratings or classifications are more based on common criteria for shared concerns, this could also militate for a broader acceptance of the content descriptions employed, thereby allowing for pictograms to become harmonised.

Only where ratings and descriptions provide for the necessary basis, both parental control and technical measures are likely to become a pan-European additional instrument. Not to neglect, the impact such might in future have on the position of service providers.

Conclusion

In the beginning of my presentation, I acknowledged that all the issues involved are both complicated and complex. My suggestions therefore are of a rather abstract nature. It seems important to me that you continue to have conferences like the one today, that there is in every country an exchange of views between institutions responsible for different media.

Where there are co- or self-regulatory bodies in place, they should be encouraged to institutionalise a process of mutual information and discussion. Whatever the individual setting in one Member State, it would seem worth to consider that there should be one 'address' in each country that could – either on the political, the administrative or the professional level – act as an intermediate, internally as well as externally.

Is it likely that a possible Community appetite will materialise in the format of a legally-binding instrument? Probably the answer would be more easy if one knew whether the current Commission during the last month of its mandate will be presenting a constructive proposal for a revised TWF-Directive. In particular, it seems to be decisive whether there is a chance for a comprehensive approach regarding all electronic media. Next week, the responsible Commissioner will hold an expert hearing in Brussels on the very topic. In autumn, or late this year, the Commission is expected to present another evaluation report on the 1998 Recommendation. Besides the European Parliament, which in its resolution on the Cinema Communication of July 2002 remained rather mute on the present topic, some Member States have already signalled that they would be interested in giving their views on the outcome of the Olsberg study.

Summing up, I think there will only be some sort of soft-law approach which could turn out to be a good starting point.

Thank you very much for your attention!

Alexander Scheuer

Saarbrücken/Berlin, 3 September 2003