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COMMUNICATION FROM THE COMMISSION  
TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 189 b (2) of the EC-Treaty

**ON THE COMMON COUNCIL POSITION ON  
THE PROPOSAL FOR A PARLIAMENT AND COUNCIL DIRECTIVE  
AMENDING COUNCIL DIRECTIVE 89/552/EEC  
ON THE COORDINATION OF CERTAIN PROVISIONS  
LAID DOWN BY LAW, REGULATION OR ADMINISTRATIVE ACTION  
IN MEMBER STATES CONCERNING THE PURSUIT OF  
TELEVISION BROADCASTING ACTIVITIES  
("TELEVISION WITHOUT FRONTIERS")**

## **1. Context**

### *1.1. Background*

The "television without frontiers" directive<sup>1</sup> was adopted to create the legal reference framework needed at Community level to ensure the free movement of television broadcasts. Since the directive sets out to achieve its primary objective by using the technique of coordination of national provisions where this is necessary, it also takes account of the objectives of these national provisions and in this way constitutes the cornerstone of what may be termed the "European audiovisual area".

### *1.2. The revision process*

Article 26 of the directive requires the Commission to report on the implementation of the directive five years on from its adoption and, where necessary, to put forward proposals for adapting it in line with developments in television broadcasting.

At the Essen European Council in December 1994 the Heads of State or Government invited the Commission to put forward a proposal amending the directive.

In its resolution<sup>2</sup> on the 1995 work programme, Parliament also asked the Commission to come up with proposals for a revised directive.

On 31 May 1995 the Commission sent a communication<sup>3</sup> to Parliament and the Council with the implementation report, an explanatory memorandum and the proposal for a directive amending the 1989 directive.

The Economic and Social Committee issued its opinion<sup>4</sup> on 13 September 1995.

On 14 February 1996, in accordance with the co-decision procedure laid down in Article 189(b) of the EC Treaty, Parliament adopted, at first reading, a legislative resolution<sup>5</sup> approving the Commission proposal, subject to its own amendments.

The Commission presented its amended proposal, incorporating those of Parliament's amendments it accepted, on 7 May 1996.<sup>6</sup>

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<sup>1</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989, p.23).

<sup>2</sup> P 188.641, 15.3.1995.

<sup>3</sup> COM(95)86 final (OJ C 185, 19.7.1995, p.4).

<sup>4</sup> ESC 972/95.

<sup>5</sup> P 196.583.

<sup>6</sup> COM(96)200.

The Council reached full political agreement on its common position on 11 June 1996 with a view to formal adoption at a later date, after finalisation of the text.

## **2. Observations on the Council's common position**

### *2.1. Summary of the Commission's position*

The Commission considers that the Council's common position, which incorporates many of the points raised by Parliament, constitutes progress in the right direction by:

- modernizing certain provisions of the 1989 directive in line with developments in television broadcasting;
- providing more legal safeguards in the European audiovisual area;
- making the directive more workable.

### *2.2. Improvements over 1989*

The improvements to the 1989 version, which incorporate in part some of the major Parliament amendments (see table in annex), basically concern:

- \* more precise definitions (Article 1 "broadcaster"; "television advertising"; "teleshopping");<sup>7</sup>
- \* clarification of, and increased legal security in, the rules governing national authorities' jurisdiction over TV channels, also known as the "jurisdiction determination criteria" (Articles 2(2), 3 and 4);
- \* the rights of third parties, whether or not nationals, to bring matters concerning actual compliance with the provisions of the directive before the relevant national authorities (Article 3(2));
- \* adapting the definition of "European works" to encourage co-productions with non-member countries (Article 6);
- \* updating the provisions on the media time scales (Article 7);
- \* establishment of a legal framework for teleshopping programmes and channels with partial alignment with the rules on content and presentation that apply to advertising (Articles 10, 11, 12, 13, 15 and 16) and also with special rules for certain products or audiences (Article 14 - medicinal products; Article 16(2) - protection of minors), the presentation of teleshopping spots (Article 18a) and teleshopping channels (Article 19);
- \* establishing similar rules governing self-promotion (Article 19a);

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<sup>7</sup> The numbering of the articles here is the numbering of the new consolidated version in the common position, which is easier to follow than the numbering in the amending directive.

- \* not including public service announcements and charity appeals broadcast free of charge in the maximum amount of advertising time allowed (Article 18(3));
- \* introducing more effective measures to protect minors against programmes which may have a harmful effect on them, and mandating the Commission to carry out an investigation on further measures, including technical means, to protect minors, with a view to subsequent revision of the special rules (Article 22b(2) and recital 33);
- \* improving procedures for exercising the right of reply (Article 23(1));
- \* setting up a Contact Committee (Article 23a) with the job of facilitating the effective implementation of the directive as a whole and Article 2 in particular (this is related to the issue of abusive circumvention of national rules referred to in recital 12).

### 2.3. *The promotion of European works (Article 4)*

The Commission must point out that it had preferred its initial proposal, which set out to amend the provisions of the 1989 directive on the promotion of European works as follows:

- removing the phrase "where practicable" from Articles 4(1) and 5(1);
- allowing thematic channels to opt for the investment obligation instead of the transmission time obligation;
- stipulating effective application of these arrangements for a fixed period of ten years.

The Commission position was closer to Parliament's opinion (first reading) than the Council's common position. The Commission, however, was faced with the unanimous position of Member States in Council in favour of the 1989 provisions being maintained as such. Moreover, the Commission considers the introduction of the Contact Committee as a step in the right direction for the implementation of Article 4. Other points in the common position relating to Article 4 should also be considered:

- maintaining the 1989 provisions intact means that there is no lowering of standards, and Article 4(2) (no back-sliding) remains in force;
- Parliament and the Council are in agreement on an important point, namely that they are both in favour of deleting the clause proposed by the Commission that would have limited the application of Article 4 to a fixed period of ten years.

In such circumstances, the fact that the Council could not reach unanimity on certain advertising issues (Article 16), which have no link with Article 4, would not justify the Commission preventing the adoption of the common position, especially since:

- most of the Member States agree with the Commission on the advertising provisions (Article 16) on which there was disagreement;
- preventing the adoption of the common position would have blocked the co-decision procedure and deprived Parliament of the opportunity to give the proposal a second reading;

- the promotion of European works is only one of five areas of coordination in the directive. The other coordinated areas (the criteria determining jurisdiction; advertising; sponsorship and teleshopping; the protection of minors and the right to reply) are also highly important in the field of broadcasting. The agreement on Article 4 makes considerable progress in these areas possible and this is essential for the proper operation of the directive as a whole (since, unless amended, the 1989 version automatically remains in force).

#### 2.4. *Scope*

Parliament wished to extend the scope of the directive to cover certain new audiovisual services (amendment 77). The Commission did not take up this amendment in its own amended proposal and the Council followed suit. It would seem rather premature to extend the scope of the directive for the following reasons:

- \* the definition of "television broadcasting" in Article 1(a) of the directive already covers such services as "pay-per-view" and "near video-on-demand", which are becoming increasingly widespread in Europe; this means that the immediate legislative needs at Community level are already catered for;
- \* services on individual demand (point-to-point services), such as video-on-demand, pose special problems, particularly from the legal point of view, which require more thorough consideration. This is why the Commission had a statement entered in the Council minutes to the effect that it would soon be presenting a Green Paper on new audiovisual services (point-to-point). The Green Paper will shortly be laid before Parliament also.

#### 2.5. *The criteria for determining jurisdiction (Article 2(2), (3) and (4))*

Parliament, the Council and the Commission share the same objective: to place broadcasters under the jurisdiction of the Member State with which they have the closest economic ties. The three institutions also agree on the precise criteria for determining the appropriate jurisdiction:

- where the broadcaster's actual head office is located;
- where editorial decisions are taken;
- where the broadcaster's workforce operates.

The common position establishes a comprehensive system, combining the first or second criterion (where the places are in two different Member States) with the third criteria in a variety of ways to cover all eventualities. If the criteria in paragraph 3 were to be fully cumulative, there would be many cases where the provisions of this paragraph would be inapplicable and paragraph 4 (containing strictly technical criteria) would come into play, undermining the purpose of the provisions as intended by the three institutions. The Commission would like to draw Parliament's attention to the importance of covering all eventualities in order to avoid abusive circumvention of national rules (a problem already mentioned above).

### **3. Conclusion**

The Council's common position on the proposal amending Directive 89/552/EEC is a compromise, for which the Member States and the Commission have had to display considerable flexibility given how different the positions were at the outset, particularly as regards Article 4. A compromise was needed to keep the decision-making process rolling and to make the necessary amendments to other provisions of the directive. The Commission considers that the interim outcome has already brought a considerable number of improvements over the 1989 version and that these improvements take account of several of Parliament's major concerns expressed on the first reading.

<p style="text-align: center;"><b>Positions and concerns expressed by Parliament in its amendments and taken up by the Council in its common position</b></p>
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**European Parliament opinion**  
(14 February 1996)

- \* Abuse of dominant positions, pluralism and freedom of televised information (Ams 1 and 26).
- \* Green Paper on new services (Am. 2)
- \* Any legislative framework concerning new audiovisual services to be in line with the spirit and the objectives of the Directive (Am. 3).
- \* Reference to Article 128(4) of the Treaty - cultural aspects (Am. 7).
- \* Support for audiovisual production (Am. 10).
- \* Developing European fiction films (Am. 88).

**Council common position**

- \* Recital 25: rules concerning the need to safeguard pluralism in the information industry and to avoid abuses of dominant positions. Furthermore, recital 16 of the 1989 directive, corresponding to amendment 1, remains in force.
- \* The Commission had a statement entered in the Council minutes, declaring its commitment to submitting a Green Paper, which will be laid before Parliament in the near future.
- \* Recital 6: Any legislative framework concerning new audiovisual services must be compatible with the objective of the Directive; legal framework ensuring the free movement of services.
- \* Recital 18: Community's obligation to take cultural aspects into account in its activities.
- \* Recital 19: ensuring the competitiveness of the programme industry.
- \* Recital 20: developing European fiction films.

- \* Deletion of the 10-year cut-off proposed by the Commission for the application of the quotas (Ams 11 and 59).
- \* High level of consumer protection in teleshopping (Am. 12).
- \* New definition of "broadcaster" (Am. 19).
- \* More precise definition of "television advertising" (Am. 20).
- \* New definition of teleshopping (Am. 21).
- \* Clarification of the criteria determining jurisdiction:
  - actual location of head office;
  - where editorial decisions are taken;
  - where the staff operate
 (Ams 22 and 23).
- \* Clarification of additional criteria determining jurisdiction (e.g. for satellite channels) (Am. 24).
- \* Concern over abuses of national rules (relocation for the purpose of evasion) (Am. 75).
- \* Deletion of the 10-year cut-off for the application of the quotas (deletion of recital 19 in the Commission proposal and the corresponding article of the directive - Article 3(2) or 25a of the consolidated version).
- \* Recital 27: to ensure a high level of consumer protection.
- \* Article 1(b): definition of "broadcaster".
- \* Article 1(c): more precise definition of "television advertising" and Article 18(3) (public service announcements and charity appeals are not counted in the maximum advertising time allowed per day and per clock hour).
- \* Article 1(e): definition of teleshopping.
- \* Article 2 § 3 : Clarification of the criteria determining jurisdiction:
  - actual location of head office;
  - where editorial decisions are taken;
  - where the staff operate.
- \* Criteria clarified in Article 2(4).
- \* Recital 12 referring to the case law of the Court of Justice and Article 23a(2) specifying the issues to be handled by the Contact Committee.



- \* Clarification of the conditions governing derogation from the general principle of freedom of reception (Am. 25).
- \* Provision for any legal person established in one of the Member States to seek redress from the relevant national authorities in the Member State concerned, regardless of whether or not they are a national of that country, so as to ensure the proper implementation of the Directive (Am. 28).
- \* Definition of European works (co-productions with non-member countries) (Am. 36).
- \* Release windows : time limit for television broadcasting of films after their first cinema showing: standard time limit of 18 months, but 12 months for pay-television and pay-per-view (Am. 37).
- \* Exclusively local stations to be exempt from the quota arrangements (Am. 38).
- \* Extension of the rules on advertising to cover teleshopping (Ams 39, 40 and 42).
- \* Special rules on advertising breaks during feature films and television films to preventive excessive interruption (Am. 41).
- \* Article 2a: introduction of the term "derogate".
- \* Article 3(2) stipulates that measures shall include appropriate procedures for third parties directly affected, including nationals of other Member States to apply to the relevant authorities to seek effective compliance with the provisions of the Directive.
- \* Clarification of the conditions to be fulfilled and more flexibility in the proportional rule (new paragraphs 1(d) and 3a added to Article 6).
- \* Article 7 : Release windows : incorporates the same time limits as those proposed by Parliament.
- \* Article 9 incorporates Parliament's position.
- \* Articles 10 to 16 extend the rules on advertising to cover teleshopping:
  - recognizability;
  - respect for human dignity;
  - consumer protection;
  - alcohol and tobacco; etc.
- \* Article 11(3) incorporates Parliament position.

- \* Ban on teleshopping for medicinal products (Am. 44).
- \* Article 14 bans teleshopping for medicinal products subject to marketing authorization (Directive 65/65/EEC).
- \* Greater protection for minors against exploitation by teleshopping (Am. 102).
- \* Article 17 bans sponsorship to promote medicinal products available only on prescription.
- \* Clarification on the maximum permitted advertising time per clock hour and per day (Ams 45 and 46).
- \* Article 16(2) prohibits teleshopping from exhorting minors to contract for the sale of goods or services (the word "directly" does not appear in this provision).
- \* Teleshopping windows not to exceed 15 minutes and no more than four such windows per day (Am. 74).
- \* Article 18(1) and (2) incorporates Parliament's position
- \* Advance warning to be given by acoustic or visual means of programmes that may be harmful to minors (Am. 76).
- \* Article 18a stipulates a maximum window length of 15 minutes and no more than 8 such windows per day.
- \* Protection of minors against programmes that may be harmful to them (violence etc.); enabling parents to exercise direct control over programme reception (Ams 15, 52 and 55).
- \* Article 22(3) incorporates Parliament's position.
- \* Improving the provisions on the right of reply, guaranteeing prompt and effective access (Am. 57).
- \* Recital 33 and Article 22b cover Parliament's concerns and state a commitment to examining the technical possibilities (for example, the v-chip).
- \* Article 23(1) requires Member States to ensure that the right of reply is not hindered by unreasonable conditions and that the reply is transmitted within a reasonable time.

\* When the directive is revised, the Commission should examine whether any amendments of the directive are necessary with regard to subsequently developed services operating on individual demand (Am. 58).

\* Article 26 acknowledges that new technological developments will have to be taken into account when the directive is revised.

**A total of 29 of the positions or concerns expressed by Parliament in its opinion of 14 February 1996 on the Commission proposal were taken up in the common position adopted by the Council.**