COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31.05.1995
COM(95) 86 final

95/0074 (COD)

REPORT ON APPLICATION OF DIRECTIVE 89/552/EEC

and

Proposal for a EUROPEAN 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

---

(presented by the Commission)

Contents

PART C

Explanatory memorandum and examination of the provisions amended

Proposal for a European Parliament and Council Directive amending Directive 89/552/EEC

REPORT ON APPLICATION AND EXPLANATORY MEMORANDUM

PART A: INTRODUCTION

1 Institutional and political background

The "Television without frontiers" Directive, 89/552/EEC,[1] was adopted on 3 October 1989 after several years of debate within the Community institutions.[2] The intensity of the discussions reflected the place which television already occupied in our societies, at the heart of the major economic, industrial, cultural, social and technological challenges facing us.

The Community institutions' interest has by no means diminished since the adoption of the Directive. Several examples serve to illustrate this point: the Conclusions of the Strasbourg European Council in December 1989 and the Communication on Audiovisual Policy adopted in February 1990[3] in the wake of the Paris Audiovisual Conference, the adoption of the MEDIA Programme,[4] the Green Paper on concentration and pluralism in the media adopted by the Commission in December 1992,[5] the adoption of the Action Plan for advanced television services in 1993,[6] and the attention devoted to audiovisual matters in the GATT negotiations concluded on 15 December 1993.

1994 has seen a new burst of interest in and analysis of trends in a sector whose distinguishing features include its capacity for rapid development, particularly in response to technological change.

The Commission published its first report on the application of Articles 4 and 5 of the Directive in March this year, as part of its regular monitoring function,[7] and then went on to launch a much more ambitious study of the future of the programme industry, with the publication of a Green Paper entitled "Strategy options to strengthen the European programme industry in the context of the audiovisual policy of the European Union".[8] The Green Paper itself drew on numerous contributions from professionals in the field supplied during the preliminary consultations, and on the Report by the Think-Tank set

---

1 OJ No L 298, 17.10.1989, hereinafter "the Directive".

2 The Commission had presented its proposal on 30 April 1986 (COM(86)146 final, published in the Bulletin of the EC, Supplement 5/86.

3 COM(90)78 final.

4 Council Decision of 21 December 1990 concerning the implementation of an action programme to promote the development of the European audiovisual industry (MEDIA) (1991 to 1995) - OJ No L 380.

5 Pluralism and media concentration in the internal market - An assessment of the need for Community action - COM(92)480.

6 Council Decision of 22 July 1993 on an action plan for the introduction of advanced television services in Europe - 93/424/EEC - OJ No L 196 p. 48.

7 Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC Television without frontiers - COM(94)57 final - 03.03.94.

8 COM(94)96 final.

up by the Commission and comprising six well-known figures in the field.[9] The Green Paper was discussed extensively by the relevant ministers from the Member States at the informal Council meeting in Athens on 20 and 21 April 1994. The conclusions which the Presidency drew from these discussions broadly confirm the relevance of the analysis in the Green Paper and underline the need for the continued evolution of Community regulations, taking as a starting point the achievements of the Directive.

The European Parliament has also continued to show a strong interest in the audiovisual industry throughout 1994, notably by adopting the Barzanti[10] and Hoppenstedt[11] reports in May. Looking more specifically at the legislation in general and the Directive in particular, Parliament sought to reiterate the importance which it attributes to the Directive by attaching to the proposal for a directive on the use of standards for the transmission of television signals[12] an amendment[13] in the form of a recital emphasizing the need to reaffirm the role that the "Television without frontiers" Directive should play in boosting Europe's audiovisual capacity.

2 The Directive and the Green Paper on the programme industry

In its chapter on "The rules of the game", the Green Paper considers ways in which the Community regulatory framework might contribute more effectively to promoting the programme industry. Such an exercise becomes important when viewed in the light of Article 128(4) of the Treaty, which requires the Union to take cultural aspects into account in its action under other provisions of the Treaty, which therefore includes the Directive. For although the Directive includes measures aimed at promoting the production and distribution of television programmes, and although attention has often focused on this aspect, we should not lose sight of the fact that its original purpose was to contribute to the completion of the internal market for services, the Commission's White Paper on completing the internal market, published in 1986,[14] having identified the establishment of a common market in broadcasting as being important and urgent.

The Directive coordinates Member States' provisions in a number of areas where differences between them were such as to form a legal obstacle to the free movement of television broadcasts. The adoption of the Directive and the introduction of common rules in the areas where they were required now means that, provided a broadcaster established in a Member State complies with the law applicable in that state, its broadcasts may be received and retransmitted freely throughout the Union. The areas coordinated for this purpose go well beyond mere programme promotion to include matters such as jurisdiction, television advertising and sponsorship, the protection of minors and the right of reply. The report on application which forms Part B of this document therefore

---

9 Report by the Think-Tank on the audiovisual policy in the European Union.

10 Report on problems in the audiovisual sector since the "Television without frontiers" Directive: Commission Communication on the application of Articles 4 and 5 of Directive 89/552/EEC - PE 208 575.

11 Report on the Communication from the Commission on the evaluation of the MEDIA Programme COM(93)462 final - PE 209 002.

12 COM(93)556 final. OJ No C 341, 18.12.93, p. 18.

13 PE 180 706, adopted on 20.4.1994.

14 COM(85)310.

examines the implementation of the Directive in relation to all the objectives laid down and the legal means employed, not just in relation to the aspect of promoting programmes which forms the subject of the Green Paper on the programme industry.

3 The consultation process

There have been extensive consultations with all of the parties concerned on the aspects of the Directive concerned with the promotion of programmes on the basis of the questions raised by the Green Paper. At the same time the Commission has also conducted periodic consultations with those concerned on matters relating to the other areas coordinated. It has invited the Member States meeting in the ad hoc group[15] to submit written contributions on any practical difficulties in implementing the Directive.

Finally, with the European Audiovisual Conference which took place from 30 June to 2 July 1994, the general process of consulting the professionals in the field was extended to all the areas coordinated by the Directive. One of the four working groups at the Conference dealt with the "Rules of the Game". This group, which contained representatives of all the professional organizations involved, examined the Directive in depth, considering the relevance of its provisions in the light of the developments in the sector. Its overall verdict was positive, but it identified a number of provisions in need of updating or clarification.

The outcome of this consultation procedure, coupled with the Commission's own analysis of trends (notably in its Green Paper), which there is no need to re-examine here, have prompted it to propose the partial revision of the Directive which forms part C of this document. The Commission had already announced its intention of producing a proposal for a revision in its Action Plan on "Europe's Way to the Information Society"[16] in July 1994.

4 The Directive and the Information Society

The first chapter of the Action Plan deals with the regulatory and statutory framework of the Information Society; paragraph 10 deals with the audiovisual industry and, in particular, the content of audiovisual services. The aim is to ensure the free movement of such services within the Union, responding to the opportunities for growth in this sector opened up by new technologies and taking account of the specific nature, and in particular the cultural and sociological impact, of audiovisual programmes, whatever their mode of transmission.[17]

There is no need here to reiterate the importance of a content strategy to promote the development of the Information Society. Suffice it to say that this paragraph of the Action Plan lays down a principle that emerged clearly from the consultation process, namely that measures relating to the content of audiovisual services must take account of their

---

15 Group of representatives of the Member States set up by the Commission as part of the implementation of the Directive (representatives of the EFTA states also take part in the group's work in the framework of the European Economic Area, as does the Secretariat General of the Council of Europe).

16 COM(94)347 final, 19.07.1994.

17 COM(94)347 final, page 8, point 1.10.

cultural and sociological impact regardless of their mode of transmission. The object of such services is to deliver images and sound to consumers; the way in which these images reach their audience is of less importance than their content.

The Directive helps to establish a legal environment conducive to the development of the Information Society by making broadcasting services eligible for the benefits of the internal market, enabling them to move freely as long as they comply with certain ground rules.

At its joint meeting on Industry and Telecommunications on 28 September 1994, the Council congratulated the Commission on the speed with which it had presented its Action Plan. In the conclusions adopted at this meeting the Council identified several questions as being of particular urgency, including "improvement of the competitiveness of the European audiovisual and information industry in the world market, including the necessary development of a European programme industry taking due account of the cultural specificities and impacts on the society of these programmes".[18] It is in this spirit that the Commission is proposing a partial revision of the "Television without frontiers" Directive. The Commission has also started work on the legislative framework for the information society: it will shortly be presenting Green Papers on copyright in the information society, the legal protection of encrypted transmissions and commercial communication in the internal market and a communication on a mechanism to secure transparency about national regulations and their consistency with the principles of the internal market, and it has begun consultations on a possible Community initiative on media ownership. A Green Paper on the development of new broadcasting services will look at questions of encouragement for new broadcasting services, promotion of cultural identities and language diversity and the implications for the protection of the general interest.

5 Completing the preparations for amendment

Political circles once again demonstrated their interest at the end of 1994 when the Heads of State and Government meeting at the Essen European Council invited the Commission to present its proposals in time for their next meeting, due to take place in Cannes in June 1995.

This momentum has been kept up in the first few months of 1995. The directive was discussed by the ministers responsible for audiovisual matters at an informal Council meeting in Bordeaux on 13 February. In its conclusions, the Presidency notes that the Ministers felt that the planned amendments to the Directive must be based on experience, the European programme industry must be promoted, a greater measure of pluralism and diversity of operators had to be introduced and technological change in the information field and the emergence of new services had to borne in mind. To this end, they asked the Commission to submit a proposal for an amendment ... in order, amongst other things, to provide operators with clear and well defined rules on Governments' responsibility towards broadcasters, the development of the European programme industry, respect for pluralism and protection for the public in relation to new services. They recommended

---

[18] Conclusions of the Council 9561/94 (Presse 197), 28 September 1994.

that the proposals be sent to the Council in time for it to start preliminary discussions on 3 April.

Furthermore, when Parliament adopted its resolution on the Commission's work programme for 1995[19] on 15 March, it called on the Commission to adopt its proposal for an amendment to the Directive as soon as possible "maintaining and improving the measures on the application of the distribution quotas for European audiovisual production."

It is against this background that the Commission, taking account of the ongoing activities of the various institutions in this field, entered a new round of discussions with the industry and, on 22 March, presented a proposal for an amendment to the "Television without frontiers" Directive.

The present Directive is not, however, about to expire. It will remain in force until the adoption of a new text, and the Commission, acting in accordance with Article 155 of the EC Treaty, will continue to monitor compliance with it and do all that is necessary to secure its proper application.

---

19 PE 188.641.

PART B: REPORT ON THE APPLICATION OF DIRECTIVE 89/552/EEC

1 Subject of the report

Article 26 requires the Commission to submit to the Community institutions a report on the application of the Directive, accompanied if necessary by proposals to adapt it to developments in the field of television broadcasting, within five years from the date of adoption.

In this report the Commission has concentrated on identifying the problems encountered by Member States in applying the Directive, taking into account its general objectives. The explanatory memorandum accompanying the initial proposal made clear that the chief aim of the Directive was to create a common legal framework conducive to the development of a European market in broadcasting and related activities, such as television advertising and the production of audiovisual programmes, while respecting and encouraging the diversity and specificity of the audiovisual systems of the Member States. The Commission wishes to stress the importance of the combined economic and cultural component of this objective, which reflects the unique nature and special identity of this sector of activity. This was translated more specifically into a joint political determination to coordinate national legislation in certain areas in order to:

- encourage the provision and movement of audiovisual services within the Union,
- develop a modern European communications infrastructure capable of strengthening the Union's economic position and hence ensuring its competitiveness in the world market,
- promote the development of the market for television advertising and for audiovisual programmes in an economic and geographic context that extends to the Community's borders,
- increase the production and distribution of European works in order to encourage national cultural industries and the expression of the cultural identity of each Member State,
- offer new outlets for the creativity of the professions and workers in the cultural field,
- encourage the development of broadcasting as a strategic sector of the Community telecommunications industry.

The Commission has taken careful note of the comments made by Member States at its request about the practical difficulties they have experienced in applying the Directive. Regular exchanges took place over the period September 1993-June 1994 in the context of meetings organized by the Commission with national experts representing the Member States within the ad-hoc group.[20]

---

[20] Cf. Part A, point 1.3 above.

Provisions of the 1989 Directive

The Directive establishes the legal frame of reference for the free movement of television broadcasting services in the Union. To this end it provides for the Community coordination of national legislation in the following areas:

- law applicable to television broadcasts

The system established by the Directive, which introduces the rule of a single applicable law, hinges on a fundamental and twofold principle:

- each broadcaster shall be subject to the legislation of a single Member State, which is responsible for ensuring compliance (Article 2.1);
- Member States shall ensure freedom of reception and retransmission on their territory of broadcasts under the jurisdiction of another Member State (Article 2.2). The provisional suspension of retransmissions is allowed only in the event of repeated infringement of Article 22 (see below). This will give rise to a special consultation procedure involving the Commission, the transmitting State and the receiving State.

- promoting the production and distribution of European works

These measures are intended to encourage the European programme industry to adapt to the new audiovisual area created and require broadcasters to:

- reserve a majority proportion of their transmission time, excluding time appointed to news, sports events, games, advertising and teletext services, for European works (Article 4),
- reserve 10% of transmission time, or alternatively 10% of the programming budget, for European works created by independent producers, with an adequate proportion of recent works (Article 5).

A definition of the concept of European works is given in Article 6.

These rules do not apply to local television broadcasts which do not form part of a national network (Article 9).

- Televised broadcasts of cinematographic works

The Directive introduces a mechanism to establish a system of media time-scales: a cinematographic work may not be broadcast on television until two years after it was first shown in cinemas (or one year in the case of a co-production with a broadcaster). A different deadline may be agreed with the rights holders (Article 7).

- Television advertising and sponsorship

In the area of advertising the coordinated rules deal with:

- the general provisions to ensure that advertising is recognizable as such (Article 10);
- arrangements for advertising breaks (Articles 11 and 18);
- rules on ethical matters and the protection of minors (Articles 12 and 16); advertising for tobacco products (Article 13), medicinal products (Article 14) and alcohol (Article 15).

As regards sponsorship, the aim of the Directive is to ensure on the one hand that it is recognizable and on the other to prevent any influence being exerted on programme content (Article 17).

- Protection of minors (Article 22)

The Directive contains a general rule concerning programme content:

- a general ban on programmes likely to be seriously harmful to minors; and
- restrictions in the form of selected time of broadcast or technical means on programmes likely to be harmful to minors.

The Directive also contains a general ban on programmes containing incitement to hatred on grounds of race, sex, religion or nationality.

- Right of reply (Article 23)

This Article provides for legal redress for any person whose legitimate interests have been damaged by an allegation in a television broadcast, by appropriate rules of civil, administrative or criminal law.

In addition to these areas that are coordinated, the Directive contains a number of general provisions:

- Member States are free to:

- adopt stricter rules for broadcasters under their jurisdiction (Article 3),
- adopt stricter or more detailed rules on the proportions of European works where justified on grounds of language policy (Article 8),
- adopt other rules on advertising breaks for broadcasts intended solely for the national territory that cannot be received elsewhere (Article 20).

- Member States must:

- ensure compliance with the Directive (Article 3),
- ensure that appropriate measures are taken to penalize television broadcasts that do not comply with the rules on advertising and sponsorship (Article 21).

The deadline for Member States to comply with the Directive was 3 October 1991, two years after adoption. Although most of the Member States did meet this deadline, national implementing measures continued to be notified until July 1994. Acting under its powers to monitor the application of Community law, the Commission launched the infringement proceedings that proved necessary after examination of the measures. Two cases were referred to the European Court of Justice because the national legislation failed to comply with the Directive.

This Directive was followed by another, adopted in 1993, on copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission,[21] to be transposed into national legislation by 1 January 1995. Together the two Directives are intended to create a regulatory environment conducive to the growth of the broadcasting industry.

2 Economic considerations

The approximation of national legislation in the areas cited above has at any rate created a framework conducive to the free movement of television services between the Member States of the Union. The commitment of the Community institutions to coordination has enabled the national broadcasting systems, hitherto organized essentially along national lines for regulatory purposes, to respond to the constant pattern of change in the world audiovisual environment typified, over the last ten years by the explosion of communication technologies.

The establishment of a common legal framework, however limited, has encouraged the industry to organize itself in such a way as to benefit from a market that is much larger geographically and economically. There is plenty of evidence to support this analysis:

- Expansion in services

The number of national and cross-border television channels in the European Union has grown steadily in recent years, from 77 in 1988 to 85 in 1989, 92 in 1990 and 1991, 111 in 1992 and 129 in 1993.[22] Much of the increase is due to the appearance of a growing number of satellite channels, many of them catering for special interests, and all of them financed either by advertising or subscription.

- Growth in the advertising market

The increase in the number of national and cross-border television channels has led to a very large increase in advertising investment in television. Income from television advertising increased by 50% between 1989 and 1992.[23]

---

21 Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.93). In its initial 1986 proposal the Commission had included provisions on copyright and related rights, but the Council preferred to deal with them in a separate Directive.

22 Source: Marché mondial du cinéma et de l'audiovisuel, Etude IDATE (Institut de l'audiovisuel et des télécommunications en Europe), December 1993, vol. 2, p. 39.

23 European Advertising & Media Forecast - March 1994.

The Commission also found that the television advertising expenditure of the 100 leading pan-European brands rose by 21% between 1990 and 1991 and by 28% between 1991 and 1992.[24]

- Generally positive outcome for European works

In line with the monitoring system established by Article 4(3) of the Directive, the application of Articles 4 and 5 formed the subject of a separate Commission communication sent to the Council and Parliament in March 1994.[25] The results recorded on the basis of the statistics supplied by the Member States show that the vast majority of broadcasters complied with the proportions laid down in Articles 4 and 5 for European works and independent productions in the period 1991-92. Even where the proportions were not actually achieved, the Commission noted an overall upward trend.

The Commission would sum up the results as follows:

- *broadcasts of European works (statistics were supplied for all channels referred to in the national reports. The overall average complying with the required proportion was 66.6%):*

  Portugal, Ireland, Denmark, the Netherlands: all channels broadcast at least a majority proportion of European works, if not more;

  United Kingdom, France: all channels broadcast over the air transmitted over 50% of European works;

  Italy, Spain, Belgium, Greece, Germany, Luxembourg, France (one cable channel), **United Kingdom** (certain satellite channels): certain channels did not broadcast the requisite proportion of European works.

In most cases general interest channels broadcast over the air achieve proportions well over the requisite 51% and rarely fall below 40%.

- *independent productions (statistics were not supplied for all channels referred to in the national reports; the overall average complying with the required proportion was 68.4%):*

  France (the only country to have opted for "proportion of programming budget"), **Germany, Denmark, the Netherlands**: all channels complied with the 10% figure;

  Spain, Ireland, Portugal: statistics were supplied for all channels. One of these (a Portuguese channel) complied with the 10% rule, the others achieved proportions between 5 and 9%;

---

24 AFEP - 6 September 1994.

25 COM(94)57 final, 3.3.94.

Luxembourg, Belgium, United Kingdom, Greece, Italy: statistics were not supplied for all channels. Where data were provided the majority of channels achieved proportions of over 10%.

- *Recent works (statistics were not supplied for all channels referred to in the national reports):*

  Italy, Portugal, Germany, Denmark, Greece, France, Ireland: no statistics;

  Spain, the Netherlands: statistics supplied for all channels (proportions of between 1 and 3% in Spain and between 9 and 29% in the Netherlands);

  United Kingdom, Luxembourg: statistics supplied for the majority of channels (proportions of between 1 and 15% in Luxembourg and between 1 and 100% in the United Kingdom);

  Belgium: statistics supplied for two channels (67.7% for one, 3.4% for the other).

The Commission considers the results generally encouraging, although the variety of criteria used by the Member States and the differences in presentation of the national reports highlight a series of methodological, technical and legal problems which have complicated the Commission's job of monitoring the application of the system (see point 3.2.2 below).

3 Application of the Directive

3.1 General problems

3.1.1 Applicable law

The operation of the system of free movement set up by the Directive has encountered one legal difficulty: the problem of identifying the place with which certain television channels have a legal tie. So far though there have been few actual cases in which this difficulty has arisen, but the Commission believes that the increase in the number of satellite television services will make this problem more and more acute. The problem is to identify the criterion which determines that a broadcaster is legally under the jurisdiction of a particular Member State. Article 2.1 provides two possible linking factors between a broadcaster and a particular national legal system:

- the broadcaster is under the jurisdiction of that Member State; or
- the broadcaster is not under the jurisdiction of any Member State but makes use of a frequency, a satellite capacity or a satellite up-link situated in that Member State.

The effect of using different criteria to determine whether a Member State has jurisdiction might be an increase in the number of cases where a channel is potentially under no State's jurisdiction (conflicting renvoi of jurisdiction) or under several States' jurisdictions (conflicting claim of jurisdiction). An example of a conflicting disclaimer of jurisdiction

is the case of Red Hot Television,[26] discussed below, and an example of a conflicting claim of jurisdiction is the case of RTL-TVi, included by both Belgium and Luxembourg in their national reports on the application of Articles 4 and 5.[27]

In cases of conflicting disclaimer of jurisdiction, such as the Red Hot Television case, it is difficult to take measures against a channel which evades all legal controls, being broadcast from the Netherlands or Denmark but liable to be regarded as established in the United Kingdom.[28]

Cases of conflicting claims of jurisdiction, on the other hand, are likely to undermine the operation of the Directive by producing a cumulation of laws applicable to a single broadcaster (laws which may contain mutually incompatible provisions).

Establishment as the decisive criterion

These practical examples underline the need for common criteria to determine which national law is to apply in each case. The Commission and the majority of Member States regard the broadcaster's place of establishment as the primary connecting factor. This option is based as much on the history of the Directive, its wording and its purpose as on a general trend in Community law and the consistent case law of the Court of Justice.[29]

---

26 Reference was in fact made to the European Court of Justice for a preliminary ruling on two questions relating to Red Hot Television; they concerned the concept of "retransmission" and the definition of the nuisance caused by certain programmes rather than the problem of legal link (C-327/93; see below at points 3.2.1 and 3.2.5). However the case provides a useful example. The channel began broadcasting in July 1992 from a satellite up-link situated in the Netherlands and, from December 1992, from a satellite up-link situated in Denmark, with certain elements of relevance to its broadcasting activities being situated in the United Kingdom. The British authorities decided to intervene to halt the broadcasts on their territory and the question which then arose was which Member State had jurisdiction. In fact it came under the jurisdiction of neither Denmark, nor the Netherlands, nor even the United Kingdom because the law in the first two countries stipulates that establishment is the legal link giving jurisdiction, while British law focuses on the place where the satellite up-link occurs.

27 See Communication of March 1994, op. cit. p. 13.

28 IP(93)251, 2.4.1993.

29 Cf. Articles 58, 59, 60, 66 of the Treaty; General Programme for the abolition of restrictions on the freedom to supply services (OJ 32/62, 15.1.1962, p. 32); and *Factortame* Judgment (Case C-221/89 [1991] ECR I-3905).

Historically, the Commission's original proposal clearly took place of establishment as the connecting factor.[30] The revision of the wording to refer to jurisdiction rather than the proposed concept of establishment was made to solve a specific problem arising in Germany, where Allied Forces radio broadcasting (the original proposal encompassed radio broadcasting) originated and was established in Germany but was not under Germany's jurisdiction. The wording actually adopted by the Council supports the view that the original intention to define the jurisdiction of the Member State as depending on the place of establishment is maintained since the first indent of Article 2(1) refers solely to broadcasters and the second indent explicitly mentions purely technical criteria. The purpose of the Directive also supports this interpretation, because the ideal of a single applicable law depends on a clear connecting factor, and place of establishment is obviously the best one, better at any rate than the alternatives. On a technical level, for example, a broadcaster can easily up-link the same programme to different viewers via different satellites or up-link it from several different Member States simultaneously.[31]

Although the Commission remains convinced that establishment is the only factor that will really work, it is open to the idea of identifying criteria that can be used to define the concept of establishment more precisely in the specific context of the broadcasting business, in order to ensure a high level of stability and legal certainty for organizations operating in the Union and hence to foster the development of cross-border television.

3.1.2 A fundamental ambiguity

The particular blend of measures in the Directive was the result of a political compromise complicated by the fact that the broadcasting industry is of both economic and cultural interest. The final text was adopted in 1989 after prolonged discussions within the Community institutions. The Council reached agreement on a Directive containing certain provisions whose ambiguity has led to quite widespread problems of application. This is particularly true of Articles 4 and 5 on the proportions of European works and independent productions to be broadcast. The flexibility which was deliberately allowed in the application of these measures by the inclusion in these two articles of the phrases "where practicable", "progressively" and "by appropriate means" opened the way to the creation of mechanisms that differed markedly from one Member State to the next and entailed varying levels of obligation. This has led to uncertainty about the application of the principle of freedom of reception and retransmission enshrined in the Directive.

A specific example will serve to illustrate this point: the broadcast from the United Kingdom of television channels known as TNT/Cartoon, which were the subject of complaints by a European professional organization and a French special-interest

---

30 This article establishes the principle that all broadcasting activity intended for reception within the territory of the Community must comply with the laws of the country in which it originates, i.e. the Member State in which the originating body is established, whether the programme is intended to be received by the public in that Member State or in other Member States.(point 43 of the explanatory memorandum).

31 Broadcasters may wish to "simulcast", i.e. transmit the same programme using different transmission standards in order to reach different geographical markets (PAL or SECAM) or different types of market, e.g. D2-MAC or PAL PLUS for the 16/9 television market.

television channel.[32] The two channels had licences issued by the British authorities under the special scheme set up by British law for "non-domestic" satellite television channels. This scheme contains provisions to encourage the broadcasting of proportions of European works and independent productions that are noticeably less strict than the rules laid down for terrestrial channels or domestic satellite channels.

The wording of Articles 4 and 5 ("wherever practicable") thus gives such channels *carte blanche*, because of the freedom of reception and retransmission enshrined in Article 2(2), to transmit broadcasts across frontiers that contain very few, if any, European works and independent productions, because of the alleged "inapplicability" of such obligations to channels whose programming is voluntarily restricted to material from non-member countries (despite the fact that the programmes broadcast do in fact fall into the categories addressed by Articles 4 and 5). As was apparent in the case of the channels concerned, such a situation is bound to lead to disputes because it causes serious problems of discrimination and unfair competition for professionals, broadcasters and producers in the various Member States. An example here would be the case of the TNT/Cartoon channel, which prompted a Belgian court to submit a request to the European Court of Justice, on 29 November 1994, for a preliminary ruling on the interpretation of Articles 2, 4 and 5 of the Directive.

The Commission realizes that the present wording of Articles 4 and 5 allows Member States to introduce arrangements of varying degrees of flexibility to encourage compliance. However, it strongly contends that a Directive should not be transposed into national law in such a way as to distort its fundamental objectives. It is worrying that certain Member States do not have adequate legal instruments or other means of control or penalties to ensure that compliance with the application of the Articles in question took proper account of the objectives which, in this case, were essentially to promote the production and circulation within Europe of European and independent audiovisual programmes.

Replying to a Parliamentary question on 4 January 1990, the Commission drew attention to the fact that the Directive was legally binding on the Member States in its entirety and pointed out that, while the flexibility incorporated into Articles 4 and 5 made assessment more difficult, it in no way detracted from the legal nature of what amounted to an obligation to behave in a certain manner.[33]

---

32 Other complaints have been received about the alleged non-application of Articles 4 and 5. The most recent - from Italy - is currently being examined.

33 Written question No 758/89 by Mr Kenneth Collins (OJ C 97, 14.4.1990)

3.2 Specific problems

3.2.1 Article 2(2) - Freedom of reception

The Red Hot Television case referred to above (point 3.1) raised an important question about the term "retransmission" used in Article 2(2). This Article expressly states that in the event of an infringement of Article 22 (protection of minors) and subject to the observance of the procedure specifically laid down for this purpose, a Member State may provisionally suspend the "retransmission" of the offending broadcasts. The question, then, is whether the provisional suspension applies only to cable television.

The Commission's view is that retransmission should be understood in the broadest possible sense. Restricting it to cable television would imply that the special procedure for provisional suspension would not apply where a satellite channel infringed Article 22. In practical terms this would mean that in a Member State with both satellite and cable transmission systems the same channel might be provisionally suspended from the cable still available via antenna. Similarly, a Member State in which cable television predominated would find itself in a different position from another Member State where direct reception was more common, because the first would have every opportunity to use the suspension procedure but the second would not.

Such an interpretation would have the effect of emasculating the provision in question, creating *de facto* discrimination contrary to the general objectives of the Directive. The Commission notes that the purpose of the combined procedure of Articles 2(2) and 22 is to enable Member States that deem it necessary to restrict the broadcast on their territory of channels infringing Article 22.

One final comment should be made about this procedure, and more specifically subparagraph (b). The Member State does not have to wait a full 12 months before instigating the procedure; it is sufficient for Article 22 to have been infringed twice in the course of the 12 months preceding the instigation of the procedure.

3.2.2 Chapter III - Promoting the distribution and production of television programmes

- Monitoring Articles 4 and 5

As was shown above (point 2.3), the Commission issued a specific Communication on the application of Articles 4 and 5, concluding that the results were generally positive. But that first monitoring exercise revealed a series of problems that complicate any evaluation of the impact of these measures in business terms, based on data supplied in the national reports.

These problems stem partly from the ambiguity of the wording of Articles 4 and 5 (see point 3.1.2) and partly from other methodological, technical and legal difficulties associated with the monitoring exercise itself, such as differences in presentation of national reports, the different reference criteria used by the Member States, the definition of certain concepts used (e.g. independent producer), and the failure to supply statistics about certain new channels and, more generally, about the proportions of independent - and particularly recent - productions. With regard to the latter, the Commission notes that

the main difficulty Member States encountered was judging what constituted an "adequate proportion" to be earmarked for recent independent productions.

As to the question of what constitutes an independent producer, the Commission has carried out an economic analysis and consulted representatives of the Member States in the Ad-hoc Group and on this basis has suggested that a producer should be regarded as independent of television broadcasting organizations if:

- no single television broadcasting organization holds more than 25% of the production company's equity (or 50% in the case of several television broadcasting organizations);
- the producer does not supply more than 90% of its output over a period of three years to a single television broadcasting organization, unless the producer makes only one programme or a single series in the whole of this reference period;

on the understanding that these criteria must also be applicable the other way round (e.g. if a producer has a significant holding in a television broadcasting organization). The Commission has thus given the Member States the means to define the concept of an independent producer for themselves, on the basis of common criteria, for the purpose of applying Article 5 of the Directive. For further details see Chapter 5 of the report on application of Articles 4 and 5, cited above.

This being the very first report, the Commission's overall assessment of the exercise took account of the problems encountered by the Member States in implementing the necessary control mechanisms, in particular the problem of data collection. Even so, it considered it unsatisfactory that the vast majority of the Member States failed to indicate the measures adopted or envisaged to deal with broadcasters under their jurisdiction that have not achieved the required proportions, despite the fact that Article 4(3) specifically requires this. In May 1994, a letter was accordingly sent to all the Member States directly concerned, requesting precise information on the subject. The Commission reserves its position on whether or not these national measures adequately comply with the requirements of Articles 4 and 5.

To sum up this point, the Commission considers that the results of the first period of application of Articles 4 and 5 are encouraging, primarily because of the general upward trend.

Article 4(4) expressly mentions the possibility of proposals to revise Articles 4 and 5. When adopting its first monitoring report, the Commission made clear that the question of refining or strengthening the system set up by Articles 4 and 5 was under consideration, while making the point that harmonization in this area was essential to help independent operators in the context of the new Community audiovisual market established by the Directive.

However, the Commission did not consider it appropriate to put forward proposals for revision in March 1994, given that it was due to present an overall assessment of the application of the Directive before the end of the year. It therefore preferred to await the overall assessment before proposing any changes, which could then be brought together in a broader set of proposals.

This approach also allowed it to take into account the outcome of discussions on the Green Paper on audiovisual policy.

- European works

The Member States mentioned no particular problems with the application of Article 6 as regards the definition of European works, although there were requests for information about the state of ratification procedures for the agreements with certain non-member countries. However, the Commission is aware of the fact that parties in non-member countries wishing to invest in production in the European Union sometimes experience difficulties because of disparities in national measures.

- Cinematographic works

The principle laid down in Article 7 that, unless agreed otherwise with the rights holders, a specified period must elapse between a cinematographic work being shown for the first time in the cinema and being broadcast on television has presented only one difficulty of application in a small number of Member States. This relates to the point which marks the start of the period in question, which is to be the first cinema showing in any of the Member States of the Union.

The Commission does not share the view of some Member States that the starting point can be replaced by the first showing in national cinemas. Such a change would have the effect of undermining the intended harmonization in this area, by creating a chain reaction of discrimination between broadcasters in the various Member States and hence paralysing the commercialization of cinematographic works. These problems of discrimination would also become increasingly acute as more satellite television services were developed.

While giving a degree of priority to agreements between the professionals, the Directive opts for a certain degree of harmonization to prevent the emergence of national regulations diverging so widely as to interfere with the transmission of television broadcasts across frontiers. Any proposal to count the period from the time of showing in national cinemas would completely defeat the purpose of this provision, because harmonization can only be based on a single starting point for the requisite period. The Commission would also stress that it remains convinced that priority should be given to agreements between the professionals.

3.2.3 Chapter IV - Television advertising and sponsorship

The measures relating to television advertising and sponsorship have presented no fundamental problems and have on the whole been correctly applied in all Member States. However, the Commission has been asked on several occasions to clarify its interpretation of certain provisions, for in certain cases it feels the Member States should have some scope for adapting measures to their individual situations in compliance, nevertheless, with Community law. Thus, on 9 February 1995, in a preliminary ruling, the Court of Justice recognized that a national measure prohibiting the broadcasting of advertising for the distribution sector by broadcasters established in the Member State in question was not contrary to the Directive (Leclerc, C-412/93).

The requests for interpretation have related to the following questions:

- identification of name or logo of sponsor (Article 17(1)(b)

The Commission considers that the provision requiring sponsored programmes to be clearly identified as such at their beginning and end does not mean that the sponsor's name and or logo cannot be mentioned during the programme; but all other relevant provisions must be complied with scrupulously, and the Member States retain the power to regulate broadcasters within their jurisdiction in a stricter or more detailed fashion.

- advertising spots broadcast within a given one-hour period (Article 18(2)

How is the hour to be measured: does the provision apply to a 60-minute period starting on the hour or to any 60-minute period whatever? The Commission, like the majority of Member States and broadcasters, has chosen the first option, to simplify monitoring.

- programmed duration of audiovisual works for the purposes of advertising breaks (Article 11(4) and (5)

Should the duration include advertising time, including advertising for the programme itself, and sponsorship? This has been a source of controversy in Germany in particular, where the Koblenz Court of Appeal was asked to rule in March 1994 on the "gross-net" issue. In the Commission's view "gross" time (i.e. including the duration of advertising spots) constitutes the minimum level required for the purposes of the directive, but it admits that here again the Member States retain the power to regulate broadcasters within their jurisdiction in a stricter or more detailed fashion.

- status and calculation of the maximum permissible volume of 'telepromotion'[34]

The Commission has been at pains to point out that telepromotion should, in its opinion, be treated as a form of advertising that is lawful in principle and therefore subject to all the provisions on advertising contained in the Directive.[35] But there are two quantitative parameters that are not alternatives but cumulative. The 20% maximum (Article 18(1)) and the maximum number of hours per day (Article 18(3)) are both applicable. The Article 18(2) restrictions on advertising volumes per hour are not, however, applicable, since they apply only to spot advertising. The option open to the Member States here relates to the possibility of raising by 15% to 20% the daily broadcasting time devoted to advertising.

- home shopping

The Commission has been asked to specify that, under the Directive as it currently stands, a television service that includes direct offers to the public for the sale or rental of a produce or service is covered by the Directive's definition of "television broadcasting"

---

[34] Television promotion of products or services by means of games or studio shows.

[35] IP(93)396, 24 May 1993.

schedule, is therefore subject to the restrictions laid down in Article 18, which means that such advertising may under no circumstances exceed one hour per day. However, it should be added that services which comply with no limitations on broadcasting time may be established in any Member State provided they cannot be received directly or indirectly in one or more other Member States (see Article 20).

This system of restriction applying only to home shopping presents problems of application. In 1994 several complaints were referred to the Commission regarding the failure of certain satellite television channels licensed in one Member State and therefore liable to be freely received in the others to comply with this restriction. The Commission therefore feels it should emphasize the fact that the development of this activity, which is facilitated by the increased opportunities for broadcasting, should be encouraged as it is highly valued by consumers. It accordingly believes that the principle and content of this restriction should be revised in the light of general business considerations in the broadcasting industry, in order to avoid a large increase in the number of disputes and promote the development of a new and essentially legitimate type of service.

3.2.4 Chapter V - Protection of minors

A second question put in the Red Hot Television case (see points 3.1.1 and 3.2.1) is whether programmes likely to "seriously impair" the development of minors could be considered lawful on the same grounds as programmes liable simply to "impair" it. The latter can be transmitted provided that broadcasting times or technical means are chosen to ensure that minors in the area likely to receive the broadcast are protected. But the aim of the legislation was clearly to establish a general prohibition on programmes likely to "seriously impair" the development of minors.

The fact that a national court felt the need to refer the question to the European Court, however, suggests a need to clarify the wording. The Commission therefore feels that Article 22 should be formally clarified in order, first, to make it easier for a Member State of reception to use the temporary suspension procedure authorized in the event of repeated infringements by a channel that is not under its jurisdiction (Article 2(2) in conjunction with Article 22) and, second, to improve the application of the system for protecting minors. Such a clarification would, incidentally, help to meet the concerns of the European Parliament, expressed in particular in its report on pornography (rapporteur Mr J.T. Nordmann), adopted in December 1993.[36]

3.2.5 Chapter VI - Right of reply

No particular problems of application have been cited.

* * *

This first exercise has underlined the value of the Directive in the body of Community legislation. In an international environment that is changing and constantly evolving it constitutes the essential base on which to build the expansion of the European audiovisual

[36] PE 204.592.

4)

industry and the improvement of working conditions for those involved. Growth in this sector is crucial and was recognized as an urgent priority by the Essen European Council (10-11 December 1994) which stressed the importance of new information services and content and the essential cultural contribution the audiovisual industry had to make to the development of the Information Society.

PART C: EXPLANATORY MEMORANDUM AND EXAMINATION OF THE PROVISIONS AMENDED

1 Nature and thrust of the proposed revision

Article 26 provides for the Commission, if necessary, to make proposals to adapt the Directive to developments in the field of television broadcasting, over and above its report on application. The Commission has accordingly prepared the proposal for a revision which appears as Part D of this document, taking account of three types of factor:

- the conclusions it draws from the report on application and the contributions of Member States on the practical difficulties they have encountered;
- the conclusions it draws from the broad consultation process conducted with the professionals in the field and the Member States in the course of 1994 and the first few months of 1995;
- its analysis of trends in the audiovisual industry, particularly in the Green Paper and its work on the Information Society.

In formulating its proposal the Commission has tried to strike a balance, taking account of sometimes incompatible or contradictory interests, seeking above all to enhance the legal certainty of a Community instrument that is generally well regarded by all concerned and essential for the development of the industry. There is a consensus on the essential value of the Directive, so it is neither necessary nor desirable to rework the text substantially. However, while leaving the general structure of the Directive unchanged, certain significant changes and several secondary improvements are necessary to bring the Directive up to date and improve the way it operates, the aim being to produce an instrument that can provide a stable legal framework conducive to the development of the audiovisual industry in the Union until the end of the century.

With regard to scope, however, the definition of television broadcasting in Article 1(a) of the 1989 Directive has not been changed. It covers "traditional" television services as well as newer ones such as "pay-per-view" and "near-video-on-demand".[37] All point-to-multipoint services, i.e. services broadcast simultaneously to more than one receiver (television set) are already covered and fit into the framework created by the Directive.

It was not felt to be advisable to extend the scope of the Directive to the new point-to-point services because of the specific nature of the problems they present. The Commission is nevertheless aware of the urgent need to start constructing a legal framework which will allow these new audiovisual services to develop in Europe, in a way which safeguards the public interest. The Commission has devised a legal framework for information society services under which the legal regulation of each one of them must be anchored in the single market and initiatives must always towards avoiding market fragmentation, over-regulation in the Community context and conflicts between instruments that might be prejudicial to the development of these services. The Commission is of the opinion that it is too early and too risky to try establishing now

---

37 For the purposes of the Directive, NVOD refers to pay-per-view multiplexed services.

what the future Community regulations might look like, since there is inadequate information about the problems these services may generate and the proper Community response to them. The Commission, therefore, prefers to launch a fact-finding and consultation exercise on individual questions such as copyright (Green Paper in preparation), legal protection of encrypted transmissions (Green Paper in preparation), commercial communication (Green Paper in preparation), media ownership (consultations in progress) and transparency of national regulations and their consistency with the principles of the single market (paper in preparation). A Green Paper on the development of new broadcasting services will look at questions of encouragement for new broadcasting services, promotion of cultural identities and language diversity and the implications for the protection of the general interest.

At this stage, the Commission is therefore convinced of the need for a limited revision of the Directive. Three are three basic reasons:

- first, certain clarifications of the existing regulations have proved essential for reasons of legal certainty and efficiency: there was a need for clearer criteria determining which Member State has jurisdiction over a broadcaster and the rules on the protection of minors required clarification;
- second, certain rules have to be amended to take account of the new economic and technological realities of the industry: this means, in particular, setting minimum rules to allow for the development of cross-border home-shopping services, extending the opportunities for broadcasters to insert advertising material in their programmes;
- third, Member States' reports in the context of the monitoring of Articles 4 and 5 of the Directive, coupled with the conclusions of the consultations on the Green Paper, have demonstrated the need to amend certain aspects of the rules on the promotion, distribution and production of European works.

In proposing this limited revision, the Commission seeks to build on the achievements of the Directive, particularly as regards its principal aim of ensuring the free movement of services, but also to maintain the balance which it strikes in important areas: between protecting general interests and the development of audiovisual services and between the development of these services and strengthening the European programme industry.

2 The provisions amended

(N.B. the paragraphs of this section follow the text of the proposal for amending the Directive.)

2.1 Chapter I - Definitions (for the current Directive)

Article 1(b) and (e)

The proposed definition of home shopping singles out the characteristic of home shopping that distinguishes it from advertising: home shopping services take the form of programmes or spots offering goods or services directly to the public in return for payment. The new home-shopping provisions aim to open the way for the development of televised home-shopping services in Europe on a trans-national basis.

2.2 Chapter II - General provisions

Article 2

The amendments proposed here are necessary for the reasons set out in point 3.1.1 of the report on the application of the Directive. They are a response to a general request by the Member States meeting in the Ad-hoc Group. The growth in the number of audiovisual services will make it increasingly necessary to be able to ascertain clearly and with certainty which broadcasters are under the jurisdiction of which Member States. The problem particularly concerns channels broadcast by satellite. It is worth restating the Commission's technical and legal analysis here.

2.2.1 Establishment as the criterion laid down under the Directive determining jurisdiction

The Directive was adopted to provide the legal framework for the free movement of television broadcasts in the Community. This movement would be impeded if the legislations of several Member States were to be applicable to a given broadcast at the same time.

Article 2(1) of the Directive therefore provides that the law applicable to a television broadcast is that of the Member State under whose jurisdiction the broadcasting organization falls, ensuring application of a single law.

In cases where a broadcaster is active on the territory of the European Community but does not fall under the jurisdiction of any Member State, the Directive provides subsidiary criteria to determine the law applicable to the broadcast in question. These criteria, set out in the second indent of Article 2(1), are as follows:

- the use of a frequency granted by a Member State;
- the use of a satellite capacity granted by a Member State; or
- the use of a satellite up-link situated in a Member State.

The Commission takes the view that the decisive criterion for determining jurisdiction is the Member State where the broadcaster is established. This is clear both from the wording of the Directive itself, its context, its history and, above all, from its purpose.

I Background

The Commission's original proposal of 6 June 1986 clearly defined establishment as the determining criterion for "jurisdiction". Paragraph 43 of the Explanatory Memorandum contained an explicit definition of the notion of "jurisdiction" as meaning "the Member State where the broadcaster is established".

Paragraph 43 reads: "This article establishes the principle that all broadcasting activity intended for reception within the territory of the Community must comply with the laws of the country in which it originates, i.e. the Member State in which the originating body is established."

The revision of the wording to refer to "jurisdiction" was made solely to solve a specific problem arising in Germany, where Allied Forces radio broadcasting (the original proposal encompassed radio broadcasting) in Berlin originated and was established in Germany but was not under the jurisdiction of the Federal Republic.

The original legislative intent to define the Member State's jurisdiction as the place where a broadcaster is established was not abandoned.

II Wording

The Commission's position is also consistent with the wording of Article 2(1) first indent. The reference to "broadcasters" means that the Member State responsible is to be identified on the basis of criteria which are relevant to the organization which is responsible for the broadcast, and not to the services which it broadcasts.

It is also of relevance that Article 2(1) second indent refers to purely technical criteria. The legislator would have explicitly made reference to a technical criterion in the first indent also, if the intention was to take technical operations to determine the Member State which has jurisdiction over a given broadcaster.

III Context

Television broadcasting constitutes a "service" within the meaning of Articles 59 and 60 of the Treaty.[38] Similarly, the Directive aims at ensuring the freedom to provide broadcasting services within the Community. Beneficiaries of the freedom to provide services within the meaning of Articles 59 and 60 are "nationals of Member States who are established in a Member State other than that of the recipient of the service."

With regard to companies, Article 58(1) of the Treaty stipulates the criteria of the registered office, central administration or principal place of business when defining companies entitled to benefit from the chapter on the right of establishment. Article 66 provides for the application of Article 58 for companies in the context of freedom of services as well. Therefore, beneficiaries of the freedom to provide services within the meaning of Articles 59 and 60 are companies which have their registered office, central administration or principal place of business in a Member State other than that of the recipient of the service.

The term "jurisdiction" in Article 2(1) of the Directive cannot be construed in a sense which fundamentally differs from Article 58 of the Treaty. The Community legislator would have had to lay down specific and precise rules if the intention had been to set the conditions for the freedom to provide broadcasting services following a different pattern from the usual.

Court of Justice case law substantiates this view and provides further guidance. The Court of Justice stated in the *Factortame* case[39] that the "concept of establishment within the

---

38 ECJ, Case 155/73 [1974] ECR 409.

39 ECJ Case C-221/89 [1991] I-3905.

meaning of Article 52 et seq. of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in a Member State for an indefinite period." The Court pointed out further that the concept of establishment coincides with the place where an economic activity is managed and from where the operations are directed and controlled. In this regard, Advocate-General Mischo pointed out the significance of the fact that Article 58 lays down the criterion of the registered office, central administration or principal place of business when defining the companies entitled to benefit from the chapter on the right of establishment.

Other Community documents may be quoted which consistently underline that the mere fact of an organization having its legal seat in a Member State is not in itself sufficient to determine its establishment within the meaning of the Treaty, but that an effective and durable link with the economy of the Member State concerned is also required (see for example the General Programme for the suppression of restrictions on the freedom to supply services, adopted by the Council in 1962, OJ No 32/62, 15.1.62).

Applying these principles to broadcasting as a specific activity, the Commission recommended in its Suggested Guidelines for the monitoring of the TV without frontiers Directive, dated 15.2.93 (discussed at length with the Member States in the ad-hoc group) that relevant criteria for determining the place of establishment should bear upon the real economic activities involved, such as programme producing, assembling of schedules, exercise of editorial control in relation to each programme service in question, rather than on purely technical operations on the telecommunications side.

IV Purpose and practical considerations

Besides the legal arguments, the Commission believes that the place of establishment is by far the most effective basis for determining jurisdiction in the light of the objectives of the Directive.

Article 2(1) seeks to ensure the application of a single law to all broadcasts within the Community, namely the law of the originating Member State. This requires the application of a criterion, or criteria, guaranteeing as high a degree of stability as possible.

The criterion of jurisdiction, determined on the basis of the place of establishment of the broadcaster, is the most appropriate and the most efficient in terms of allocating legal responsibility for broadcasting organizations. Because of its emphasis on the broadcasting organization, it is less likely to give rise to problems in conferring responsibility over a particular programme service.

The up-link criterion does not guarantee stability as technological progress has been such that satellite up-links have become highly mobile and are used in several ways. It is for example increasingly common to up-link different time slots or "windows" of the same programme service from different Member States. Broadcasters may choose to transmit the signal of a single programme service from one up-link at one time of the day and from another at another time, e.g. mornings and evenings.

It may also be the case that a broadcaster up-links the same programme to different viewers via different satellites, for example using the option of "simulcasting", i.e. transmitting the same programme using different transmission standards in order to reach different geographical markets (PAL or SECAM) or different types of market (e.g. PAL-PLUS or D2-MAC for the wide screen market). In such cases it may be appropriate to up-link the same programmes from different places at the same time.

The up-link criterion could give rise to legal uncertainty, as it would be possible for a broadcaster simply to move its satellite up-link into the territory of another Member State and thus escape from the application of the law of a Member State. The case of Red Hot TV has clearly demonstrated the risk of a legal vacuum.

The increasing number of problems which can be attributed to the up-link criterion strengthens the case for not taking it as the criterion for determining jurisdiction.

This phenomenon will accelerate with the advent of digital transmission techniques which will eliminate to a large extent the technical constraints traditionally applying to broadcasting as an activity.

2.2.2 Clarification of the "establishment" criterion as applied to audiovisual services

In view of the above, the Commission remains convinced that establishment is the most effective basis on which to determine jurisdiction. However, in the light of experience, it believes it is necessary to refer in Article 2 itself to the cumulative criteria identified by the Court of Justice, namely actual pursuit of an economic activity and a fixed establishment in the Member State in question.

The proposal would also add a recital specifying a series of relevant factors qualifying the notion of establishment for the purposes of applying the Directive, with a view to identifying and clarifying the establishment rule in order better to achieve the basic objectives of stability and legal certainty. These criteria must also take account of the legal context of Community law as regards establishment as well as the specific nature of broadcasting as an activity.

The following criteria are suggested:

- the place where the broadcasting organization has its head office (i.e. where the company is set up under the law of a Member State, having its registered office, central administration or principal establishment in this Member State),
- the place where decisions on programming policy are usually taken.
- the place where the programme to be broadcast to the public is finally produced.

These are the principal criteria, the second and third relating specifically to broadcasting. However, they many not in themselves be sufficient to ensure an "effective and stable link" with the economy of the Member State concerned. A further condition should therefore be added:

- provided a significant part of the workforce is employed in the same Member State.

"Significant" here should be taken to mean a quantitatively important share of the workforce but also, and above all, a qualitatively significant part (people with an activity directly linked to the production and/or marketing of the programmes).

Any disagreement that still arises between the Member States, despite the application of these criteria, will be for the domestic courts or, ultimately, the Court of Justice, to resolve.
Finally, a broadcaster which is not "established" in a Member State within the meaning of paragraph 2 but uses a frequency, satellite capacity or satellite up-link under the jurisdiction of a Member State will be subject to the law of that state pursuant to paragraph 3. This is the same provision that appears in the current Directive and its purpose is to ensure that all broadcasts transmitted in the Union which have a link with one of its Member States - in this case a technical link - comply with the Directive.

2.2.3 Article 2a

This is the current Article 2(2), the central mechanism of the Directive which justifies the fact that it is based on Articles 57(2) and 66 of the Treaty (see also the ninth recital of the 1989 Directive, which refers to freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by all the Member States). The proposed amendments specify in detail the technicalities of the exceptional procedure whereby a Member State may take steps against broadcasts infringing Articles 22 and 22a and were prompted by the lessons of the Red Hot Television case (see Report on application, point 3.2.1).

The proposal also seeks to add a recital referring to the fact that the Court has consistently held that a Member State retains the right to take measures against a broadcasting organization under the jurisdiction of another Member State in the event of a clear and deliberate attempt to bypass its legislation. The relevant case is *Van Binsbergen*,[40] which is referred to in a Commission statement entered in the minutes of the Council meeting of 3 October 1989.

This case law was recently supplemented by the Court's decision of 5 October 1994 in Case C-23/93 *TV10 SA v Commissariaat voor Media*.[41] This was a preliminary ruling on the interpretation of the provisions of the EC Treaty relating to the provision of services. Although the judgment makes no reference to the Directive, which had not been adopted at the time the events which form the subject of the case took place (the Commissariaat voor de Media's decision of 28 September 1989), it is important to take note of the conclusions for the areas covered.

The Court confirmed that:

- the concept of provision of services used in Articles 59 and 60 of the EC Treaty embraces the broadcasting, through the intermediary of cable operators established

---

40 ECJ, Case 33/74 [1974] ECR 1299.

41 Not yet published.

in one Member State, of television programmes supplied by a broadcasting organization established in another Member State;

- a Member State may impose restrictions on the transmissions of a broadcaster which establishes itself in another Member State but whose activities are entirely or partially directed at the territory of the first Member State, if the choice of establishment was made with a view to enabling this organization to evade the rules that would have applied to it had it been established in the territory of the first Member State.

The Commission draws the following conclusions from this.

Firstly, the Court confirms that broadcasting and cable retransmission are services within the meaning of Articles 59 and 60 of the Treaty; circumvention of national laws and regulations does not take a case out of the Directive.

Secondly, the decision endorses the place of establishment as the criterion determining the sole law applicable to a broadcaster, except where establishment is selected with the obvious intention of evading the rules of a state to whose territory the broadcasts in questions are entirely or partially directed (paragraph 21 of the Court's decision refers to establishment for the purpose of providing such services). In this specific case the state of reception can treat a broadcaster under the jurisdiction of another state as equivalent to a domestic broadcaster. This should be provided for by inserting a recital to this effect in the Directive.

Thirdly, however, this case law, as formulated by the Court, does not relate to:

- broadcasting organizations that have been established for a certain time in a Member State and wish to extend the range of their broadcasts from that Member State (TV10 was a new organization that had chosen to establish itself in a Member State other than the Netherlands, which was to be the main target of its transmissions, and in fact never began broadcasting);
- broadcasting organizations whose transmissions are directed either mainly at the territory of the Member State under whose jurisdiction they operate, or at the territory of several Member States;
- broadcasting organizations whose transmissions are directed either mainly at the territory of a single Member State and which have not established themselves in another Member State solely in order to escape the rules that would have been applicable if they had been established in the receiving Member State.

It is reasonable to conclude that the Court framed its decision in this very precise way specifically to avoid undermining the meaning of the relevant provisions of the EC Treaty and the Convention for the Protection of Human Rights and Fundamental Freedoms. There can be no question of circumvention in this context if the national rules that have been evaded were themselves incompatible with Community law. Finally, it should be noted that the facts as ascertained by the court referring the case concern an area that is not coordinated by the Directive, namely Dutch domestic measures to ensure the pluralist, non-commercial content of the programmes.

The Commission concludes that there is no need to propose a fundamental amendment to Article 2(2) of the Directive.

2.2.4 Article 3

In order to give the Directive greater legal consistency and in view of the Leclerc judgment (Case C-412/93, 9 February 1995, already referred to in the report on application) the Commission felt it was preferable to merge the exceptions provided for in Articles 8 (linguistic objectives) and 19 (exemptions regarding advertising) into a single, general exemption, though this is not to be exhaustive.

Since the Directive came into effect it has transpired that certain provisions have not been applied in the spirit of the Directive, either because of incorrect transposal, or because of differences in interpretation, or because broadcasters have simply not complied with them.

This has led some observers, including certain Member States, to call for the state of reception to be given a right of enforcement.

This request flies in the face of the principle of free movement of services and of Article 2, establishing the rule of a single law applicable to each broadcasting organization, and it could not, therefore, be met. However, mindful of the concerns expressed by certain professionals and Member States, the Commission felt the need to lay down more detailed provisions on national enforcement of the Directive's obligations by television broadcasters in the second paragraph, and in particular to provide for penalties on a sufficient scale to serve a veritable enforcement function. Incidentally, any failure by a Member State to discharge its supervisory function would itself be a violation of the Directive, and specifically of Article 3(2).

Independently of the checks to ascertain that national rules are compatible with the Directive, which must be carried out at Community level, it is clear that legal certainty for broadcasting organizations is also a function of the possibility of obtaining interim protective measures swiftly in the event of infringements of national rules by another broadcasting organization, regardless of which Member State has jurisdiction.

The Commission also takes the view that a recital should be included to the effect that specific measures exist in all of the Member States enabling any interested party to assert its rights in the event of infringement of the provisions of this Directive.

2.3 Promoting the distribution and production of programmes

2.3.1 Promotion of European works (Articles 4 and 5)

A number of Member States had their own regulations promoting domestic and European production prior to 1986 proposal. Provisions of the same type therefore had to be incorporated into the areas coordinated by the Directive. In its initial proposal (July 1986), the Commission had suggested that the minimum broadcasting quotas for European works be set at 30% at first, rising to 60% after three years. Despite opposition from Parliament on this point, the Directive as adopted by the Council insisted on a

"majority proportion" "wherever practicable", with an "absolute minimum" clause to the effect that where a majority proportion was unattainable, it must not be lower than the average for 1988 in the Member State concerned. A monitoring system was also set up and the Commission is required to produce a report every two years on the percentages achieved by each of the television channels within the jurisdiction of the Member States.

The first such report was adopted on 3 March 1994.[42] In its conclusions, the Commission made the following remarks on the first monitoring exercise:

"Articles 4 and 5 apply to all broadcasting stations under the jurisdiction of the Member States except local stations that are not part of a national network. The Commission realizes that the wording of the articles, and in particular of the use of the terms such as "where practicable" and "progressively", posed interpretation problems for both national authorities and operators. The use of such terms reflects the need for flexibility in a system that covers both generalist land-based broadcasters and special interest satellite services, for instance.

"The ideal answer would probably be to include in the Directive more detailed rules better tailored to cater for the differences between the various types of channel. However, the Commission's view is that this first monitoring exercise has helped to clarify the scope of the two articles. It clearly emerges that the majority of channels covered in the reports - in particular those that have been established for some time - are economically able to present a majority proportion of European works and at the same time achieve satisfactory audience ratings.

"The Commission therefore considers that Article 4 requires all channels under the jurisdiction of the Member States to transmit, in principle, a majority proportion of European works where they exist in sufficient number for the type of channel in question or where the European programme industry is potentially able to produce them in sufficient quantity. The aim of the provision, after all, is to stimulate the development of the industry and to enable viewers to have access to such productions. Furthermore the Directive establishes a legal framework that applies to all broadcasters; the principle of competition means that this framework must be applied equitably and as uniformly as possible. The reports show that there are no grounds (in terms of economic viability) for any significant differences in applying the rules of Articles 4 and 5 to channels of the same type in whatever market, simply because the broadcaster in question comes under the jurisdiction of another Member State. The term "progressively" makes it possible to make allowance for the special circumstances facing new broadcasters, but does not release them from the obligation to attain a majority proportion in the long run. In this connection, Article 4(2) lays down a reference threshold which applies in all the Member States if the majority proportion is not attained.

Article 5 imposes rather less onerous obligations on broadcasters. The Commission therefore feels that the same degree of flexibility is not appropriate as for Article 4 and that Article 5 should therefore be applied more rigorously by the Member States."

---

42 COM(94) 57 final, op. cit.

The proposed amendments to Articles 4 and 5 follow the same approach, with due consideration for the outcome of the comprehensive consultations that were held in political circles and with professionals in the industry, and the round of consultations launched by the Green Paper from April 1994. The main features of the proposed system are as follows:

Article 4

* The broadcasting obligations are identical to those in the 1989 Directive for general-interest channels, i.e. broadcasters must reserve a majority proportion of transmission time for European works, excluding the time appointed to news, sports, games and advertising. Thus there is no change to the "base", which continues to encompass studio productions, as under the 1989 Directive. The first monitoring report, referred to above, revealed that the general-interest channels had no difficulty complying with this requirement.

* However, the system does need to be adjusted for the special-interest channels, whose numbers are steadily increasing. These channels could be given the opportunity to opt for a minimum investment, i.e. 25% of the programming budget, as defined in the proposal.

* The "absolute minimum" clause (Article 4.2 of the 1989 Directive) is deleted.

* The channels have three years after they are launched to attain the required proportions.

* Channels broadcasting in a non-European language to specific cultural target audiences are not required to comply with Articles 4 and 5.

* The monitoring system has been left largely intact, though the new version acknowledges that the proportions may not be attained, in which case the Member States must inform the Commission, giving reasons and stating what measures are being taken to redress the situation.

* The Article is to be applicable for ten years from the entry into force of the new Directive, after which period Community provisions will no longer apply. National measures obstructing the free movement of television programmes will, however, continue to be prohibited. The restriction on the period of applicability does not preclude the Commission from making proposals for measures to meet evolving needs.

Article 5

* The only change is that broadcasters will have to earmark at least 50%, rather than merely "an adequate proportion" for recent works. Not only does this clarify matters, it is also intended to promote the production and distribution of new independent works.

In both cases, the vague phrase "wherever practicable", which resulted in legal disputes[43] and was incompatible with the idea that Article 4 would eventually be repealed, has been deleted. This will lead to greater legal certainty and ensure fair competition between channels of the same type in various Member States. However, deleting the phrase does not detract from the flexibility of the clause, as a result of the following:

- retention of the 1989 base, including studio productions;
- deletion of the "absolute minimum" clause;
- the fact that special-interest channels can opt for a minimum investment;
- realistic requirements (majority proportion of transmission time or 25% of programme budget), compatible with current market practices;
- gradual introduction over three years and general exemption for channels broadcasting in a non-European language.

The grounds for scrapping the system will be all the stronger if it is capable of achieving its objectives. It is worth recalling that the requirement that broadcasters reserve a majority of broadcasting time for European works and a percentage of broadcasting time or a share of the programming budget for independent productions reflects both a desire to help audiovisual professionals make the most of a market enlarged by the free movement of television services and a wish to promote awareness of European cultures in the Union, through measures to stimulate the production and distribution of their works. This aim found broad support among the professionals, most notably at the Audiovisual Conference in July 1994; they complain that the few legal measures that do exist at European Union level specifically to help promote the European programme industry are not applied consistently. Furthermore, the approach is consistent with the 1994 Green Paper which stressed that the next ten years would a decisive period for the future of the European programme industry - a view confirmed by subsequent consultations. Either the industry will become competitive on the world markets and in the multi-service environment or it will become essentially a second-rate player, unable to progress beyond the confines of the national markets.

The monitoring report concluded that Article 5 was basically capable of being enforced and was indeed complied with by and large. The Article's value, which is ultimately structural, has been highlighted by the professionals, who see it as securing pluralism in a world of media mergers. That is why the obligation to use material from independent sources from the first day a channel broadcasts remains, the proportions being unchanged, and will not disappear at the end of the ten-year period.

2.3.2 Detailed examination of the proposed amendments

Certain aspects of the proposed amendments call for more detailed explanation from the Commission.

a) Special rules for channels specializing in drama and documentaries

---

[43] In view of the objective of the measure, i.e. to promote the distribution and production of European works, a teleological interpretation of the clause, in the Commission's view, would mean that the majority proportion was the rule and that exceptions would have to be justified on a case-by-case basis on the basis of objective criteria.

The Member States must allow television channels which devote at least 80% of their time to cinematographic works, drama, documentaries or animation to opt to allocate 25% of their programming budgets to European works instead of complying with the transmission-time requirement. The proposal uses the same phrase - "programming budget" - as Article 5 of the 1989 Directive, but defines it in precise terms as the accounting cost of acquiring or commissioning broadcasting rights, producing and co-producing for all programmes broadcast by the channel in any given year.

The Commission feels that the minimum investment requirement is best expressed in terms of the programming budget. It enables the objective to be clearly defined, i.e. to encourage channels broadcasting stock programmes[44] to invest in production in Europe while leaving the irrelevant activities that broadcasters may be involved in out of the calculation This applies in particular to organizations broadcasting a range of special-interest channels, some of which, such as news and sports channels, may not be subject to the majority proportion requirement or the minimum investment requirement.

It should be made clear right away that the measure does not seek to establish any hypothetical equivalence between transmission time requirements and minimum investment requirements. To do so would be pointless, if only because the concept of the "average hourly cost" bears no relation to the way the audiovisual industry is actually financed.

The condition a special-interest channel should have to meet in order to be able to opt for the investment requirement, i.e. at least 80% of programming devoted to stock programmes, was based on an examination of figures relating to the programme distribution of a number of such channels in Europe. The percentage is high enough to ensure that only special-interest channels qualify while allowing them to devote a limited share of their broadcasting time (20%) to other categories of programme.

The minimum investment - 25% - is based on figures from a study commissioned by the Commission aimed at determining what was reasonable, i.e. what would not hinder the development of the services in question, but would be sufficiently effective in terms of the boost to the European programme industry.

b) The gradual approach for new channels

The second major proposed amendment seeks to define precisely the notion of progressivity. New television channels will have three years to comply with the requisite proportions. These must be attained in stages, i.e. regular progress must be made. The three-year deadline was suggested by businesses and some national reports produced for the first monitoring exercise as being necessary for attaining financial equilibrium in most cases. It is also consistent with the ten-year limit on the validity of European measures to promote the industry.

---

44 Stock works differ from flow programmes, which have a limited shelf-life and profitability, such as game-shows and studio productions, in that the initial costs of producing them presuppose a long-term profitability strategy (several television showings) on different supports (cinema, video tape, video game version, etc.) and on as many geographical markets as possible, given the more durable nature of their content.

2.3.3 Article 6

The amendment to paragraph 1(a) is of a formal nature and serves to update the text.

The amendment to paragraph 3 seeks to include European non-member countries with which the European Union has concluded Europe agreements covering the audiovisual industry in order to ensure the legal certainty needed for the application of the obligations in Articles 5 and 6 while at the same time encouraging partnerships between audiovisual companies in the Union and their counterparts in these countries. This amendment reflects the overall approach to cooperation with these countries advocated by the Commission in both regulatory matters and questions relating to financial support.

The insertion of a new paragraph 4 reflects the desire to conduct an active policy on extra-European investment in European programme production, in particular by encouraging co-production agreements with non-member countries outside Europe with which bilateral agreements already exist in this field. It is a response to the need, reiterated several times by the professionals, to open profitable markets for European programmes while respecting their cultural identity. For this reason the Commission proposes that programmes produced by financial partnerships in which investors from these non-member countries do not have a majority holding continue to be regarded as European works. This co-production policy should raise the profile of European programmes on the markets of these non-member countries and develop the synergies necessary for the creation of jobs with other industries on the world market.

2.3.4 Article 7

The new Article 7 does not alter the basic principles of the earlier system whereby Member States introduce time limits on broadcasts of cinematographic works but broadcasters are free to negotiate different limits with rights holders. The Commission wishes to stress that the purpose of this provision is to strike the best possible balance, in the context of the free movement of television broadcasts, between the television showing of a cinematographic work and its first appearance in the cinema. The principle of freedom of contract, however, takes precedence, with the previous provision acting as a safeguard clause in the event of a failure by the parties to reach agreement.

As it made clear in the report on application, the Commission believes that responsibility for organizing the time-scales for the television broadcast of cinematographic works should, ideally, be left to contractual agreements between rights holders and broadcasters. Maintaining the principle of contractual freedom in this area thus complies with the wishes of the vast majority of professionals who are keen to bring profitability to a creative activity in a state of crisis. Producers, who generally hold all the commercial rights, must have their hands free to negotiate the sales of their works in accordance with their own ideas and in their own best economic interests. These economic interests vary from one production to another and from one market to another, adapting to very different situations based on diverse cultural traditions.

However, it has proved necessary to incorporate the new forms of television exploitation, namely pay-per-view services, in the system of time-scales, given the important position

these will occupy in the broadcasting markets of the future and the impossibility of imposing on them the two-year delay provided for in the 1989 Directive. To even out competition between the various television media, the Commission decided on the following order of succession from the time of a film's first cinema showing:

1) television communication services operating pay-per-view
2) television communication services requiring a specific subscription
3) other television communication services.

In setting the time-scale the Commission has been influenced by the fact that broadcasting organizations are currently the largest investors in cinematographic production and by contractual practices and agreements which generally allow the release of the video edition of a film six months after its appearance in the cinema (which is intended to maximize producers' revenue). The choice of a single period for each category of service is intended to simplify the application of the system. As they stand, the time periods reflect the real-life situation and are best placed to create a time-scale compatible with the need to ensure fair competition between the different television media to generate an active investment policy in the cinema.

The Commission would also like to clarify the reasons for retaining the first showing of a cinematographic work in the cinema of a Member State of the Union as the starting point for calculating the first possible date of its broadcast on television. They relate to both legal considerations and a desire to encourage broader strategies for the commercial marketing of films. As the Directive is based on the coordination of national laws, the Community legislator opted for the principle of a single starting point in order to provide legal certainty for broadcasters and to avoid discriminating between broadcasters in different Member States. This option is similar to the cable-satellite Directive that provides for the contractual acquisition of a programme's satellite rights in accordance with the laws of one place only, namely the Member State of broadcast.[45]

The Commission would also point out that this principle is consistent with a commercial practice that is becoming increasingly common in the Union, whereby big-budget films are released in several countries at the same time. The Commission sees this broader strategy, which gives more and more Europeans access to new cinematographic works at the same time, as having the effect of increasing mutual understanding among Europe's peoples. It believes that encouraging such moves is rather like indirectly supporting the restructuring of the cinema sector, because it leads film producers and distributors to develop from the outset marketing strategies suited to the nature of the works they are producing. A promotion budget will be defined differently depending on whether the work has national or European potential and according to the economic risks entailed.

2.3.5 Article 8

Since its content has been incorporated into the new Article 3, Article 8 has been deleted.

---

[45] Directive 93/83/EEC (OJ L 248, 6.10.93) states that "The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth." (Article 1(2)(b))

2.4. Chapter IV - Television advertising, sponsorship and home shopping

2.4.1 Article 11

The purpose of this Article is to regulate the way in which programmes may be interrupted for advertising and home-shopping breaks.

The proposed amendment takes account of the fact that films made for television can, from the outset, have natural breaks built in allowing advertising spots to be inserted without detracting from the integrity of the work. Films made for cinema, however, are constructed differently for different media, i.e. the cinema and subsequently video, and there are no planned advertising breaks.

It also takes account of the business life cycle of television films, which is closer to that of other television material (serials, for instance); they tend to make the bulk of their profits on a single showing.

The Commission would also point out that the phrase "for each complete period of 45 minutes" in the third paragraph should be interpreted as allowing a broadcaster to interrupt a feature film once per period without having to wait for the 45th minute, provided, of course that the other provisions of the same Article are complied with (the 20 minute period, for example, though that is also to be viewed as a principle rather than a rule to be enforced to the nearest second). And since a full-length feature film is by definition longer than 45 minutes, the proviso can safely be deleted.

2.4.2 Articles 12 to 16

Articles 12 to 16 on the protection of television audiences are extended to include home shopping programmes and spots, as defined in the new Article 1(e) (see point 3.2.4 in Part B of the report on application).

2.4.3 Article 17

The prohibition of sponsorship by companies whose main activity is the manufacture or sale of pharmaceutical products available only on prescription creates unwarranted discrimination vis-à-vis other companies effectively in the same position but with the sole difference that activities devoted to the manufacture or sale of these products do not exceed 49% of their total operations. The proposal therefore seeks to lift the ban on sponsorship by the first category of companies. This does not undermine the consumer protection objective of the Article as a whole, as the general rules on sponsorship clearly prohibit the promotion of goods or services supplied by the sponsor. Moreover, unlike tobacco companies, whose name is often associated with their products, the companies targeted by this measure are not generally associated in the public's mind with a particular pharmaceutical product.

2.4.4 Article 18

Television advertising is in a state of constant flux. New forms are emerging. But the advertising slot remains the most conventional, and commonly the most profitable, form. It generally lasts between a few seconds and one and a half minutes and is inserted between programmes or parts of programmes.

The reference to "other forms of advertising" (than slots) was introduced into paragraph 1 to make the article more flexible so that it will cover new forms of advertising, such as tele-promotion and "*Dauerwerbesendungen*", which are longer and actually constitute part of the programme itself, as and when they emerge. Member States that so wish may raise the aggregate limit on advertising to 20% of daily broadcasting time to allow for these new forms of advertising, the broadcaster remaining free to determine how the aggregate is shared out between the different forms within the general limit of 15%.

Because of the growth in home shopping, the time restrictions imposed by this paragraph 1 apply to only one form of home shopping, namely home-shopping spots, which, like traditional advertising spots, are relatively short. They are distinguished from advertising spots by being direct offers to sell or hire rather than promotional messages. They are not to be confused with the broadcasting slots devoted to home shopping referred to in Article 18b(1), which are not spots inserted between programmes or parts of programmes but programmes in their own right. Home shopping spots are covered by the general limit of 15%/20% of daily broadcasting time.

Paragraph 2 aims to restrict excessive concentration of advertising in a given period of time, in this case an hour. The 1989 Directive did not define an hour, with the result that the provisions were applied differently depending on whether the calculation was based on a sliding hour or a clock hour. The sliding hour restricts the scope for concentrating advertising in a given period more. The complexity of the calculations that broadcasters and national authorities would have to carry out to ensure compliance with the rule, and the attendant costs constitute another argument in favour of the clock hour, which is simpler to calculate. The Commission has therefore proposed an amendment to this effect. But, given that the advertising spot is still the most profitable form of advertising in terms of revenue per unit of time from the broadcaster's point of view, especially at peak viewing times, there is no obvious need for the restriction to be extended to other forms of advertising that take up more air time or to home-shopping spots (which, it will be remembered, are governed by Article 18a - see below). The effect of these advertising market factors is that broadcasters unlikely to excessively concentrate forms of advertising other than advertising spots, especially at peak viewing hours when the need to achieve equilibrium in the viewer's interest is most acute.

2.4.5 Article 18a

Home shopping is expanding rapidly at national level in most Member States and outside the Community and cannot be allowed to develop outside the legal framework created by the Directive.

Because of the impact that seeing the product on the screen can have on the decision to buy, measures to protect both the television viewer and the consumer must be laid down in the Directive for the sake of setting standards and preventing abuse.

The general principles laid down in paragraph 1 on the content of home shopping broadcasts therefore set minimum standards intended to ensure that viewers can clearly distinguish such broadcasts from advertising or other programmes such as game shows, for example.

In order to extend the protection already provided, paragraph 2 draws expressly on the Directive on the protection of consumers in respect of contracts negotiated at a distance, on which the Council adopted a common position on 30 March 1995.[46]

2.4.6 Article 18b

Restricting the daily volume to one hour, as the 1989 Directive does, is not an appropriate way to deal with home shopping in all its different forms.

The present proposal therefore seeks to encourage television home shopping by repealing the restriction on hours for channels devoted exclusively to this activity. This idea of a Community-wide market for home shopping reflects widespread demand among professionals in the Member States.

This Article seeks also to enable broadcasters operating channels not devoted entirely to home shopping to create broadcasting slots devoted to home shopping for up to three hours in any 24-hour period. This would help them to make slack viewing periods more profitable.

2.4.7 Article 19

This main provisions of this Article have been incorporated into the more general framework of Article 3. Article 19 as such has been repealed.

2.4.8 Article 20

This provision extends to home shopping the possibility granted to Member States to take separate measures for broadcasts that are intended solely for their national territory and cannot be received directly or indirectly in one or more other Member States.

2.4.9 Article 21

In order to enhance the legal coherence of the Directive, the contents of this Article have been transferred to Article 3, which introduces a number of measures aimed at enforcing the rules laid down in the Directive more effectively. Article 21 as such is repealed.

2.5 Chapter V - Protection of minors and public morality

---

[46] COM(93)396 final - SYN 411.

2.5.1 Article 22

The protection of minors is an area where Member States have the right to block transfrontier broadcasts, in accordance with the procedure in Article 2a (formerly Article 2(2)). This provision has been slightly reworked to draw a clear distinction between programmes that are the subject of a general ban (those likely to "seriously impair" the physical, mental or moral development of minors) and those which are authorized subject to guarantees about technical means (e.g. coding) or timetabling (late-night broadcast).

2.5.2 Articles 22a and b

The original Article 22 has been divided in two to make the public order provision easier to understand. This has a much more general scope than the protection of minors and seeks also to protect adults from programmes that are physically, mentally or morally harmful. Member States, of course, remain free to invoke the procedure of Article 3 in the event of repeated infringements of this Article.

In view of the concern expressed by Parliament and certain Member States at the increasing number of television programmes containing excessively violent scenes, the new Article 22b is intended to ensure that the matter is given due attention in the report on application, provided for in Article 26.

2.6 Chapter VI - Final provisions

2.6.1 Article 25

A one-year deadline is set for transposing the Directive into national law, given that the proposed amendments are merely adjustments or additions to laws and regulations already existing in the national legal orders. It is important to reduce to a minimum the delay between the adoption of the amended Directive and its application, during which time the current Directive will remain in force in the national legal systems.

2.6.2 Article 26

The amended Directive will be subject to another examination by the Commission three years after its adoption, to review the experience gained in the meantime and, if necessary, prepare new proposals to take account of developments in the sector.

3. International aspects

3.1 The European Convention on Transfrontier Television

A number of Member States have ratified the Council of Europe's European Convention on Transfrontier Television, which entered into force on 1 May 1993.

To enable the broadcasting organizations and national regulatory authorities to organize their activities efficiently, the Directive and the Convention should obviously be as compatible as possible, given the respective roles of the European Union and the Council

of Europe. It is fortunate in this respect that the two instruments cover essentially the same fields.

There are, however, significant differences in certain provisions, although these do not necessarily make for incompatibility. Articles 4 and 5 of the Directive, for example, on the promotion of the production and distribution of television programmes, go beyond what is provided for in Article 10 of the Convention as regards cultural objectives, but this does not lead to incompatibility, provided that Member States of the Union that are parties to the Convention are prepared to receive broadcasts from countries that are not members of the Union but are parties to the Convention which do not necessarily comply with the standards of Articles 4 and 5.

There are also a number of institutional differences. Article 21 of the Convention establishes a permanent committee qualified to make recommendations on the application and interpretation of the Convention and to propose amendments. There is no equivalent provision in the Directive, given that under the Treaty it is for the Commission to ensure the correct application of Community law, subject to the authority of the Court of Justice.

Other examples of differences between the Directive and the Convention are more fundamental. Article 16 of the Convention on targeted advertising has no equivalent in the Directive (given that it would be fundamentally incompatible with Article 59 of the Treaty). The same is true of Article 5(2) of the Convention on the criteria of jurisdiction.[47]

It is clear that some of the amendments to the Directive proposed by the Commission pursuant to Article 26 will increase the disparities between the two texts. The proposed amendments to the rules governing home shopping are a striking example. However, the Commission would stress the following:

- firstly, Article 26 of the Directive expressly provides for the possibility of adapting the Directive to take account of developments in television broadcasting. In an area such as this it is essential that the legal and regulatory framework be able to evolve to take account of technological advances and changes in the market;
- secondly, Article 27(1) of the Convention states that in their relations with each other the Parties that are Members of the Community will apply the latter's rules, and will therefore apply the rules of the Convention only in so far as there is no Community measure relating to the particular subject in question. It is therefore quite possible to amend the Directive without causing any additional legal difficulty for the three Member States of the Union that have ratified the Convention.

It is worth noting also that Articles 21 and 23 of the Convention provide for a relatively flexible amendment mechanism which would make it possible to adapt the Convention if the Parties so desired. In due course, once the two instruments had become fully compatible, the Commission feels it would be worth considering the possibility of

---

[47] See Part B point 3.1.1 and Part C point 3.1.1 above.

suggesting that the Community accede to the Convention (a possibility provided for in Article 29(1)). In the meantime, Commission representatives participate in the meetings of the permanent committee and, similarly, representatives of the Council of Europe sit in the ad-hoc group. This overlap is conducive to the exchange of information on the implementation of the two instruments.

3.2 Europe agreements

The association agreements between the Union and certain countries of Central and Eastern Europe, known as "Europe agreements", provide for the possibility of the non-member states concerned participating in the Union's audiovisual policy, including its regulatory aspects, by making explicit reference to the approximation of laws and regulations on broadcasting. The agreements with Bulgaria, the Czech Republic, Hungary, Poland, Romania and Slovakia have now entered into force. Negotiations are under way with Slovenia and the three Baltic countries.

The Commission will examine the practical arrangements for implementing all the relevant provisions with the countries concerned.

3.3 Towards a world broadcasting convention

With technological progress and the development of satellite broadcasting the issue of "extra-territorial" channels is becoming increasingly common. It is a problem of broadcasting organizations that direct their transmissions at the territory of the European Union without being under the jurisdiction of a Member State within the meaning of Article 2 of the Directive (i.e. without being established in a Member State or using a satellite facility under the jurisdiction of a Member State). Member States may take whatever steps they consider appropriate with regard to such broadcasts, providing they comply with their international commitments and those entered into by the Union. For the purpose of clarification it would seem to be helpful to add a recital to this effect.

However, over and above the Directive, and in order to enable international broadcasting activities to develop within the framework of certain common rules aimed notably at protecting public order and the public interest, it is worth considering the possibilities that an international (i.e. intercontinental) agreement might offer in this area.

Such an agreement might cover matters such as criteria for determining jurisdiction, the procedures to be observed by the receiving state in the event of unilateral action, provisions on public order and the protection of minors and, possibly, certain aspects of advertising. If such an instrument attracted a sufficient number of signatories it could make it possible to set minimum common standards and prevent the emergence of "broadcasting havens" designed to evade the rules regarded as essential by the states concerned. As a first stage, the Commission intends, in consultation with the Member States, to look more closely at certain aspects of the content of any such initiative in this field and at the sort of institutional context in which it might operate, while at the same time developing informal contacts with non-member countries that might be interested.

Proposal for a

EUROPEAN 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

---

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 57(2) and 66 thereof,

Having regard to the proposal from the Commission[1],

Having regard to the opinion of the Economic and Social Committee[2],

Acting in accordance with the procedure referred to in Article 189b of the Treaty[3],

Whereas Council Directive 89/552/EEC[4] constitutes the legal framework for broadcasting in the internal market;

Whereas Article 26 of Directive 89/552/EEC states that the Commission shall, no later than the end of the fifth year after the date of adoption of the Directive, submit to the European Parliament and the Economic and Social Committee a report on the application of the Directive and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting;

Whereas the application of Directive 89/552/EEC and the report on its application have revealed the need to clarify certain definitions or obligations on Member States under this Directive;

Whereas the Commission in its Communication of 19 July 1994 entitled "Europe's way to the information society. An action plan" underlined the importance of a regulatory framework applying to the content of audiovisual services which would help to safeguard the free movement of such services in the Community and be responsive to the opportunities for growth in this sector opened up by new technologies, while at the same time taking into account the specific nature, in particular the cultural and sociological impact, of audiovisual programmes, whatever their mode of transmission;

Whereas the Council welcomed this action plan at its 1787th meeting on 28 September 1994 and stressed the need to improve the competitiveness of the European audiovisual industry;

---

(1) OJ No

(2) OJ No

(3) OJ No

(4) OJ No L 298, 17.10.1989, p. 23.

Whereas the Heads of State and Government meeting at the European Council in Essen on 9 and 10 December 1994 called on the Commission to present a proposal for a revision of Directive 89/552/EEC before their next meeting;

Whereas the application of Directive 89/552/EEC has revealed the need to clarify the concept of jurisdiction as applied specifically to the audiovisual sector; whereas, in view of the case law of the Court of Justice of the European Communities, the establishment criterion should be made the principal criterion determining the jurisdiction of a particular Member State;

Whereas, the concept of establishment, according to the criteria laid down by the Court of Justice in its judgment of 25 July 1991 in Factortame[5], involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period;

Whereas the establishment of a television broadcasting organization, for the purpose of Directive 89/552/EEC, as amended by this Directive, may be determined by a series of practical criteria such as the location of the head office of the provider of services, the place where decisions on programming policy are usually taken, the place where the programme to be broadcast to the public is finally mixed and processed, provided that a significant proportion of the workforce required for the pursuit of the television broadcasting activity is located in the same Member State;

Whereas the Court of Justice has constantly held[6] that a Member State retains the right to take measures against a television broadcasting organization that is established in another Member State but directs all or most of its activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the organization had it been established in the territory of the first Member State;

Whereas any interested party in the Community must be able to assert its rights in the competent courts of the Member State with jurisdiction over the television broadcasting organization that is failing to comply with the national provisions arising out of the application of this Directive;

Whereas Member States are free to take whatever measures they deem appropriate with regard to broadcasts coming from third countries, and which do not satisfy the conditions laid down in Article 2 of Directive 89/552/EEC, provided they comply with Community law and the international obligations of the Community;

Whereas in order to eliminate the obstacles arising from differences in national legislation on the promotion of European works, Directive 89/552/EEC contains provisions aimed at harmonizing these regulations; whereas those provisions which, in general, permit the liberalization of trade must contain provisions harmonizing the conditions of competition;

---

(5) Case C-221/89, Queen v Secretary of State for Transport, ex parte Factortame, [1991] ECR I-3905, para. 20.

(6) See, in particular, the judgments in Case 33/74, Van Binsbergen v Bestuur van de Bedrijfsvereniging, [1974] ECR 1299 and in Case C-23/93, TV 10 SA v Commissariaat voor de Media, [1994] ECR I-4795.

Whereas, moreover, Article 128(4) of the Treaty requires the Community to take cultural aspects into account in its action under other provisions of the Treaty;

Whereas the Green Paper on "Strategy options to strengthen the European programme industry in the context of the audiovisual policy of the European Union", adopted by the Commission on 7 April 1994, emphasizes in particular the need to step up measures to promote European works in order to further the development of the sector;

Whereas, in addition to the considerations cited above, it is necessary to create conditions for improving the competitiveness of the programme industry; whereas the Communication on the application of Articles 4 and 5 of Directive 89/552/EEC, adopted by the Commission on 3 March 1994 pursuant to Article 4(3), shows that the measures to promote European works can contribute to such an improvement, but that they need to be modified to take account of developments in the field of television broadcasting;

Whereas, if Article 4 of Directive 89/552/EEC, as amended by this Directive, is effectively implemented over a ten-year period, it should be possible, given the impact of the financial instruments available to the Community and the Member States, to achieve the objective of strengthening the European programme industry;

Whereas it is necessary to ensure the effective application of such measures throughout the Community in order to preserve free and fair competition between firms in the same industry; whereas the application of such measures could help to reinforce mutual trust between Member States;

Whereas, at the end of the ten-year period, any national measures in this field must not interfere with the principle of free circulation of services by restricting the reception or retransmission of television broadcasts from other Member States;

Whereas the proportions of European works must be achieved taking economic realities into account; whereas, therefore, it is necessary to introduce a progressive system for achieving this objective;

Whereas account should be taken of the specific nature of transmissions broadcast only in a language other than those of the Member States;

Whereas the question of specific time scales for each type of television showing of cinematographic works is primarily a matter to be settled by individual contracts; whereas, however, in the absence of agreements between the interested parties or professionals concerned, a schedule tailored to the needs at each stage in the showing of such works, should be drawn up;

Whereas it is important to facilitate the development of teleshopping, an activity with an economic importance for operators as a whole and a genuine outlet for goods and services within the Community, by modifying the rules on transmission time; whereas, to ensure the full protection of consumer interests, teleshopping should be governed by a number of minimum standards regulating the form and content of broadcasts;

Whereas it is necessary to clarify the rules for the protection of the physical, mental and moral development of minors; whereas the establishment of a clear distinction between programmes that are subject to an absolute ban and those that may be authorized subject to appropriate technical means should satisfy concern about the public interest expressed by Member States and the Community;

Whereas the Court of Justice has constantly held[7] that the concept of services, as referred to in Articles 59 and 60 of the EEC Treaty, embraces the broadcasting of television programmes, including transmission through the intermediary of cable operators; whereas in accordance with Article 3b of the Treaty action by the Community should not go beyond what is necessary to achieve its objectives in the sphere of television broadcasting; whereas the principle that Member States are free to lay down stricter or more detailed rules for the broadcasters under their jurisdiction should be reaffirmed,

Whereas Article B of the Treaty on European Union states that one of the objectives the Union shall set itself is to maintain in full the "acquis communautaire",

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 89/552/EEC is amended as follows:

1. Article 1 is amended as follows:

(a) point (b) is replaced by the following:

"(b) "television advertising" means any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, or rights and obligations, in return for payment. It does not include teleshopping;"

(b) the following point (e) is added:

"(e) "teleshopping" means television programmes and spots containing direct offers to the public with a view to the sale, purchase or rental of products or with a view to the supply of services in return for payment;"

---

(7) See, in particular, the judgments in Case 155/73, Sacchi, [1974] ECR 409 and in Case 52/79, Procureur du Roi v Debauve, [1980] ECR 833.

2. Article 2 is replaced by the following:

"Article 2

1. Each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State.

2. The broadcasters under the jurisdiction of a Member State are those established in the territory of that Member State, in which they must have a fixed establishment and actually pursue an economic activity.

3. Broadcasters established outside the territory of the Community shall also be under the jurisdiction of a Member State if they satisfy one of the following conditions:

(a) they use a frequency granted by that Member State,

(b) although they do not use a frequency granted by a Member State, they do use a satellite capacity granted by that Member State,

(c) although they use neither a frequency nor a satellite capacity granted by a Member State, they do use a satellite up-link situated in that Member State.

4. This Directive shall not apply to broadcasts intended exclusively for reception in third countries, and which are not received directly or indirectly by the public in one or more Member States."

3. The following Article 2a is inserted:

"Article 2a

Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive. They may, provisionally, take appropriate measures to restrict reception and/or suspend retransmission 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 and/or Article 22a;

(b) during the previous 12 months, the broadcaster has infringed the same provision(s) on at least two prior occasions;

(c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of its intention to take measures to restrict reception and/or suspend retransmission should any such infringement occur again;

(d) consultations with the transmitting State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in point (c), and the alleged infringement persists.

The Commission shall, within no more than two months following notification of the measure taken by the Member State, take a decision on whether the measure is compatible with Community law. If it decides that it is not, the Member State will be required to put an end to the measure in question as a matter of urgency.

The provision referred to in the first paragraph is without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned."

4. Article 3 is replaced by the following:

"Article 3

1. Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive. These rules, which must be compatible with Community law, may concern, inter alia:

   - the achievement of language policy goals;

   - the taking into account of the public interest in terms of television's role as a provider of information, education, culture and entertainment and the need to safeguard pluralism in the information industry and the media.

2. Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction comply with the provisions of this Directive.

   Each Member State shall determine the penalties applicable to television broadcasting organizations under their jurisdiction who do not comply with provisions adopted for the implementation of this Directive, which penalties shall be sufficient to enforce compliance.

3. Member States shall also provide in their legislation, as regards television broadcasting organizations under their jurisdiction, for the possibility of invoking interim measures aimed at remedying an infringement of the provisions of this Directive, if necessary by suspending the broadcasting licence."

5. Article 4 is replaced by the following:

"Article 4

1. Member States shall, by appropriate means, ensure that broadcasters reserve for European works, within the meaning of Article 6, a majority

proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext and teleshopping services.

2. In the case of channels which devote at least 80% of their transmission time, excluding the time appointed to advertising and teleshopping, to cinematographic works, drama, documentaries or animation, Member States shall allow television broadcasting organizations to choose between complying with the first paragraph or allocating 25% of their programming budget to European works within the meaning of Article 6. For the purposes of this Directive, "programming budget" means the accounting cost of acquiring, commissioning, producing and co-producing all those programmes broadcast by the channel in question in any given year.

3. The proportions referred to in paragraphs 1 and 2 shall be attained progressively, in stages, no later than three years after the date of the first broadcast by the channel in question.

4. Channels broadcasting entirely in a language other than those of the Member States are not covered by the provisions of this Article or those of Article 5.

5. Member States shall provide the Commission with a report on the application of this Article and Article 5 every two years from the date of adoption of this Directive.

That report shall in particular include a statistical statement on the achievement of the proportion referred to in this Article and Article 5 for each of the channels falling within the jurisdiction of the Member State concerned. Member States shall notify the Commission of the reasons for the failure to attain those proportions and the measures they are taking in each case to ensure that the television broadcasting organization does actually attain them.

The Commission shall inform the other Member States and the European Parliament of the reports, which shall be accompanied, where appropriate, by an opinion. The Commission shall ensure the application of this Article and Article 5 in accordance with the provisions of the Treaty. The Commission may take account in its opinion, in particular, of progress achieved in relation to previous years, the share of first broadcast works in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audiovisual production capacity or restricted language area."

6. Article 5 is replaced by the following:

"Article 5

Member States shall ensure, by appropriate means, that broadcasters reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teleshopping and teletext services, or alternately, at the

discretion of the Member States, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters.

This proportion must be achieved by earmarking at least 50% for recent works, that is to say works transmitted within five years of their production."

7. Article 6 is amended as follows:

(a) in paragraph 1, point (a) is replaced by the following:

"(a) works originating from Member States"

(b) paragraph 3 is replaced by the following:

"3. The works referred to in point (c) of paragraph 1 are works made exclusively or in co-production with producers established in one or more Member States by producers established in one or more European third countries with which the Community has concluded agreements relating to the audiovisual sector, if those works are mainly made with authors and workers residing in one or more European States."

(c) the following paragraph 3a is inserted:

"3a. Works that are not European works within the meaning of paragraph 1 but that are produced within the framework of bilateral co-production treaties concluded between Member States and third countries shall be deemed to be European works provided that the Community co-producers supply a majority share of the total cost of the production and that the production is not controlled by one or more producers established outside the territory of the Member States."

(d) in paragraph 4, the words "and paragraph 3a" are added after the words "within the meaning of paragraph 1";

8. Article 7 is replaced by the following:

"Article 7

Rightsholders and broadcasters shall agree time limits for broadcasting cinematographic works. In the absence of such agreements, television broadcasting organizations shall not broadcast any cinematographic work until the following periods have elapsed since the work was first shown in cinemas in one of the Member States:

(a) six months for pay-per-view services;

(b) twelve months for pay-television services other than those referred to in (a);

(c) eighteen months for services other than those referred to in (a) and (b).

Member States shall ensure that the television broadcasting organizations under their jurisdiction comply with these provisions."

9. Article 8 is deleted.

10. The title of Chapter IV is replaced by the following:

"Television advertising and sponsorship, and teleshopping"

11. In Article 11, paragraph 3 is replaced by the following:

"3. The transmission of feature films may be interrupted once for each complete period of 45 minutes. A further interruption is allowed if their scheduled duration is at least 20 minutes longer than two or more complete periods of 45 minutes."

12. In Article 12, the introductory words are replaced by the following:

"Television advertising and teleshopping shall not:"

13. Articles 13 and 14 are replaced by the following:

"Article 13

All forms of television advertising and teleshopping for cigarettes and other tobacco products shall be prohibited.

Article 14

Television advertising and teleshopping for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls shall be prohibited."

14. Article 15 is amended as follows:

(a) The introductory words are replaced by the following:

"Television advertising and teleshopping for alcoholic beverages shall comply with the following criteria:"

(b) Points (a) to (f) are replaced by the following:

"(a) they may not be aimed specifically at minors or, in particular, depict minors consuming such beverages;

(b) they shall not link the consumption of alcohol to enhanced physical performance or to driving;

(c) they shall not create the impression that the consumption of alcohol contributes towards social or sexual success;

(d) they shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;

(e) they shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;

(f) they shall not place emphasis on high alcoholic content as being a positive quality of the beverages."

15. Article 16 is amended as follows:

(a) The introductory words are replaced by the following:

"Television advertising and teleshopping shall not cause moral or physical detriment to minors and shall therefore comply with the following criteria for their protection:"

(b) Points (a) to (d) are replaced by the following:

"(a) they shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;

(b) they shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;

(c) they shall not exploit the special trust minors place in parents, teachers or other persons;

(d) they shall not unreasonably show minors in dangerous situations."

16. Article 17(2) is replaced by the following:

"2. Television programmes may not be sponsored by natural or legal persons whose principal activity is the manufacture or sale of products, or the provision of services, the advertising of which is prohibited by Article 13."

17. Article 18 is replaced by the following:

"Article 18

1. The amount of advertising shall not exceed 15% of the daily transmission time. However, this percentage may be increased to 20% if it includes forms of advertising other than advertising spots and/or teleshopping spots inserted in a service that is not exclusively devoted to teleshopping, on condition that the amount of spot advertising does not exceed 15%.

2. The amount of spot advertising within a given *clock* hour shall not exceed 20%."

18. The following Articles 18a and 18b are inserted:

"Article 18a

1. Teleshopping programmes and spots must be easily identifiable as such and if they are inserted in a service that is not exclusively devoted to this activity they must be clearly distinguished from that service's other broadcasts, including advertising broadcasts, by optical or acoustic means.

2. Teleshopping programmes and spots must comply with the provisions of Council Directive [concerning consumer protection with regard to distance selling][8], and in particular with those provisions that relate to information on contractual obligations.

Article 18b

1. Windows devoted to teleshopping and inserted in a service not exclusively devoted to this activity shall not exceed three hours in any twenty-four-hour period.

2. Services devoted exclusively to teleshopping shall not be subject to any scheduling restrictions as regards time-limits."

19. Article 19 is deleted.

20. Article 20 is replaced by the following:

"Article 20

Without prejudice to Article 3, Member States may, with due regard for Community law, lay down conditions other than those laid down in Article 11(2) to (5) and Articles 18 and 18b in respect of broadcasts intended solely for the national territory which cannot be received, directly or indirectly, in one or more other Member States."

21. Article 21 is deleted.

22. The title of Chapter V is replaced by the following:

"Protection of minors and public morality"

---

[8] OJ No L

23. Article 22 is replaced by the following:

"Article 22

1. Member States shall take appropriate measures to ensure that television broadcasts, including trailers, 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.

2. The measures provided for in paragraph 1 shall also 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."

24. The following Articles 22a and 22b are inserted:

"Article 22a

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

Article 22b

The Commission shall attach particular importance to application of this chapter in the report provided for in Article 26."

25. Article 25 is deleted.

26. Article 26 is replaced by the following:

"Article 26

Not later than the end of the third year after the date of adoption of this Directive and every two years thereafter, the Commission shall submit to the European Parliament, the Council, and the Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting."

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than one year after the date of its adoption. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Article 1 point 5 shall be effectively applied for a period of ten years from the date of entry into force of this Directive.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

ISSN 0254-1475

COM(95) 86 final

DOCUMENTS

EN 15

Catalogue number : CB-CO-95-119-EN-C

ISBN 92-77-87040-0

Office for Official Publications of the European Communities

L-2985 Luxembourg