



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 04.12.1996
COM(96) 626 final

95/0074 (COD)

OPINION OF THE COMMISSION

pursuant to Article 189 b (2) (d) of the EC Treaty,
on the European Parliament's amendments
to the Council's common position regarding the

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**

AMENDING THE PROPOSAL OF THE COMMISSION

pursuant to Article 189 a (2) of the EC Treaty

EXPLANATORY MEMORANDUM

1. The 1989 Directive¹

The 1989 Directive was adopted in order to create the legal reference framework needed at Community level to ensure the free movement of television broadcasts. This is achieved through the coordination of national rules in the fields where the disparities between them were - or are potentially - such as to create legal barriers to free circulation. The fields concerned are respectively jurisdiction, the promotion of distribution and production of television programmes, advertising and sponsorship, the protection of minors and the right of reply. Member States may not restrict the reception or the retransmission of broadcasts from other Member States for reasons which fall within the coordinated fields. A Member State may only lay down more detailed or stricter rules in these fields as regards broadcasters under its own jurisdiction. The main objective of the Directive is to achieve free circulation. Because it uses the method of the coordination of national rules where necessary to achieve this primary objective, the Directive also espouses the objectives of those national rules. It is the cornerstone of the "European audiovisual space" and has been, or is in the process of being supplemented by complementary legal measures (in particular the cable and satellite copyright Directive²).

2. The History of the Proposal for a Directive amending the 1989 Directive

Article 26 of the 1989 Directive requires the Commission to present a report on its application five years after adoption, accompanied if appropriate by proposals to adapt it to developments in the field of television broadcasting. The Commission's services carried out an extensive consultation process in 1994. The Commission presented to Parliament and Council a Communication including the application report, the introductory statement and the proposal for a Directive amending the 1989 Directive on 31 May 1995³. The purpose of the proposal is to adapt and clarify certain provisions of the 1989 text in the light of the experience gained in its implementation and of developments in the sector. The current Directive remains in force until amended (the next report on application is due at the beginning of 1997).

The Economic and Social Committee adopted its opinion on 13 September 1995 (CES 972/95).

On 14 February 1996 Parliament adopted a legislative resolution⁴ in the first reading under the co-decision procedure (Art.189 (b) EC Treaty) approving the Commission's proposal

¹ Council Directive 89/552/EEC of 3 October 1989 "on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities" (OJ L298 p. 23 17.10.1989)

² Council Directive 93/83/EEC (OJ L248, p. 15, 06.10.1993).
See also the recent "Green Paper on the legal protection of encrypted signals" COM(96)76

³ OJ C185, p. 4, 19.07.1995

⁴ OJ C065, p.61, 04.03.1996

subject to the amendments it had made.

The Commission accordingly adopted an amended proposal incorporating *inter alia* those parliamentary amendments it had accepted in Plenary⁵.

The Council adopted its Common Position on 8.07.1996. This was transmitted to Parliament at the same time as the Commission's Communication on the Common Position in accordance with the second sub-paragraph of Article 189b(2) of the EC Treaty⁶.

The Parliament adopted on 12.11.1996 a decision amending the Common Position "with a view to the adoption of a European Parliament and Council Directive amending Council Directive 89/552/EEC"⁷.

3. The Commission's Opinion

The Commission is required at this stage to deliver an Opinion pursuant to Article 189b(2)(d) of the EC Treaty. This is the purpose of the present document, which constitutes a new amended proposal, based on the Common Position (accepted by the Commission), and which incorporates those amendments adopted by Parliament on which the Commission has a positive opinion (presented in the right hand column in the following pages). Certain amendments have been re-drafted and/or re-numbered where the Commission considers this necessary. The reasons for the Commission's position are explained in the comments section below each amendment.

4. Conclusion

The Commission hereby submits to the European Parliament and Council its Opinion pursuant to Article 189b(2)(d) of the EC Treaty constituting its amended proposal pursuant to Article 189a(2) of the EC Treaty.

⁵ COM(96)200 final of 07.05.1996.
OJ C222, p.10, 30.07.1996

⁶ SEC(96)1292 final, 11.07.1996

⁷ EP 253.831

Amended 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 pursuant to Article 189 a (2)
of the EC-Treaty)

Amendment 1
Recital 5a (new)

Common Position of the Council

Amended Proposal

(5a) Whereas the Commission has submitted a Green Paper on Protection of Minors and of Human Dignity in new audiovisual and information services and has undertaken to submit a Green Paper focusing on developing the cultural aspects of new services;

Comment : the wording has been adapted to take account of the adoption by the Commission on 16 October 1996 of the first Green Paper. The Commission accepts this purely factual amendment, but would point out that, strictly speaking, it is out of place in a legal text.

Amendment 2
Recital 6

Common Position of the Council

(6) Whereas any legislative framework concerning new audiovisual services must be compatible with the primary objective of this Directive which is to create the legal framework for the free movement of services;

Amended Proposal

(6) Whereas any legislative framework concerning new audiovisual services must include arrangements which are in line with the spirit and objectives of this Directive;

Comment : Numbered 5b in Parliament's amendment, in fact corresponds to recital n° 6 in the Common Position

Amendment 3
Recital 6a (new)

Common Position of the Council

Amended Proposal

(6a) Whereas, however, pending the introduction of a comprehensive European legal framework for the new services, the Member States should take action with regard to services comparable to television broadcasting in order to prevent any breach of the fundamental principles which must govern information and the emergence of wide disparities as regards free movement and competition;

Comment : Slight drafting change to Parliament's amendment, for legal reasons.

Amendment 4
Recital 19a (new)

Common Position of the Council

Amended Proposal

(19a) Whereas, with a view to promoting the production of European works according to the objectives of the MEDIA programme, the Community should provide appropriate financial support to particular artistic works, including those realized by independent producers and to co-production works with producers established in two or more Member States;

Amendment 5
Recital 21

Common Position of the Council

(21) 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) of that Directive, draws the conclusion that measures to promote European works can contribute to such an improvement;

Amended Proposal

(21) Whereas, in addition to the considerations cited above, it is necessary to create conditions for improving the competitiveness of the programme industry; whereas the communications on the application of Articles 4 and 5 of Directive 89/552/EEC, adopted by the Commission on 3 March 1994 and 15 July 1996 pursuant to Article 4(3) of that Directive, draw the conclusion that measures to promote European works can contribute to such an improvement but that they need to take account of developments in the field of TV broadcasting;

Amendment 6
Recital 20a (new)

Common Position of the Council

Amended Proposal

(20a) Whereas the production and distribution of European works should also be promoted by a Guarantee Fund;

Comment : numbering change (recital 20a instead of 22a) in order to align with numbering in Common Position

Amendment 7
Recital 22a (new)

Common Position of the Council

Amended Proposal

(22a) Whereas for the purposes of the implementation of the measures designed to promote works created by producers who are independent of broadcasters, guideline criteria are needed whereby a producer may be deemed to be independent if :

- the broadcaster holds no more than 20% of the share capital of the production company (50% if more than one television broadcaster is involved);

- over a three-year period the producer supplies to the same broadcaster no more than 90% of the works produced, unless, over the same period, the producer makes only one programme or only one series, except where the broadcaster is predominantly using a minority language in the Member State concerned;

- the producer does not hold a significant number of shares in a broadcaster;

Comment : Numbering change (22a instead of 22b)

Amendment 8
Recital 22b (new)

Common Position of the Council

Amended Proposal

(22b) Whereas Member States shall also take into account the destination and ownership of secondary rights when assessing the criteria of independence;

Comment : *Numbering change (22b instead of 22c)*

Consequence of Amendment 29
Recital 23

Common Position of the Council

Amended Proposal

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

(23) Whereas the question of specific time scales for each type of television showing of cinematographic works is primarily a matter to be settled by means of agreements between the interested parties or professionals concerned;

(deletion)

Comment : Deletion of second part as a consequence of Amendment 29 (Article 7)

Amendment 9
Recital 35

Common Position of the Council

(35) Whereas the approach in Directive 89/552/EEC and this Directive has been adopted to achieve the essential harmonization necessary and sufficient to ensure the free movement of television broadcasts in the Community; whereas Member States remain free to apply to broadcasters under their jurisdiction more detailed or stricter rules in the fields coordinated by this Directive, including, inter alia, rules concerning the achievement of language policy goals and of the protection 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 and the protection of competition with a view to avoiding the abuse of dominant positions and/or the establishment or strengthening of dominant positions; whereas such rules must be compatible with Community law;

Amended Proposal

(35) Whereas the approach in Directive 89/552/EEC and this Directive has been adopted to achieve the essential harmonization necessary and sufficient to ensure the free movement of television broadcasts in the Community; whereas Member States remain free to apply to broadcasters under their jurisdiction more detailed or stricter rules in the fields coordinated by this Directive, including, inter alia, rules concerning the achievement of language policy goals and of the protection 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 and the protection of competition with a view to avoiding the abuse of dominant positions, for example by securing exclusive rights to major events to the disadvantage of the majority and/or the establishment or strengthening of dominant positions; whereas such rules must be compatible with Community law;

Amendment 11
Recital 35a (new)

Common Position of the Council

Amended Proposal

(35a) Whereas the objective of supporting audiovisual production in Europe can furthermore be pursued within the Member States inter alia through the definition of a public interest mission for certain broadcasting organizations, including the obligation to contribute substantially to investment in European production;

Comment : numbering change (35a instead of 35b). The term "European (instead of "national and local") production is appropriate in order to avoid potential contradictions with Community law.

Amendment 14
ARTICLE 1(1)(b)
Article 1(c) (Directive 89/552/EEC)

Common Position of the Council

Amended Proposal

(c) 'television advertising' means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes 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, rights and obligations, in return for payment;

(c) 'television advertising' means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes 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, rights and obligations, in return for payment or by distributing such goods as a free promotion. It shall include all items of publicity broadcast on behalf of someone other than the broadcaster in advertising breaks. It shall not include teleshopping;

Comment : the Commission indicated in Plenary its agreement in substance on this amendment but also indicated that the wording was not entirely appropriate. This is because the objective of excluding "public service announcements and charity appeals" from the daily and hourly time limits is already met by the Common Position in Article 18, new paragraph 3. Moreover, new recitals 25 and 26 in the Common Position already deal adequately with the question of announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from these. The drafting of this paragraph has been amended accordingly.

Amendment 23
ARTICLE 1(5)(a) (new)
Article 4(2) (Directive 89/552/EEC)

Common Position of the Council

Amended Proposal

"5(a) In Article 4, paragraph 2 is replaced by the following :

2. Where the proportion laid down in paragraph 1 cannot be attained, it must not be lower than the average for 1992 in the Member State concerned."

Comment : The Commission gave a positive opinion on amendment 23 in Plenary in the context of a system including investment obligations, in the spirit of its initial proposal. However, the Parliament failed to adopt the amendment on investment obligations (am. n° 22) which was designed to introduce the necessary flexibility into the system. Consequently, the "no-back sliding" clause in amendment 23 would become extremely difficult to apply. The underlying purpose being to update the reference year for the "acquis communautaire", the Commission proposes the same formula as in the Common Position but with a reference to 1992, as in the Parliamentary amendment, instead of 1988 (or 1990 for Greece and Portugal). There is also a numbering change (5a instead of 5c)

Amendment 24
ARTICLE 1(5)(b) (new)
Article 4(2a) (new) (Directive 89/552/EEC)

Common Position of the Council

Amended Proposal

b) The following new paragraph 2a is inserted :

"2a Channels broadcasting entirely in a language other than those of the Member States shall not be covered by the provisions of this Article or Article 5.

Where such a language or languages are a substantial but not exclusive part of the channel's transmission time, the provisions of this Article and Article 5 shall not apply to that part of transmission time."

Comment : *Rewording of amendment for purposes of clarification.*

Amendment 25
ARTICLE 1(5)(c) (new)
Article 4(3) (Directive 89/552/EEC)

Common Position of the Council

Amended Proposal

c) Paragraph 3 is replaced by the following :

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

That report shall in particular comprise all qualitative assessments and statistical information supplied to the Member State concerned by the channels falling within its jurisdiction for the purpose of ascertaining whether the proportion referred to in this Article and Article 5 has been achieved. In addition Member States shall indicate to the Commission the reasons for the failure to attain those proportions and the appropriate measures they propose to take in each case to ensure that the TV 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 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."

Amendment 29
ARTICLE 1(8)
Article 7 (Directive 89/552/EEC)

Common Position of the Council

Article 7 shall be replaced by the following :

"1. Unless otherwise agreed between rightsholders and broadcasters, the latter shall not broadcast any cinematographic work until eighteen months have elapsed since the work was first shown in cinemas in one of the Member States.

2. The period referred to in paragraph 1 shall be reduced to twelve months :

(a) for pay-per-view and pay-television channels;

(b) in the case of cinematographic works co-produced by the broadcaster. "

Amended Proposal

Article 7 shall be replaced by the following :

"Article 7
Member States shall ensure that
broadcasters under their jurisdiction do not
broadcast cinematographic works outside
periods agreed with the rightholders."

Amendment 31
ARTICLE 1(12)
Article 10 (Directive 89/552/EEC)

Common Position of the Council

Article 10 shall be replaced by the following :

"Article 10

1. Television advertising and teleshopping shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.

2. Isolated advertising and teleshopping spots shall remain the exception.

3. Advertising and teleshopping shall not use subliminal techniques.

4. Surreptitious advertising and teleshopping shall be prohibited."

Amended Proposal

Article 10 shall be replaced by the following :

"Article 10

1. Television advertising and teleshopping broadcasts, spots and windows shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.

2. Isolated advertising and teleshopping spots shall remain the exception.

3. Advertising and teleshopping broadcasts, spots and windows shall not use subliminal techniques.

4. Surreptitious advertising and teleshopping broadcasts, spots and windows shall be prohibited."

Amendment 33
ARTICLE 1(14), SECOND SUBPARAGRAPH (new)
Article 12(c) (Directive 89/552/EEC)

Common Position of the Council

Amended Proposal

"Article 12(c) is replaced by the following :

(c) be offensive to religious,
philosophical or political beliefs;"

Amendment 36
ARTICLE 1(21)
Article 18a(1a) (new)

Common Position of the Council

Amended Proposal

The following Article shall be inserted :

"Article 18a

1. (no change)

1a 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 and acoustic means, so that any fraudulent intent to circumvent the rules applying to advertising can be excluded.

2. (no change)

Comment : This is the first part of amendment 36. The Commission has a negative opinion on the second part (which does not therefore appear here).

Amendment 38
ARTICLE 1(18)
Article 16(1) (Directive 89/552/EEC)

Common Position of the Council

Amended Proposal

In Article 16, the present text shall become paragraph 1 and the following paragraphs shall be added :

"(1a) Member States shall take the necessary measures to ensure that broadcasts by broadcasters under their jurisdiction do not include advertising spots which might seriously impair the psychological well-being of minors.

2. (no change)"

Comment : the 2nd part of amendment 38 has been re-located in the appropriate Article of Chapter IV, which concerns the provisions on advertising. The word "programme" has been replaced by "broadcast" because it is already a fundamental principle of the Directive that programmes and advertising should be kept separate (cf. Article 10 § 1). The matter of programme announcements (1st part of amendment 38) is already covered by the phrase "including trailers" included in the amended version of Article 22 (cf. infra).

Amendment 38
ARTICLE 1(27)
Article 22(1) (Directive 89/552/EEC)

Common Position of the Council

Article 22 shall be replaced by the following :

"1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence."

Amended Proposal

Article 22 shall be replaced by the following :

"1. Member States shall take appropriate measures to ensure that television broadcasts, including trailers, by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence.

2. (no change)

3. (no change)"

Comment : Corresponds to 1st part of Amendment 38

Amendment 43
ARTICLE 1 (31)
Article 23a (2) (aa) (new)

Common Position of the Council

Amended Proposal

"aa) to deliver own-initiative opinions or opinions requested by the Commission on the application by the Member States of the provisions of this Directive, without prejudice to the Commission's powers under Articles 155 and 169 of the Treaty;"

Comment : it is appropriate to add "without prejudice ..." for reasons of conformity with the Treaty provisions.

Amendment 44
ARTICLE 1(31)
Article 23a (2) (c)

Common Position of the Council

"c) to discuss the outcome of regular consultations which the Commission holds with representatives of broadcasting organisations, producers, consumers, manufacturers, service providers and trade unions;"

Amended Proposal

"c) to discuss the outcome of regular consultations which the Commission holds with representatives of broadcasting organisations, producers, consumers, manufacturers, service providers and trade unions and the creative community;"

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