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RECH	113
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PROGRESS REPORT

from : Presidency

to : Council

No. Prev. doc: 8601/06 AUDIO 11 TELECOM 32 COMPET 85 RECH 94 CULT 32
EDUC 78 SOC 177 CONSOM 25 SAN 84 CODEC 376

No. Cion prop. : 15983/05 AUDIO 44 TELECOM 152 COMPET 290 RECH 244 CULT 75
EDUC 200 SOC 524 CONSOM 57 SAN 219 CODEC 1209 - COM(2005) 646
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Subject : Proposal for a Directive of the European Parliament and of the Council 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
– *Progress report/exchange of views*

I. Introduction

1. The European Commission adopted a legislative proposal for revision of the “Television without Frontiers” directive on 13 December 2005. The proposal sets out a new approach to the regulation of audiovisual media services which seeks to address the significant technological and market developments since the last revision of this Directive in 1997 and in particular the need to ensure a level competitive playing field in an area where the nature of the services provided and the manner of their provision is changing rapidly.

2. The Audiovisual Working Party has examined the proposal at eight meetings during the Austrian Presidency and has completed a first reading of the text. Although many delegations are still consulting and do not have final positions, it has nevertheless been possible to establish the main tendencies of delegations in reaction to the proposal, both regarding the overall approach of the Commission and the more detailed questions.
3. This progress report seeks to summarise, in Section II below, the main reactions of delegations¹ as well as setting out, in Section III, some questions which should serve as a basis for Ministers' interventions during the policy debate to take place at the Council on 18 May 2006.

II. The principal reactions of delegations

(i) Overall approach and regulatory architecture (Article 1(a) to (e))

4. The Commission explained that it was seeking to establish a two-tier system of regulation which, so as to avoid distortions of competition, would be applicable to all audiovisual media services irrespective of the electronic means used to transmit them. All audiovisual media services, as defined in Article 1a of the Directive, would be subject to a first tier of basic obligations. "Non-linear" services (where the user "pulls" the content he/she wants when he/she wants) would be subject only to this basic tier, whereas "linear services" (in effect television style broadcast services) would be subject to all the obligations of the Directive, reflecting the lesser degree of control exercised by the user over such "push" services. The key new provisions proposed are a new generic definition of an "audiovisual media service", a revision of the definition of "television broadcasting" and a new definition of a "non-linear service".
5. The basic approach of the Commission was received on the whole favourably by the Group, with only one delegation - with some support from another delegation - clearly indicating opposition to the extension of the Directive's scope to non-linear services.

¹ A detailed outcome of the Working Party's proceedings can be found in document 8707/06 AUDIO 12 TELECOM 34 COMPET 92 RECH 96 CULT 38 EDUC 86 SOC 191 CONSOM 27 SAN 89 CODEC 388.

Although there was general support for creating a system that was platform-neutral and future-proof, some delegations nevertheless had concerns about the appropriateness of the linear/non-linear distinction as an indicator of impact on society, whilst other delegations remained to be convinced regarding the substantive difference from the user perspective between "pull" (non-linear) and "push" (linear) systems of delivering content. Many other delegations, however, appeared generally comfortable with the linear/non-linear distinction. Most delegations also endorsed the definition of "audiovisual media service". However views differed on certain of the cumulative criteria contained within that definition, in particular the necessity of the element "information, entertainment or education", the introduction of a new element on "editorial control" and the necessity of a clearer definition of the "principal purpose" element.

(ii) Internal Market aspects (jurisdiction, country of establishment, free movement of services and freedom to impose stricter regulations) (Articles 2, 2a and 3(1) and (2)).

6. The Commission proposal retains the principle of the country of establishment as the determinant of jurisdiction, but introduces a specific procedure, based on ECJ case-law, for dealing with cases of abusive circumvention of national laws by providers of services. Regarding the freedom of reception and retransmission of services, the principle is subject to the same derogations as in the existing directive, but for non-linear services this would have the consequence of removing some of the possibilities for derogations currently available under the e-Commerce Directive. The removal of these possible derogations is justified, according to the Commission, by the additional harmonisation achieved by this new proposal for audio-visual non-linear services. The principle that Member States can apply stricter regulation to services within its jurisdiction is left intact.

7. Regarding the provisions on jurisdiction, all delegations generally approve the country of establishment principle, and there is complete agreement that Member States should retain their ability to subject media service providers within their jurisdiction to stricter regulations. Providers whose range of programmes, or a part of it, is mainly or exclusively directed to the public of another Member State present a specific issue. Whilst some delegations see the Commission's proposal regarding the capabilities to fight abuse and fraudulent conduct resulting from such cases as appropriate, a significant group of delegations deems these measures as insufficient given their specific national regulations on advertising, protection of minors or media pluralism. They therefore seek more far-reaching measures within the scope of the directive.

8. Regarding the application of Article 2a on the freedom of reception and retransmissions of services, discussions focussed on the application of the principle to non-linear services. Several delegations clearly have doubts as to whether the additional harmonisation proposed in matters such as the protection of minors is sufficient justification for the removal of the derogations to free movement in the existing e-Commerce Directive.

(iii) Enforcement and Supervision (Articles 3(3) and 23b)

9. In Article 3(3) the Commission asks Member States to encourage co-regulation as a means for ensuring compliance with the rules of the Directive. Article 23b sets out a requirement for independence of national regulatory authorities

10. Following the explanation from the Commission that the Member States would have the obligation to only examine the possibilities of the introduction of such measures at national level and not to actually set up such co-regulatory regimes, a majority of delegations seemed able to accept this new provision. Regarding Article 23b, delegations were still reflecting on the Commission's explanation of its proposal, which clarified that there was no requirement to have a regulatory authority, but if a Member State had one, it should be independent of both national governments and providers.

(iv) Provisions applicable to both linear and non-linear services

(a) Obligation to inform (Article 3c)

11. Most delegations endorse, subject to linguistic clarifications, the planned obligations to inform in Article 3c.

(b) Protection of minors (Article 3d)

12. Delegations broadly support the introduction of a common standard for the protection of minors for all audiovisual services, although, as mentioned above, certain delegations may not see this as sufficient harmonisation to permit the free transmission of non-linear services from another Member State. Some delegations see a need for further discussion as to whether the provision only relates to the form of transmission of certain material or whether the content of the service is also subject to the rule. (It should be noted that the higher level of protection of minors for linear services (Article 22) is left unchanged by the Commission proposal).

(c) Incitement to hatred (Article 3e)

13. The majority of delegations seemed able to support the application of this provision to all audiovisual media services (Art. 3e). Nevertheless, further discussion is required regarding the restriction or extension of the range of criteria sought by several delegations.

(d) Cultural diversity (Article 3f)

14. Whilst several delegations support in principle the Commission's proposal for the introduction of a provision on cultural diversity covering all services (subject to further discussion on practical implementation and precise formulation), other delegations consider the retention of the current system for linear services to be sufficient. Regarding linear services, the Commission restated that no rules other than the current obligations under Articles 4 and 5 are proposed.

(e) Audiovisual commercial communication (Article 3g, Article 1(f))

15. In relation to the (general) provisions on audiovisual commercial communication, the majority of delegations seem to be in agreement with the amendments proposed. An extension of the definition of surreptitious advertising to cover non-linear services was also supported by the majority.

All delegations essentially support the principle of identification and the ban on surreptitious advertising and subliminal techniques. The majority of delegations further agree that the various bans regarding discrimination, protection of religious and political beliefs, health, safety as well as environment (Article 3g(c)) should in the future also apply to non-linear services and expressly cover the protection of human dignity (as in the current Article 12). The provision on the protection of minors (Art. 3g(f)) in audiovisual commercial communication does not in principle meet with any objections.

There are differing views amongst the delegations on the issue of an extension of the provisions already in place for linear services regarding advertising for alcoholic beverages and medicinal products to non-linear services.

Regarding the definition in Article 1(f), individual elements, such as the question of the restriction to “moving images” or the integration of the criteria “for remuneration”, require more in depth discussion in view of their connection with other definitions.

(f) Product placement and sponsoring (Articles 3h and 1(k))

16. The Commission made several clarifications on product placement and sponsoring and the difference between the two notions, and explained the issues surrounding the characterisation obligation, the principle of identification, the issue of “quid pro quo” or the inclusion of products in an action.

There are differing views on these issues among the delegations: several delegations advocate the proposal on the creation of legal security, while several delegations are hesitant and one delegation is expressly against the introduction of provisions on product placement.

In future debates, the differentiation between product placement, surreptitious advertising and sponsoring must be discussed further.

Several delegations call for further discussions on the method of identification of product placement, the issue of “undue prominence” as well as the scope of the prohibitions of product placement and sponsoring (such as for religious content, cultural broadcasts, "journalistic works", documentaries, news and children’s programmes).

(v) Additional provisions applicable only to linear services (television broadcasts)

(a) Short news reports (Article 3b)

17. Regarding short news reports, the Commission explained that the Member States will not be under any obligation to create a right to short news reports. If, however, Member States do have such legislation in place at national level, broadcasters in other Member States shall be guaranteed non-discriminatory access to the signal of another broadcaster against appropriate remuneration. The rule only relates to events for which exclusive rights were acquired and does not contain any obligation as to the event organiser.

The majority of delegations are, in principle, in favour of such a rule. Some delegations, however, are of the opinion that primary legislation sufficiently covers such non-discriminatory access and so question the need for this provision.

(b) Advertising and teleshopping (Articles 10, 18, 19 and 20)

18. Regarding the provisions on the principle of **separating and identifying television advertising and teleshopping** as well as on **isolated spots** (Art 10), the majority of delegations called for further discussion. Some delegations, however, welcomed the simplification of the regime proposed, notably in order to ensure the viability of financing content.

In relation to the insertion of advertising and teleshopping spots, the majority of delegations hold a positive stance regarding the Commission's intention to simplify the rules and make them more flexible. There are, however, differing views regarding the specific issues. Several delegations advocate retention of existing regulations, such as in regard to the insertion of advertising in "intervals" or "autonomous parts" of programmes or regarding the current 30 minute rule. Furthermore, details such as the formulation of clear guidelines for the insertion of advertisement, the number of breaks allowed in programmes as well as the scope of the prohibition on advertisement-insertion (e.g. additionally for children's and news programmes) require further discussion.

19. Regarding the **amount of admissible advertising** (Article 18), the Commission stated that announcements made by a broadcaster regarding its own programmes and ancillary products are governed by qualitative provisions and not time restrictions. Sponsorship announcements and product placements are not taken into account.

A majority of delegations support the amendments proposed. There is a need for clarification regarding the definition of "short" forms of advertising. The formulation in Article 19 requires revision regarding broadcasts exclusively devoted to teleshopping and advertising. Most delegations are in favour of the deletion of the provision on teleshopping windows.

One delegation supports the retention of the daily advertising limits, whilst one delegation calls for further discussion on the necessity of a 20% restriction per hour.

20. In relation to the so-called “**De Minimis Rule**” of Article 20, according to which different advertisement conditions could be put in place for broadcasts with no relation to the Community, the Commission argues that the newly proposed criterion of negligible audience share must be treated cumulatively.

Most delegations consider the insertion of the “no significant impact in terms of audience share” criterion to be vague and a possible source of market distortions.

III. The Policy Debate at the Council

21. So as to guide the preparatory bodies of the Council in their further examination of this proposal, the Presidency has planned a policy debate to take place at the Council on 18 May 2006. With a view to structuring the debate, the Presidency suggests the following question:

"How do you assess - in the light of the objectives pursued - the Commission's proposal with regard to:

- the appropriateness and the sustainability of the distinction between linear and non-linear services;*
- the common rules¹ applying to both categories of services;*
- the extent of the modernisation and simplification of the television advertising and teleshopping rules²?"*

22. Due to the large number of delegations involved, Ministers will have only very limited time to express themselves on this important proposal and the Presidency would therefore suggest that each Minister focuses on the elements of this question which are of key interest or concern to him/her.

¹ Identification of the media service provider, the protection of minors, the prohibition of incitement to hatred, the promotion of cultural diversity, some qualitative restrictions for as well as the identification of commercial communication.

² Regulations about recognisability and separation as well as insertion of television advertising and teleshopping, about the time limit and about the regulations for television broadcasts exclusively devoted to advertising and teleshopping.