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of : Audiovisual Working Party

on : 30 January, 7 and 16 February 2006, 7, 14 and 28 March and 11 and 21 April

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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

I. INTRODUCTION

This document sets out the results of the technical examination of the above proposal undertaken by the Working Party at its meetings of 30 January, 7 and 16 February 2006, 7, 14 and 28 March and 11 and 21 April. It is intended to complement and complete the Presidency's Progress Report (doc. 8601/06) submitted to the Education Youth and Culture Council on 18/19 May 2006. Text proposals made by delegations during the course of the Working Party meetings are set out in a separate addendum.

II. OVERALL PRESENTATION OF THE PROPOSAL BY THE COMMISSION AND MEMBER STATES' INITIAL VIEWS

The Commission explained that its proposal was the fruit of an extensive review and consultation process, which had demonstrated that, in the context of the major technological and market developments in the audiovisual sector since the last revision of the Directive, the legislative framework needed to be reviewed as a matter of urgency.

In its general presentation the Commission highlighted two aspects:

- the new regulatory architecture proposed: an extension of scope to cover all audiovisual media services, irrespective of the transmission platform, combined with a two tier regulatory structure (a basic tier of minimum rules for all services, with additional rules for traditional "linear" broadcasting);
- a simplification and modernisation of the advertising rules.

In their general comments Member States :

- for the most part welcomed the Commission's basic approach, albeit with a number of concerns regarding legal clarity of the distinction between linear and non-linear services and the precise impact of the extended scope on real examples of new services;
- welcomed the principle of simplifying advertising rules, although specific concerns were expressed by some delegations on the protection of consumer interests, in particular with regard to the new provisions on product placement .
- expressed differing views on the question of jurisdiction, in particular on the adequacy of the proposal in its approach to broadcast services primarily targeting a country other than the one in which the broadcaster is established.

III. DISCUSSION OF THE SCOPE AND REGULATORY ARCHITECTURE PROPOSED BY THE COMMISSION

(i) the basic approach

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. The upper tier of so-called "linear services" (in effect television-style broadcasting as it is traditionally understood) would be subject to all of the obligations of the Directive, while the second tier of "non-linear" services (interactive services where the user "pulls" content when he/she wishes) would be subject only to a reduced set of basic obligations.

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. A number of delegations were concerned that extending the scope of the Directive might result in having to introduce a new system of licensing, although the Commission reassured the Working Party that a licensing system was not a requirement of the text proposed.

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. Setting out its rationale, the Commission explained that content which is viewed simultaneously by the public has greater impact on society than content where the user determines the time of its transmission, and this justifies more stringent regulation of the former. Some delegations queried the validity of linear/non-linear 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.

(ii) legal certainty

Concerns about the legal clarity of the proposed scope (which existing and future services would be covered, and by which tier) were more widespread. The Commission underlined that it would never be possible to achieve complete legal certainty and thus grey zones would inevitably always exist. Nevertheless, in response to delegations' specific questions, the Commission representative did seek to clarify the intentions underlying the Commission proposal:

- whether any individual service fell within the scope of the proposed Directive would depend on whether it fulfilled all six of the cumulative criteria in the definition of "audiovisual media service";
- the broadening of the scope to non-linear services did not require the imposition of licensing requirements on such services;
- the definition of "television broadcasting" was intended to be synonymous with the concept of a "linear audiovisual media service";
- traditional teletext services would be excluded from the scope of the new proposal as they do not comprise "moving images, with or without sound";
- audiovisual services offered only to persons present on the premises of certain companies (such as a department store or metro station) were not intended to be included as they are not provided "to the general public";
- the same audio-visual content could be made available at different moments in time as part of a linear service (e.g. streamed over the Internet in real time) and as part of a non-linear service (e.g. made available for download). This may often be the case with news bulletins;
- commercial websites featuring audiovisual content shot, for instance, using "webcams" (e.g. snow conditions, road traffic) would not be considered as coming within the scope of the Directive because there was no editorial control over the audiovisual content;

- personal weblogs ("blogs") are not economic activities provided against remuneration as referred to in ECJ caselaw interpreting the Treaty. They would therefore be excluded. However, where the “principal purpose” of websites would be to provide “moving images with or without sound” as a significant commercial activity, this could bring them within the scope of the Directive.
- it was intended that religious television broadcasts be covered as in the current directive;
- there was no intention to cover gambling websites using audiovisual content. The Commission representative considered that the principal purpose of such services was not to provide moving images in order to "inform, entertain or educate" but in order to allow the public to place bets and thus such services were outside the scope, the audiovisual content being only ancillary to the main purpose of such services;
- on-line video games could potentially fall within the scope and be considered a non-linear service;

A number of different possibilities for improving the legal clarity of the text were floated, including greater use of the recitals, establishment of an Annex containing an indicative list (positive or negative) of services included or excluded from the scope, and the further development of the role of the Contact Committee established under Article 23a of the Directive.

IV. DISCUSSION OF SPECIFIC PROVISIONS

(i) Definitions, jurisdiction and free movement of services

Audiovisual media service, media service provider (Article 1(a) and (b)):

The **Commission** highlighted the six core elements of Article 1(a) and underlined that each element had to be met cumulatively for a service to fall within the scope of the Directive:

- it had to be a service within the meaning of the EC Treaty ("normally provided for remuneration");
- the principal purpose of the (overall) service was to supply moving images, so that activities which were merely ancillary did not come under the Directive;
- they had to be moving images with or without sound, which meant that neither radio nor teletext were within the scope;
- the purpose of the service was to inform, educate or entertain;
- the service was intended for the general public, meaning that private communication was excluded as would be services available only to closed user groups;
- the service had to be provided via an electronic communications network.

Whilst this explanation was useful to delegations, there was some concern that the Commission's intentions regarding specific cases were not adequately reflected in the wording of the definition itself. It was clear from discussions that the notion of "principal purpose" was of key importance. Certain delegations wished to see the notion of "editorial control" introduced explicitly in 1(a) as a limitation of scope, (it already features in 1(b)), whilst the interpretation of the phrase "in order to inform, entertain or educate" given by the Commission (excluding gambling but including religious broadcasts) did not convince all Member States.

Another point of discussion was the issue of including teletext services. While it was true that the Directive currently in force included this content, the proposal for a Directive, in contrast, excluded it. Certain delegations requested that teletext continue to be regulated by the Directive.

It was accepted that what was to be understood by "general public" was already a legal issue for the Directive currently in force and the corresponding Court of Justice case law. However, certain delegations remained concerned about the lack of clarity of this notion.

Television broadcasting - broadcaster - non-linear service (Article 1(c), (d) and (e)):

The **Commission** explained that the term "television broadcasting" was to be considered as a synonym for "linear service". The chief characteristic of television broadcasts was that their content was received simultaneously by all viewers according to a provider's pre-established programme schedule. Irrespective of their technical distribution, video-on-demand services were therefore non-linear services, over which the user had a much greater degree of control. For the Commission, services which distribute content simultaneously to consumers have a greater impact on society and provide the user with little or no control, which justifies a greater degree of regulation.

In the course of the discussions, some **delegations** were critical of the fact that exactly the same content could come under both Article 1(c) and Article 1(e), depending on whether it was streamed or downloaded ready for viewing on demand. The bottom line of the matter was whether the technological criterion was a suitable criterion for drawing a distinction, or whether instead the impact on and perception by the viewer should not be given priority. One delegation additionally pointed out that non-linear video-on-demand services were in direct competition with other forms of provision (such as DVD rented on-line and sent by post) falling outside of the scope of the Directive altogether.

Some delegations criticised the fact that linear services were defined "indirectly" in the definition of television broadcasting, and there was a broad perception that the whole text of the Directive could be clearer in setting out which obligations apply to which categories of service.

*Definition of audiovisual commercial communication - television advertising - teleshopping
(Definitions in Article 1(f), (g) and (j))*

The Commission confirmed that audiovisual commercial communication, which accompanies audiovisual media services fall within the scope of the Directive. Thus, Article 2 also applied to audiovisual commercial communication.

It was mentioned that the term "audiovisual commercial communication" was broader than the term "television advertising", as the latter was limited to linear services. Audiovisual commercial communication was a general term in relation to other concepts (television advertising, teleshopping, sponsorship) for which different rules applied. The other definitions of television advertising, teleshopping and sponsorship were not discussed specifically (except for demarcation questions, see section on Article 3h below), as these were already defined in the Directive in force. On the subject of sponsorship, the Commission stated that henceforth explicit references to products were covered.

During the discussion on one delegation's drafting proposal the Commission suggested that for the sake of clarity further reflection should be given to revising the definition with regard to its being restricted to "moving images". Furthermore, the Commission also advocated including "payment" in the definition in Article 1(f).

It was concluded that the majority of delegations considered "audiovisual commercial communication" as a useful general term, though individual elements of the definition required further discussion as regards the way it related to other definitions.

Jurisdiction (Article 2)

The **Commission** explained that in the fields coordinated by the Directive Member States are able to apply stricter rules to providers under their jurisdiction. However, the primary law principles of freedom to provide services and freedom of establishment could not be limited without proper justification by reference to overriding reasons of public interest and the means should in any event be proportionate.

In the light of the case law of the European Court of Justice, the Commission proposed the introduction as new paragraphs 7 to 10 of Article 2, of the possibility for a Member State to take measures in cases where a service provider established in one Member State directs all or most of his activity to the territory of another Member State, where certain conditions are met. This procedure would allow the justified concerns of a large number of Member States about this issue to be taken into account without calling into question the country of establishment principle.

The Commission also indicated that it might be feasible to further clarify matters by fine-tuning some of the criteria determining jurisdiction set out in Article 2, provided that a clear distinction is retained between determination of jurisdiction, on the one hand, and the possibilities open to the receiving State where the rules were circumvented, on the other.

None of the **delegations** opposed the country of establishment principle, and there is broad sympathy for the idea that a single Member State should exercise jurisdiction over any particular service provider. However, as regards the new procedure reflecting the case law of the European Court of Justice, some delegations were critical of the limitation to cases of "abuse or fraudulent conduct" considering this as an insufficient response to their difficulties. A number of delegations would prefer to see specific exceptions from the country of establishment principle so as to ensure compliance with specific domestic provisions regarding matters such as advertising, protection of young people and media pluralism.

Other delegations, however, supported the Commission's approach and emphasised the importance of the country of establishment principle and the free movement of services to the functioning of the Internal Market for audiovisual services.

As regards the proposed clarifications of the provisions on jurisdiction, most **delegations** were positive about changing the order of the jurisdiction criteria in paragraph 4. However, a number of delegations said that it was necessary, partly also for the sake of clarity where circumvention issues arose, to be specific about what was meant by "a significant part of the workforce" and "the Member State in which editorial decisions are taken". It was also suggested that the workforce criterion should come before the editorial decision criterion. Various delegations pointed out that the concept of "standard consumer equipment" was a grey area where Internet broadcasting was concerned although it should be noted that this is not a criterion for establishing jurisdiction as it only refers to services intended exclusively for reception in third countries. .

The **Commission** explained that the principle of free movement contained in the first paragraph applied to all services, whereas the possibility for an exemptions procedure in Article 2a(2)(a), whereby a Member State in certain circumstances had the possibility of restricting free reception and retransmission of television programmes, applied only to linear services. For non-linear services, the possible exemptions to free movement in Article 3(4) of the e-commerce Directive would no longer be applicable as far as audiovisual media services were concerned, this being justifiable due to the additional harmonisation achieved by the new proposal on issues such as the protection of minors and incitement to hatred. The Commission referred delegations to recital 10.

Some delegations considered that the relationship of this provision to the e-commerce Directive was unclear and called for the existing possibilities to be retained. Other delegations explicitly supported the Commission proposal. One delegation wanted the possibilities provided for in Article 2a(2)(a) also to cover Article 3(d).

(ii) General provisions applicable to all services

Transparency obligations (Article 3c):

The **Commission** explained that this provision required details for the identification of the media service provider. It was emphasised that the use of "where applicable" in Article 3c(d), left the national legislator margin for manoeuvre.

The **delegations** basically approved the obligation to supply information provided for in the text, but requested clarification as to the relation between the self- and co-regulation mechanisms and the requirement to supply the geographical address.

The protection of minors (Article 3d)

The **Commission** explained that this provision would be applicable to all audiovisual media services. In the interests of freedom of expression an absolute ban on "adult content" would not be required but Member States would need to take measures in terms of restricted access. Linear services would continue to be subject to the stricter provisions of Article 22.

The principle of both maintaining a higher level of protection for linear services (Article 22) and of introducing a minimum standard for all audiovisual media services was generally well received..

The Commission explained that in the context of a functioning internal market, its prime objective was to ensure a high level of protection for public interest objectives. In particular, this included protecting young people. The Commission noted on the issue of the demarcation between Article 22 and Article 3d, the purpose of Article 22 remained unaffected by Article 3d, and, although Article 3d would be applicable to linear and non-linear services alike, Article 3d implied no new obligations for linear services.

The Commission explained that there were three kinds of content:

- illegal content, which would not, however, be covered by the Directive, as this came under criminal law;
- content that might seriously impair the development of minors;
- content that might impair the development of minors within the meaning of Article 22(2).

The Commission indicated that it was open to the request from some delegations that examples of measures that could be taken be included in the text. The Commission also viewed positively the request of some Member States that recital 32 be reworded.

The Commission also explained that the ban provided for in Article 3d, requiring Member States to take appropriate measures "to ensure that audiovisual media services under their jurisdiction are not made available *in such a way* that might seriously impair the physical, mental or moral development of minors", covered both the content and the form in which it was made available. Some delegations criticised this wording on the grounds that it was not the way it was made available that mattered, but rather the content of the service.

One delegation also had reservations regarding recital 10 and stressed the importance of being able to impose access-blocking measures at national level in relation to the internet; this was endorsed by certain other delegations (see under "Ensuring the movement" on page 10 above).

A number of delegations requested, in some cases with specific drafting proposals, that Article 3d - following the provision in Article 22 - should include an illustrative mention of pornographic content or acts of gratuitous violence.

Prohibition of incitement to hatred (Article 3e):

The **Commission** stated that it was one of the main concerns of the draft directive to guarantee certain basic requirements for all services, and this included the requirement that they not contain incitement to hatred. It was made clear that the present Article 22a would be entirely subsumed in Article 3e and would cover both linear and non-linear services.

The **delegations** did not call into question the principle of the aims of the provision of Article 3e. However, one group among the delegations took the view that the list was too wide-ranging and needed to be limited, while other delegations asked for the list to be extended. Some delegations pointed to difficulties in implementing this provision. In this context too, the objection was raised by some delegations that Article 2a, which allows for the possibility of exceptions to the rules in the receiving state, was only decisive for television broadcasts, while regulation was desirable also for non-linear services.

On a drafting point, since audiovisual commercial communication is a concept subsumable under audiovisual media services, it was agreed that the notion of "audiovisual commercial communication" be deleted from Article 3e.

Promotion of cultural diversity (Article 3f) and Article 6

The **Commission** pointed out that both linear and non-linear services had the potential to advance the cause of European works and thereby to contribute actively to the promotion of cultural diversity. It further explained that the provision had been deliberately left open and referred to the thirty-fifth recital, which sets out options for reaching that goal. The terms of Article 3f applied to all services and introduced no additional obligations (over and above Articles 4 and 5) for linear services, the terms of the Article being fulfilled by compliance with the requirements of Articles 4 and 5. The Commission also referred to the legal obligation to take full account of Article 151 (4) of the EC Treaty (especially relevant in this field).

A number of **delegations** were against Article 3f on grounds of principle, while other Member States supported the aim of the provision but doubted that it would be possible to implement it in its current form - "where practicable" - and furthermore asked what obligations were implied by the provision. In the course of the discussion delegations asked for greater clarity as to which provision of Article 3f should apply to which services. There was a specific demand for Article 3f to refer clearly to non-linear services. Two delegations submitted drafting proposals for the provision in Article 3f, one of which provided for specific measures for the promotion of cultural diversity, e.g. that media service providers would be required to offer a reasonable number of European works in their catalogues or to invest in them in relation to their turnover. The other proposal was for an illustrative specification as to the promotion of cultural diversity in non-linear services, suggesting the example of a minimum proportion of investment in European production and a percentage quota for video-on-demand catalogues. Several delegations also spoke in favour of a better adaptation of rules on the reporting requirement for both linear and non-linear services. The planned provisions on the 2 and 4 year reporting requirements could be adapted to the provision on the reporting requirements under Articles 4 and 5.

Regarding the changes to the definition of "European works" in Article 6, the **Commission** pointed out that the Community concluded many agreements covering the audiovisual sector also and coproductions with the Contracting States in question therefore enjoyed the same preference as if they were European works. The article had also been adapted to take account of the fact that many of the "European third countries" initially referred to had now become Member States.

Delegations as yet had no firm views on the definition of "European works" in Article 6.

Requirements to be imposed on audiovisual commercial communications (Article 3g)

The **Commission** stated that for the sake of proportionality it seemed appropriate to make audiovisual commercial communications subject to certain basic consumer protection requirements. Accordingly the identifiability requirement, the prohibition on surreptitious advertising, the prohibition on subliminal techniques and the requirements hitherto laid down in Article 12 of the Directive would be applied to all services. The separation principle would be laid down only for linear services. The Commission furthermore said that teleshopping was conceivable even in the context of non-linear services. With regard to the relationship of the provisions in Article 3g(d) with the Tobacco Advertising Directive, the Commission stated that the aspect mentioned in the proposal was not covered in the Tobacco Advertising Directive. On the provisions of Article 3g(f) the Commission said that the content of Article 16(2) of the existing Directive had been incorporated into Article 3g(f) and that the wording had only been linguistically simplified.

The Commission also stressed that for the sake of proportionality and consumer choice the proposed provisions were adequate in particular for commercial communications for alcoholic beverages. In addition, on the subject of advertising for medicinal products, it pointed out that the provisions of Directive 83/2001/EC (especially Article 88) governing advertising for medicinal products were still applicable, as was made clear in the new forty-first recital. Article 88 of Directive 83/2001/EC contained detailed provisions on advertising for medicinal products.

The retention of Article 14 was also necessary, according to the Commission, because under Directive 83/2001 the onus for compliance with the provisions on advertising of medicinal products was on the country issuing the licence for prescription medicines, while the proposed Directive placed the onus for compliance with the provisions on advertising of medicinal products, as hitherto, on the country exercising jurisdiction.

There was unanimity among the **delegations** in general concerning the identifiability principle and the prohibition on surreptitious advertising and subliminal techniques. Most delegations moreover took the view that the list in Article 3g(c) should apply also to non-linear services and that protection of human dignity should be explicitly included (as hitherto in Article 12).

With regard to making additions to the requirements listed in Article 3g(c), in particular the prohibition of discrimination, there was a balance between those in favour of and those against such an extension. Nor did the provision in Article 3g(f) (incorporation of Article 16 for all services) encounter any objections in principle.

A balance also emerged among delegations between supporters and opponents of extending the provisions of Articles 14 and 15 of the existing Directive to all services. While those in favour pointed out that the criteria in question were qualitative ones which ought to be generally applicable, the opponents stressed that from the point of view of consumer choice further rules would be disproportionate and would also cause problems of enforcement.

The Chair concluded that most delegations seemed to agree in principle with the proposed changes to Article 3g(a) to (d) and Article 3g(f). It was concluded that teleshopping in (d) need not be expressly mentioned, as teleshopping was subsumed under the concept of audiovisual communications. The definition of surreptitious advertising still needed to be adapted, since the proposed definition covered only linear services. The question of extension of Articles 14 and 15 of the current Directive to non-linear services in Article 3g(e) similarly still required further discussion, as did a possible amplification of Article 3g(c).

Sponsorship, product placement - definitions and content requirements (Article 1(i) and (k) and Article 3h)

The **Commission** stressed that the interpretative Communication had already examined the question of surreptitious advertising and product placement. The proposal for a directive was not intended to "legalise" product placement, but to clarify the position in the interests of legal security.

Concerning the definition, the **Commission** said that any payment might be considered a "similar consideration" as referred to in Article 1(k) and this term was already used in the Directive in force. The criterion of undue prominence already put forward in the interpretative Communication for distinguishing surreptitious advertising could certainly be included in the recitals but could also be covered in the additional section of Article 3h(b) (as a second alternative). There was already provision in the proposal for product placement not to contain any "special promotional references". The wording "where appropriate" referred to the fact that "scheduling" was only in the linear context.

The addition of the word "directly" in Article 3h(b) was furthermore necessary in order to restrict the provision, since both product placement and references to a sponsor could be indirect encouragements to buy. The central principle of identifiability - as established in Article 3g(a) - applied also to product placement. The identification must not, however, lead to additional advertising, so for this reason neutral identification could be used. Regarding the extent of identification in the case of sponsorship, the Commission made it clear that on the basis of the case law of the ECJ the obligation to name the sponsor at the beginning and/or at the end of the programme was a minimal requirement. Sponsorship was usually a means of advertising brands and names. Even the existing definition did not exclude a reference to products, and this was also made clear by the proposal.

The most important criterion distinguishing sponsorship might be the fact that in product placement the reference to a product was built into the action of a programme, which was why the definition in Article 1k contained the words "within" audiovisual media services". Sponsor references, in contrast, were not made within a programme and were not part of the plot. The presence of a product placement assumed therefore that the product was recognisable and that a payment or similar consideration had been made for showing it.

The provisions of paragraph 2 applied to all audiovisual media services and a distinction should be made between the prohibition on audiovisual commercial communications in Article 3g(d) and the provisions of Article 3h(2).

Concerning non-prescription medicinal products the Commission stated with regard to Article 3h(3) that no single definition existed and that paramedical substances such as ginseng were not to be included as medicinal products. Directive 2001/83/EC however still stood. Product placement for non-prescription medicinal products was accordingly permissible although this was not expressly stated in the proposal.

The provisions of Article 3h(4) were applicable equally to linear and non-linear services. With regard to a sponsorship prohibition in the case of children's programmes, the Commission pointed out that a sponsorship prohibition might, if taken too far, jeopardise the financial viability of content for children.

On requests to broaden the scope of application of the paragraph, the Commission did not object to the inclusion of "religious content", while it was difficult to include "cultural programming" under paragraph 4, as there was no single definition of the term. "Journalism" could be covered by the term "current affairs", a term which under the existing Directive covered only broadcasts relating to news such as commentary or analysis of political information. Documentary films, too, were broadcasts in which facts were presented and in which therefore product placement and sponsorship should be prohibited in order to preserve objectivity and independence.

Three principal attitudes to product placement could be discerned among **delegations**. While there was some support for the proposal in the interests of legal security, attitudes on the other side ranged from scepticism to rejection (one delegation). Some delegations argued for the detailed stipulation of conditions for product placement. A lack of clarity would also result, with regard to product placement, in connection with the concepts of "any contribution" in the case of sponsorship and "payment or similar consideration" in the case of product placement. As regards the identification of product placement, several delegations favoured requiring identification not only at the beginning but also - in the interests of complete transparency - when the product was mentioned and at the end. A number of delegations also supported clearer regulation of the actual method of identifying product placement.

In this context there was also a request by one or two delegations to specify the number of sponsor references more precisely or for a ceiling on the duration and frequency of product placements. In the case of sponsorship many delegations wanted an extension of the prohibition on undertakings in the field of non-prescription medicinal products.

Concerning the categories of content types mentioned in Article 3h(4) for which sponsorship and/or product placement would be prohibited, several delegations requested an extension to e.g. religious content, cultural programmes, "journalism" and advice programmes, while other delegations also wanted to have a prohibition on sponsorship firmly tied to content and documentary films targeting children.

The **Chair** concluded that there was a need for further discussion of the demarcation between product placement, surreptitious advertising and sponsorship. This applies in particular to the relationship between surreptitious advertising and sponsorship and a clearer wording of the defining term "featured within audiovisual media services" in Article 1k. The question of the method of identifying product placement also required further discussion, as did the scope of the prohibition for product placement and sponsorship. In relation to Article 3h there was also a need for a rewording of the text, especially concerning the uniform use and the meaning of the terms "programme" and "broadcasts".

(iii) Additional rules for linear services

Short news reports (Article 3b)

The **Commission** explained its intentions regarding this provision. The text did not seek to oblige Member States to introduce a right to broadcast such reports, but if there were such a right at national level, non-discriminatory access for all television broadcasters to the signal – not the physical location – of the "source" television broadcaster must be ensured on payment of an appropriate fee ("fair and reasonable"). The rule applied only to events to which exclusive rights had been acquired and placed no obligation on event organisers. Some elements of harmonisation were included (obligation to identify the "source" broadcaster, duration of short extracts) which would facilitate the non-discriminatory exercise of this right.

Most **delegations** considered that some adjustment of the wording of this Article would be necessary to reflect this explanation. In addition certain delegations argued that the primary law principle of non-discrimination was in itself already sufficient to ensure such non-discriminatory access.

Principle of separation and recognisability, advertising-block requirement (Article 10)

The **Commission** explained that Chapter IV of the Directive was no longer intended to contain any rules on sponsoring and would refer only to linear services. The rules formerly contained in the Article 10(3) and (4) would continue to apply to all services and had thus been moved to a new Article 3g. Furthermore, the advertising-block requirement would be maintained and an exception would be made only for sports programmes in the form of broadcasts of sporting events. The Commission also cautioned that during longer sporting events, maintaining the advertising-block requirement might jeopardise the transmission of such events on free TV, which is why the proposal incorporated a realistic addition.

A majority of **delegations** rejected a waiver of the advertising-block requirement for sports broadcasts in the interest of consumer protection and the prevention of commercialisation. There was a risk that the consequence would be many short interruptions caused by advertising breaks. Some delegations, however, called for a total waiver of the advertising-block requirement to guarantee that content could be funded. Several delegations emphasised the direct link between the issue of isolated advertising spots and the possibility of inserting advertising under Article 11. This was also connected to the question of when the integrity of a programme would be jeopardised by such insertion and what constituted a natural break.

Insertion of advertising (Article 11)

During its presentation, the **Commission** said that the existing rules were overly complex and that there had been calls from many quarters to modernise and simplify the system. The proposed rules were also up to date since today's consumer could escape advertising because of wider consumer choice. The provision in paragraph 1 corresponded essentially to the existing arrangement. The provision in paragraph 2 attempted to restore a proportionate balance between the rules on minutes (45, 30, 20) that have applied up until now; The calculation which would be based on the gross coverage principle in accordance with the ruling of the ECJ, i.e. the scheduled transmission period was to be taken as the basis, without prejudice to the capacity of Member States to take stricter measures for broadcasters under their jurisdiction. The timing of the interruption could - subject to the conditions in paragraph 1 - in future be selected at will, but the maximum amount of advertising per hour remained the same.

The new rules no longer required a minimum amount of time between two consecutive advertising slots but did regulate the number of possible advertising insertions for specific categories. In the case of children's programmes, however, greater protection was required.

Although a majority of delegations agreed in principle with the aim of simplification and greater flexibility, the discussion in the Working Party yielded the following points:

- Several delegations noted that the proposed rules in paragraph 1 were too imprecise and that the reference to natural programme interruptions ought to be retained; the Commission did not object to this in principle.
- Some delegations argued for retaining the existing paragraph 2.
- Although welcoming the simplification, some delegations found that the 35 minute rule for children's programmes and news programmes led to more stringent rules. One delegation criticised the fact that documentaries would no longer be subject to restrictions.
- Another delegation pointed out that the stricter 35 minute rules would be laid down for, e.g. children's programmes, and the Commission confirmed this.
- Some delegations were against the abolition of the 20 minute rule. Others advocated replacing it with clearer rules on the number of interruptions i.e. explicitly introducing an additional rule, according to which programmes other than those subject to the 35 minute rule could be interrupted once after a full period of 20 minutes. In the interest of viewer protection, some delegations, however, advocated extending the 35 minute rule to other categories, such as documentaries and current affairs programmes, while some delegations were in favour of maintaining the current 30 minute rule.
- With regard to the ban on inserting advertising during religious services, several delegations called for such a ban to be extended to children's programmes and also, in part, in news programmes.

Duration of advertising, teleshopping and television advertising programmes, de minimis rule (Articles 18, 19 and 20)

In relation to Article 18, the **Commission** explained that in practice the limit on daily advertising time was insignificant and could therefore be omitted. The amendment in respect of short forms of advertising was based on the ruling of the ECJ, according to which continuous advertising programmes are not included in the hourly advertising time. This was also clarified in recital 44. In the past, it had not proved difficult to decide what was an advertising spot and what was a longer form of advertising.

The reference to public service announcements and charity appeals broadcast free of charge - as mentioned in recital 18 - could be omitted since they did not fall under the definition of advertising. No explicit provision was required in the enacting terms. On the other hand, it was important to maintain the qualitative, but not the quantitative, provisions for announcements about own programmes and ancillary products. Lastly, it would be difficult to justify including sponsorship announcements in advertising time, and not practicable to include product placement. As regards the question of which criterion (sliding hour, clock hour or overlapping clock hour) to use to calculate an hour in determining the advertising time per hour, reference could be made to the Interpretative Communication (recital 9 et seq.). As emphasised in recital 39, the Interpretative Communication remained valid. The point was also made that, under the Directive in force, electoral messages did not fall under the definition of advertising. Similarly, a reference was made to recital 35 of the Directive in force as regards the definition of ancillary products.

In relation to Article 19, the Commission said that certain parts of the wording needed to be adapted, for example it should refer to television "channels" rather than "broadcasts". In relation to Article 20, the Commission explained that the new criterion for audience share had to be understood as being additional to the others, and that this constituted a form of *de minimis* rule. In the case of channels with a small audience share, the possibility should be created of laying down less strict rules for advertising breaks and the duration of advertising.

The vast majority of **delegations** welcomed the abolition of the limit on daily advertising (only one delegation explicitly called for it to be maintained) and the retention of the hourly advertising limit. One delegation (with the support of another) considered the percentage of 20% per hour to be still too restrictive. Some delegations requested a reduction in the number of sponsorship announcements, especially since it was becoming increasingly difficult to distinguish them from advertising in day-to-day practice. In this connection, there was one call for a more precise definition of the options as regards sponsorship announcements. The discussion did not reveal any significant opposition among delegations about the amendments to Article 19 and the deletion of Article 18a, although one delegation did call for retaining Article 18a in a revised form.

A significant number of delegations had a difficulty with the new criterion of audience share introduced in Article 20 as a new possibility for Member States to establish alternative conditions for advertising. It remained unclear what exactly was meant by audience share and how this could be assessed in crossborder situations. There was also the question of what constituted a significant share. One delegation welcomed this approach in the direction of deregulation, although it too thought that clarification was required. A few delegations expressed the concern that with this additional criterion, if it were to be viewed "cumulatively", Member States might have less room for manoeuvre and so they were in favour of omitting it. Some delegations also doubted the feasibility of implementing the criterion in view of linear media services distributed over the Internet.

(iv) Other Provisions

Co-regulation and other implementation aspects (Article 3):

The **Commission** explained that Article 3 governed the mechanisms for implementing the Directive and that it was now being extended in order to encourage Member States to promote co- and self-regulation mechanisms.

As a result of the discussion it was established that the Member States had to verify whether within their own legal system co-regulation could constitute an appropriate means of attaining the Directive's objectives. Member States were under no obligation to use a co-regulation model, but it was one option. The effective implementation of the Directive's provisions would be taken as an indicator of the "effective enforcement" required.

On this basis, most **delegations** seemed able to accept the provision, apart from a few details. On the basis of the discussions, several delegations stated that it should be made clear that there should be no obligation to introduce such mechanisms, but Member States were obliged only to make a conscientious examination of such introduction.

Independence of the regulatory authorities (Article 23b)

The provision on the independence of the regulatory authorities (Article 23b) applies to all services. The **Commission** stated that this was not *per se* new in Community law, since the requirements of transparency and independence already appeared in existing Directives. It went on to say that no obligation to set up regulatory authorities was being created, but where they did exist they must be independent of national Governments and of service providers. It also underlined the importance of having such a provision in Community law as a reference standard for candidate countries. As regards the exchange of information, it was not a question of a regular reporting system, simply an exchange of information on the implementation of the Directive, for example to help deal with particular cases.

Although there was openness on the part of **delegations**, most needed further time to reflect on the Commission's explanations regarding this article.

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