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Issues Paper for the audiovisual conference in Liverpool

Commercial communications

INTRODUCTION

The “Television without Frontiers” Directive (hereinafter: the “Directive” or the “TWF Directive”) subjects television advertising, sponsorship and teleshopping to minimum coordination rules. Compliance with these rules, which are intended to safeguard certain basic general interest objectives, enables programmes to be freely broadcast and retransmitted throughout the European Union.

In its communication *i2010 – An information society for growth and employment*, the European Commission noted that digital convergence requires “an integrated approach to information society and audiovisual media policies in the EU” and announced its desire “to increase legal and economic certainty to encourage new services and online content”.

The public consultation in 2003, the meetings of groups of experts on television advertising, and the bilateral discussions with experts considered how to take account of technological progress and market development in the new legal framework.¹ In particular, in accordance with the work programme attached to its fourth application report, the Commission was able to ask the groups concerned about the advisability of imposing specific rules as regards non-linear programming (services on demand).²

I – RULES COMMON TO ALL AUDIOVISUAL COMMERCIAL COMMUNICATIONS

ISSUE 1: THE CONCEPT OF AUDIOVISUAL COMMERCIAL COMMUNICATIONS

The Directive contains a number of basic or “qualitative” rules applicable to television advertising and teleshopping. One question related to the option in the first issue paper on the application of the new Directive to non-linear audiovisual content services concerns the advisability of extending the application of these qualitative rules to all audiovisual commercial communications, whether they are transmitted in linear mode or at the user’s demand.

¹ Meetings on 24 November 2004 and 14 February 2005.

² Fourth report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC “Television without Frontiers”, COM(2002)778/ final.

On the principle, most of the experts consulted were in favour of technologically neutral rules which would cover linear broadcasting services, as interpreted by the Court of Justice in its judgment of 2 June 2005 in *Mediakabel*,³ as well as non-linear audiovisual services.⁴

One option would therefore be the establishment of a basic tier of qualitative rules applicable to all audiovisual commercial communications, but with application rules commensurate with each category of audiovisual content service.

The groups consulted were in favour of the adoption of a new definition of “**audiovisual commercial communications**”. This concept would cover audiovisual commercial communications of all kinds - conventional advertising slogans, promotional sponsorship slogans, teleshopping, split screens, interactive advertising, product placement, etc. - which would be subject to a common set of qualitative rules: identification principle, respect for human dignity, non-discrimination, protection of minors, public health rules. This concept of commercial communications would include the subcategories of **advertising** and **teleshopping spots**, which would continue to be submitted in addition to “quantitative” rules.

Discussions with the experts were conducted on the basis of the following concepts developed during the consultation process:

An “audiovisual commercial communication” is a subcategory of “commercial communications”, as defined in Directive 2000/31/EC, meaning any form of audiovisual communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.
An “advertising spot” means any short audiovisual commercial communication made in return for payment.
“Surreptitious advertising” means the representation in words or pictures of goods, services, the name, the trade-mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended as advertising and might mislead the public as to its nature. Such representation is not considered to be surreptitious advertising if the public is informed of its existence by any means.
“Sponsorship” means any contribution made by a public or private undertaking not engaged in activities for the supply of audiovisual content linear services or the production of audiovisual works to the financing of audiovisual content services with a view to promoting its name, its trade-mark, its image, its activities or its products.
“Teleshopping” means the broadcasting of direct offers to the public with a view to the provision of goods or services in return for payment, including immovable property, or of rights and obligations, whatever the legal, administrative or other conditions to which the supply of goods or services is subject.

ISSUE 2: RULES ON HUMAN DIGNITY AND THE PROTECTION OF MINORS

In the TWF Directive, advertising and teleshopping are subject to rules on human dignity (Article 12) and protection of minors (Article 16). The question is whether such rules should apply to all audiovisual commercial communications, both linear and non-linear, with

³ Case C-89/04.

⁴ See the summary document on regulation.

implementing arrangements adapted to the characteristics of each category of audiovisual content service.

At the moment, sponsorship slogans are not covered by these rules, but it can be considered that the application of such rules to all audiovisual commercial communications, including linear services, would offer a more coherent legal framework.

With regard to non-linear services, an important argument in favour of the implementation of such “qualitative” rules is that this would ensure greater legal certainty and coherence in the balance between the free movement of audiovisual commercial communications in the internal market and the protection of basic principles.⁵

ISSUE 3: RULES RELATING TO PUBLIC HEALTH CONSIDERATIONS (TOBACCO, ALCOHOL, MEDICINES)

The TWF Directive currently contains bans or restrictions on advertising which have public health considerations. The question is whether such rules should be part of the common set of rules applicable to all audiovisual commercial communications, subject to specific implementing arrangements which take account of the increased freedom of the user who, in the non-linear environment, has access to audiovisual content “on demand”.

The organisations which represent advertisers and advertising agencies, private broadcasters and telecommunications operators believe that audiovisual commercial communications on demand require less consumer protection. Consumer organisations and public service broadcasters are in favour of the application of the same rules to non-linear services, and in particular argue that there is a link between public health rules and the protection of minors, especially as regards the advertising of alcohol,⁶ also taking account of the time spent by young people on the Internet.

There is a broad consensus that the current rules on tobacco products and alcohol are justified and should be fully applied in an identical manner to all audiovisual services, whether or not linear.⁷

With regard to communications concerning pharmaceutical products, an option for non-linear services might be to authorise objective information – for example, in accordance with standards laid down by national bodies for the self-regulation of advertising – on the products and services referred to in Article 14(1) of the TWF Directive.

For public health policy considerations, there seems to be a broad consensus in favour of maintaining, for medicinal products on prescription only, the regulatory framework applicable

⁵ Currently, the Electronic Commerce Directive provides for exemptions from the law of the country of origin on grounds of public health, consumer protection, public order, affront to human dignity, etc.

⁶ These organisations also point out that, apart from Article 15 of the current TWF Directive, there are no provisions under Community law governing the advertising of alcoholic beverages.

⁷ Television advertising and teleshopping for tobacco products are prohibited under Article 13 of the TWF Directive, as is sponsorship by companies in that sector under Article 17(2). Television advertising and teleshopping for alcoholic beverages are permitted if they comply with the criteria on presentation and impact in Article 15 of the TWF Directive.

to teleshopping, as governed by Article 14(2) of the TWF Directive, and to sponsorship, as governed by Article 17(3). There is also the question of whether pharmaceutical products should be the subject of product placement contracts in audiovisual programmes.⁸

ISSUE 4: IDENTIFICATION OF COMMERCIAL COMMUNICATIONS IN GENERAL, INCLUDING SPONSORED SPOTS

To ensure the adequate protection of television viewers, the TWF Directive requires advertising and teleshopping to be “recognisable as such” and “kept quite separate” from other parts of programmes. The various consultations show that there is a broad consensus that these principles remain valid and are even more justified in an environment in which split screens, increased opportunities for interactivity and new and future forms of audiovisual commercial communications tend to reduce the clarity of distinction between editorial content and commercial communication.

The dual requirement of identification and separation implicitly has the effect of not authorising, within the current legal framework, recourse to product placement in programmes produced by broadcasters covered by the TWF Directive.

Many experts and observers wonder whether it is advisable to maintain this ban considering that some programmes over which broadcasters under Community jurisdiction have no production responsibility are broadcast with product placement.⁹ It should be noted that the Directive on “unfair commercial practices” adopted on 11 May 2005 includes the concept of “legitimate product placement”¹⁰ and that the Communication interpreting the TWF Directive, adopted in 2004, allows product presentation for the purposes of identifying the sponsor.¹¹ For the new Directive, the possibility of authorising product placement is an option which would cover the development of the advertising market as it presently exists, whereas product placement today in fact operates without any regulated environment. Explicit authorisation would be accompanied by the obligation, common to all forms of audiovisual commercial communications, to provide clear identification at the beginning of the programme concerned.

For product placement to be made possible, the principle of separation should cease to be an essential criterion and should simply be one of the means to enable users to identify commercial content and to distinguish it from editorial content. This option has been supported by broadcasters and advertisers. While consumer organisations expressed measured reservations, in particular as regards the possible circumvention of rules on the protection of public health, they also highlighted the advantage which a framework for the current practice would provide. Some print media organisations feared this development would transfer

⁸ Account must be taken in this respect of Directive 2004/27/EC, which amends the provision on the advertising of medicinal products in Article 88 of Directive 2001/83/EC.

⁹ Explanatory report on the European Convention on Transfrontier Television, as amended by the provisions of the Protocol which entered into force on 1 March 2002, STE No 132.

¹⁰ See recital No 6 of Directive 2005/29/EC on unfair commercial practices, adopted by the European Parliament and the Council on 11 May 2005.

¹¹ Commission Interpretative Communication on certain aspects of the provisions on televised advertising in the “Television Without Frontiers” Directive of 23 April 2004, COM (2004) 1450.

advertising revenue away from the press. Some experts pointed to the risk that this practice might affect the editorial independence of the broadcaster.

Product placement should comply with the principles set out in Articles 12 to 16 of the present Directive and such an advertising technique may not be implemented in religious programmes, news programmes or children's programmes.

ISSUE 5: IDENTIFICATION OF SPONSORED CONTENT IN PARTICULAR

In the framework of the TWF Directive, sponsorship allows the sponsor to promote its name, its trademark, its image or its activities by contributing to the funding of a televised programme. For the purposes of identifying the sponsor, the 2004 Interpretative Communication on television advertising allows reference to be made not only to the name or logo of the sponsor, but also to its products or services, provided that the latter are not given undue prominence. The sponsorship provisions include the principle whereby the sponsor may not influence the editorial content of an audiovisual service which it sponsors.

Generally, the experts have been favourable to the interpretation in the 2004 Interpretative Communication. Consumer organisations believe that the public should be warned by a possible verbal or visual reference to such products or services of the sponsor.

The consultations show that, assuming the rules would apply to all audiovisual content, some principles that apply to sponsored broadcasts, e.g. the sponsor may not influence the editorial content or be identified, should apply to all sponsored audiovisual content services.

ISSUE 6: APPLICATION OF THE RULES

Like any provisions in a Directive of the European Parliament and of the Council, the rules on advertising are transposed into national law, and responsibility for their application rests with the Member States. Simplification of the rules is intended to allow greater efficiency and optimum use of the benefits of the internal market; it must not result in an excessive margin of interpretation that would call the internal market into question.

The consultations have revealed that important work has been carried out in the field of audiovisual commercial communications in the form of codes of conduct and co-regulation mechanisms. One option would be to ask the Member States to take fuller account of these developments when transposing the new Directive.

With regard to co-regulation at Community level, the parties concerned have expressed different views, while expressing their interest in the on-going study on this question.¹² Advertisers, advertising agencies and private broadcasters are more favourable to self-regulation of the industry, which may involve a contribution from consumers. Consumers' and viewers' organisations and, to some extent, public service broadcasters on the other hand support the idea of co-regulation backed up by the public authorities by a sufficiently dissuasive system of penalties, which would imply the participation of industry and civil society on an equal footing.

¹² Study by the Hans-Bredow-Institut on co-regulation measures in the media sector.

With regard to the application of the qualitative rules and in particular provisions on public health and the protection of minors, the advertisers' and advertising agencies' representatives consider that the results obtained in the Member States are satisfactory. However, consumer associations take the opposite view. A control mechanism comparable to that put in place by the Commission to verify the Member States' application of the qualitative rules has been proposed to guarantee compliance with the qualitative provisions.

II – QUANTITATIVE RULES ON TELEVISION ADVERTISING

ISSUE 1: HOURLY AND DAILY ADVERTISING LIMITS

In order to maintain a balance between the advertising revenue needs of some broadcasters, on the one hand, and the need to maintain programme integrity and quality, on the other, Article 18 of the current TWF Directive lays down rules for the transmission time which may be devoted to teleshopping and advertising. During the public consultation in 2003, the meetings of groups of experts and the bilateral talks, the question was raised as to the advisability of adapting these provisions given technological progress and the diversification of supply, which appear to give users more autonomy.

A broad consensus takes the view that the rule on the daily amount provides no added value since the limit laid down by the Directive is extremely high.

However, most of the consumers', television viewers' and print media representatives, advertisers' organisations and advertising agencies and public service broadcasters believe there is no need to question the hourly restrictions, which are still proportionate.

One option for the new Directive would be to consider that the hourly limit is the only one which is still useful. On the other hand, the daily limit on advertising and teleshopping could be abolished, however.

The experts consulted believed that, if the new Directive covered non-linear audiovisual content services, there would be no need to subject them to quantitative limits. The option which seems to emerge from the consultations is that such quantitative limits make little sense for "on-demand" services.

ISSUE 2: HOURLY AND DAILY LIMITS APPLIED TO TEleshopping

Teleshopping is defined by the Directive and subject (under Article 18a of the TWF Directive) to special rules regarding duration. There seems to be a need to question whether these rules should be maintained in view of technological development and the new interactive services offered to users. As with advertising, one option to consider is abolition of the daily limit on time devoted to teleshopping spots, on the one hand, and of the restrictions in Article 18a(2) of the TWF, on the other.

With regard to the minimum duration of 15 minutes for teleshopping windows, one advertisers' organisation and the teleshopping organisation represented at the meetings of the group of experts on advertising considered that such a rule provides no added value and

would even be counterproductive. Moreover, a consensus emerged during the first meeting of the group of experts which considered that the provisions on the insertion of advertising and its duration on teleshopping channels no longer seemed to meet a general interest objective.

In conclusion, one option would be explicitly to exempt channels exclusively devoted to teleshopping from the application of the rules laid down in Articles 18 and 18a of the present Directive, while maintaining the “qualitative” restrictions, and to assimilate teleshopping into other forms of audiovisual commercial communications.

ISSUE 3: INSERTION OF ADVERTISING

Article 11(1) of the TWF Directive establishes the principle that advertising and teleshopping spots must be inserted between programmes. However, provided the conditions set out in paragraphs 2 to 5 are fulfilled, they may also be inserted during programmes provided that certain specific interests (the integrity and value of the programme, taking into account natural breaks in and the duration and nature of the programme, etc.) are not affected. These provisions are evidently linked to the linear nature of the programmes. The question is whether they should be retained as such or simplified in order to take account of technological evolution, market development and the aim of simplification and effectiveness in monitoring the application of the future regulatory framework.

It emerges from the public consultation in 2003, the contributions from experts and the bilateral talks held that broadcasters, advertisers and advertising agencies are in favour of relaxing the rules on insertions. The consultations have shown a very high demand on the part of broadcasters for a legislative framework which offers them genuine flexibility to insert advertising during programmes. However, consumers, rights holders and the print media fear that the general interest objectives pursued by the Directive will be called into question.

Generally, there was a certain consensus in favour of maintaining rules protecting religious services, cinematographic works, news programmes and programmes for children, which obviously correspond to the general interest objectives referred to in the above paragraph. One option would therefore be to maintain the ban on commercial communications during religious services and to limit the number of interruptions for commercial communications only for the other abovementioned programmes.

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The Directorate-General Information Society and Media of the European Commission invites you to make observations to this issues paper by 5 September 2005. Please submit your comments in a generally readable electronic format. All submissions will be published on the Commission’s website if not requested otherwise. If you would like your contribution to be treated confidentially, please indicate this at the top of the first page of your submission. Should you want to add a cover letter please do so in a separate document. In case your comments exceeds four pages please start your submission with an **executive summary**. All submissions should be mailed to the functional mailbox of the Audiovisual Policy Unit of the Directorate-General for Information Society and Media: avpolicy@cec.eu.int.