

## TOWARDS AN AUDIOVISUAL MEDIA SERVICES DIRECTIVE: AN ANALYSIS OF THE COMMISSION'S PROPOSAL

Franklin Dehousse  
Karel Van Hecke<sup>1</sup>

The current "Television without frontiers" (TVWF) Directive<sup>2</sup> constitutes the basic regulation of the European Community's broadcasting policy. Adopted in 1989, the Directive provides for the free movement of television broadcasting services in the Union as it requires Member States to guarantee the freedom of reception and transmission on their territory of television programmes which originate from other Member States. Consequently, the Directive harmonized certain national programming and advertising rules. With the aim of protecting the European TV market, it also introduced broadcasting quota for European and independent works. In the light of the rapid developments in the television sector, a revision of the Directive took place in 1997.<sup>3</sup>

Since 2002, the Commission is engaged in a new revision process in order to modernise the rules on televised services. It has also examined the possibility to extend the scope of these rules to cover all services which have an audiovisual content, including new media services delivered by Internet, email, mobile communication, etc. On 13 December 2005, the Commission eventually adopted the legislative proposal for the revision of the Directive.<sup>4</sup>

The aim of this paper is to analyse the Commission's strategy in reviewing the regulatory framework. First, we will shortly discuss and evaluate the underlying principles of the present Directive. We will subsequently take a look at the elements which require a revision of the Directive. Third, we will examine the Commission's proposal and we will conclude with some critical comments.

---

<sup>1</sup> Franklin Dehousse is professor at the University of Liège and judge at the Court of first instance of the European Communities. Karel Van Hecke is researcher at the Royal Institute for International Affairs. This comment does not in any way represent a position of the institutions to which they belong.

<sup>2</sup> 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 L* 298, 17 October 1989, p. 23.

<sup>3</sup> Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 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, *OJ L* 202, 30 July 1997, p. 60.

<sup>4</sup> Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 13 December 2005, COM(2005) 646, available from [http://europa.eu.int/comm/avpolicy/docs/reg/modernisation/proposal\\_2005/com2005-646-final-en.pdf](http://europa.eu.int/comm/avpolicy/docs/reg/modernisation/proposal_2005/com2005-646-final-en.pdf).

## 1. THE PRESENT TVWF DIRECTIVE

Different objectives underlie the current “Television without frontiers” Directive. As a general principle, the Directive provides for the free movement of broadcasting services throughout the European Union. Central in the framework is the country of origin principle, according to which cross-border service providers, once they comply with the legislation of the Member State in which they are established - which must respect some basic harmonized rules - have the right to transmit freely within the Union’s territory.

In this balanced perspective, the Directive protects certain public policy objectives such as the protection of minors, the right of reply and the public access to events of major importance. A variety of provisions on television advertising, ranging from the prohibition of tobacco advertising to procedures for interrupting programmes, envisages the protection of the European consumer.

Thirdly, in the name of cultural diversity, the Directive also aims at the preservation and promotion of the European audiovisual industry by imposing broadcasting and production quota for European works. In order to monitor the application of this obligation, Member States are required to submit a report to the Commission every two years.<sup>5</sup>

The overall result of the “TV without frontiers” Directive has been positively evaluated by industry, consumer organisations and by Member States.<sup>6</sup> Minimum standards for the freedom of television broadcasting have removed disparities between national laws and have established a true European market for television services. Equally important, the quota requirements may have helped the European and independent TV and film industry to survive the pressure from US competition.<sup>7</sup>

Nevertheless, it is very clear that the television programmes in European countries remain highly dependent upon US productions.<sup>8</sup> The cultural diversity provisions have in fact protected national programmes. They did not provoke the growth of really European programmes. The use of German programmes in Italy is very limited

---

<sup>5</sup> Articles 4 and 5 of the Directive.

<sup>6</sup> The consultation rounds in the revision process show the general satisfaction among most stakeholders. See, inter alia, the submission of the Voice of British advertisers (ISBA), available from <http://www.isba.org.uk/isba/documents/1TVWF-submission.pdf>; the submission of the European Publishers Council (EPC) available from <http://europa.eu.int/comm/avpolicy/revision-tvwf2005/docs/ip1to6-epc.pdf>; the comments of the European Coordination of Independent Producers (CEPI), available from <http://europa.eu.int/comm/avpolicy/revision-tvwf2005/docs/ip3-cepi.pdf> and the written contribution by France, available from <http://europa.eu.int/comm/avpolicy/revision-tvwf2005/2005-contribution.htm>.

<sup>7</sup> See the Final Report of the Impact Study of Measures (Community and National) Concerning the Promotion of Distribution and Production of TV Programs Provided for Under Article 25(a) of the TV Without Frontiers Directive, p. 181, available from <http://europa.eu.int/comm/avpolicy/stat/2003/4-5/27-03-finalreport.pdf>. The Report shows that the share of transmission time in Member States devoted to works made in another European country (“non-domestic European works”) increased from 10.9% in 1993 to 12.3% in 2002. It also suggests the possibility that “in the absence of Articles 4 and 5, the trade deficit with the US would have been larger” and that “measures to promote the circulation of programs within the EU have also promoted exports, but this is unproven”. (p. 182)

<sup>8</sup> According to the European Audiovisual Observatory, more than 68 % of imported fiction programmes in the EU originated from the US in 2000. Moreover, American receipts for TV transmission rights in Europe increased by 15.9% in 2000. See <http://www.obs.coe.int/about/oea/pr/desequilibre.html>.

while the reverse is also true. Furthermore, the reading of the Commission's successive reports indicates that the implementation of these provisions has often been fuzzy.<sup>9</sup>

---

<sup>9</sup> See for an overview of the reports:

[http://europa.eu.int/comm/avpolicy/reg/tvwf/implementation/promotion/index\\_en.htm](http://europa.eu.int/comm/avpolicy/reg/tvwf/implementation/promotion/index_en.htm).

## **2. THE NEED FOR REVISION**

After more than 15 years, and in spite of the high political sensitivity of the matter, there exists a fundamental need to re-evaluate the Directive. Three different but closely interconnected developments justify a thorough revision.

### **2.1. The technological changes in the audiovisual market**

The first and foremost development which necessitates reconsideration of the present regulation relates to the rapid development of new technologies and the associated changing structures in the audiovisual market. The television market itself has radically changed in recent years, most notably through the apparition of digital television. Digital programmes allow a higher level of quality. They also permit the expansion of programming through a better use of transmission capacities. Still more fundamentally, they allow the launch of new services which have promptly emerged on the market, such as on-line broadcasting, internet news providers, video-on-demand, delivery on mobile platforms, etc. As a consequence of this so-called 'media convergence', traditional (analogue) television is not the single audiovisual medium anymore.<sup>10</sup> This development of the audiovisual market will most probably speed up in the future.

From a legal point of view, it is clear that the present "Television without Frontiers" Directive does not respond to this new context. The apparition of these new audiovisual services entails different questions, firstly because it is not certain whether they fall under the present scope of the TVWF Directive. Furthermore, should these services be regulated, if at all? Should internet broadcasts be legally distinguished from traditional television programmes? If so, should they be made subject to the same or a different set of rules than television services?

### **2.2. The circumvention problem**

As stated above, the country of origin principle is regarded as an essential principle of the Directive. Once a broadcaster has established itself under a certain Member State's jurisdiction, other Member States may not hinder transmissions of that broadcaster on its territory.

Certain problems have arisen which call for a revision of the country of origin principle. Several Member States have expressed their concern about the situation whereby broadcasters deliberately establish themselves in a Member State in order to evade the more stringent legislation of the Member State receiving the

---

<sup>10</sup> The Commission has recognized this process in its initiative "i2010: European Information Society 2010". See the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2005) 229 final, 1 June 2005.

broadcasts.<sup>11</sup> This temptation is certainly stronger when Member States adopt, as allowed, stricter measures than those laid down in the Directive. In this context, calls are made to clarify the establishment criteria<sup>12</sup> and to envisage specific measures against the circumvention problem in the new Directive.

### **2.3. The need to modernise advertising rules**

The third element, which pleads for a review of the Directive, has to do with the rules on TV advertising. The economic relevance of TV advertising has radically changed over the years: much more than in 1989, advertisement revenues are of crucial importance for the financing of the audiovisual sector. Therefore, calls have been made to loosen and simplify the strict obligations of the current Directive, which are considered by the sector as too burdensome and far-reaching.<sup>13</sup>

### **2.4. The consultation process**

In 2003, the Commission announced in the fourth report on the application of the TVWF Directive<sup>14</sup> its intention to review the Directive. In the thereto attached work programme six themes were identified in need of further examination.<sup>15</sup> During the

---

<sup>11</sup> See for instance the case in which a Flemish company established itself in England after it had failed to obtain a license as private television broadcaster in Belgium. ECJ, Case C-56/96, VT4 Ltd v Vlaamse Gemeenschap, *ECR* [1997] I-3143.

<sup>12</sup> The establishment criteria determine in which Member State a broadcaster is established.

<sup>13</sup> During the consultation process of the new Directive, the issue of ‘product placement’, whereby advertisers pay to make their products visible in films and TV programmes, has proven a very contentious issue. The present Directive prohibits ‘surreptitious advertising’, i.e. the displaying of products intended to serve advertising and potentially misleading the public as to its nature. However, not all Member States interpret this provision in the same way. Product placement is currently forbidden in Member States like Germany, France and Great Britain on the grounds of consumer protection while Austria is the only country which permits it under certain conditions. This divergence within the EU is perceived as a crucial comparative disadvantage vis-à-vis the United States, where product placement has always existed.

<sup>13</sup> Hence, European producers and advertisers have asked for a European initiative with regard to product placement. Consumer organisations, however, expressed their concern about the misleading effect for the European consumer while many trade associations and broadcasters feared that allowing product placement would subordinate the editorial content to the wishes of advertisers, thereby jeopardising the integrity of, for instance, news magazines. See the comments of the British Broadcasting Company (BBC), available from <http://europa.eu.int/comm/avpolicy/revision-tvwf2005/docs/ip1to6-bbc.pdf>, and the comments of the Association of German Magazine Publishers (VDZ), available from <http://europa.eu.int/comm/avpolicy/revision-tvwf2005/docs/ip1-vdz-en.pdf>.

<sup>14</sup> 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, 6 January 2003.

<sup>15</sup> The six themes are the following: (1) Access to events of major importance to society, (2) Promotion of cultural diversity and of competitiveness of the European program industry, (3) Protection of general interests in television advertising, sponsorship, and self-promotion, (4) Protection of minors and public order - The right to reply, (5) Application (related aspects), (6) Short extracts of events and other elements not covered by the Directive.

subsequent public consultation process, all interested parties were invited to submit their observations on these topics to the Commission.<sup>16</sup>

In December 2003, the Commission released its "Communication on the Future of European Regulatory Audiovisual Policy"<sup>17</sup>, in which it proposed a dual approach for the revision procedure: in the short term, an interpretative communication relating to the Directive's provisions on TV advertising would be adopted, and, in the medium term, a thorough revision of the Directive through expert groups and independent studies was envisaged. The interpretative communication on advertising<sup>18</sup> was adopted in April 2004, whereas expert groups met between September 2004 and February 2005.

Finally, in July 2005, the Commission published six Issues Papers<sup>19</sup> which summarised the various contributions to the review process. Here again, all interested parties were invited to submit their comments. The Issues Papers were discussed at the Liverpool Audiovisual Conference, before the Commission released its legislative proposal in December 2005.

The preparatory phase to the proposal was thus characterised by a double consultation process in 2003 and 2005. These consultations focused on six themes:

#### **2.4.1. The scope of future regulation.**

The Commission identified two policy options in reviewing the Directive. Either the current TVWF Directive would be 'updated' so that all services similar to television would be regulated. Either a more comprehensive regulation would be adopted in order to cover every form of electronic delivery of audiovisual content.

In the consultations, the majority view preferred a comprehensive framework for all audiovisual media services.

#### **2.4.2. The right to information and short extracts for events of major importance.**

The Commission expressed its concern that if independent media and news agencies would be excluded from the coverage of certain newsworthy events, this would create risks in terms of censorship and media pluralism. Therefore, the Commission addressed the issue of the right to short extracts for use in information programmes.

---

<sup>16</sup> In total 150 stakeholders transmitted their contributions to the debate, ranging from Member States, broadcasting companies and television producers to advertising companies and even religious organizations. All observations are available on the Commission's web site.

<sup>17</sup> Communication from the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the future of European regulatory audiovisual policy, COM(2003)784 final., 15 December 2003.

<sup>18</sup> Commission interpretative Communication on certain aspects of the provisions on televised advertising in the "Television without Frontiers" Directive, 2004/C 102/02, *OJ C 102*, 28 April 2004, p. 2.

<sup>19</sup> See [http://europa.eu.int/comm/avpolicy/revision-tvwf2005/consult\\_en.htm](http://europa.eu.int/comm/avpolicy/revision-tvwf2005/consult_en.htm).

Here, the consultations showed two different approaches. Some parties argued that there was no need for introducing harmonisation in this field while others claimed that the revised Directive should have a provision on the access to short news reports.

### **2.4.3. The rules on advertising and sponsorship**

In the context of technological developments and new marketing trends, the Commission addressed the issue whether an adaptation of the existing measures regarding televised commercial communications (advertising, sponsorship, tele-shopping, etc.) was necessary.

As could be expected, during the consultation process, most industry representatives called for more flexibility in the advertising rules.

### **2.4.4. The protection of minors and the public order – the right to reply**

The Commission wanted to know whether there existed any problems in the application of the existing rules on the protection of minors. With regard to the right to reply, the Commission questioned its practical accessibility in an on-line environment.

The consultations showed a broad consensus on the Directive's current balance regarding the protection of minors and the incitement to hatred. All stakeholders supported the extension of the rules to on-line services.

However, the Commission later decided not to deal with the right of reply in the proposal for a new Directive. Instead, it chose to introduce a general right to reply (applicable to all electronic media) through another instrument.<sup>20</sup>

### **2.4.5. Cultural diversity and the promotion and competitiveness of the European audiovisual production**

The Commission essentially asked all stakeholders whether the current provisions on the protection and promotion of European works were appropriate.

There was general consensus in the consultations on the effectiveness of the current quota with regard to the defence of the European audiovisual production sector. But most stakeholders agreed that such rules were not an option for on-demand services.

---

<sup>20</sup> Proposal for a Recommendation of the European Parliament and of the Council 30 April 2004 on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry, COM/2004/0341, available from [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=COMfinal&an\\_doc=2004&nu\\_doc=341](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2004&nu_doc=341)

#### **2.4.6. Media pluralism**

Finally, the Commission launched a discussion on the added value of additional European instruments in maintaining and developing media pluralism.



### 3. THE COMMISSION'S PROPOSAL

#### 3.1. The Directive's scope of application

##### **3.1.1. The proposition to extend the material scope of application**

The Commission's proposal aims at extending the TVWF Directive's scope of application beyond traditional television broadcasts to all media services which have an audiovisual content, irrespective of the technical platform they are offered on. The amended Directive 89/552 would thus cover audiovisual services delivered by television, cable, satellite, broadband connection, mobile phone, etc. This could be seen as a reverse approach of the neutrality principle established by the 2002 Directives on electronic communications.<sup>21</sup>

The Commission identifies "audiovisual media services" as services the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks.<sup>22</sup> As a result, some services would fall outside the scope of the Directive. Non-commercial activities, such as purely private websites and weblogs, audio transmission and radio services as well as electronic versions of newspapers and magazines will not be covered by the Directive.

##### **3.1.2. The remaining uncertainties regarding the scope**

The proposal's definition of an audiovisual media service is bound to create confusion. For instance, according to the proposition, the Directive will not cover video clips inserted in web-sites when the principal purpose is not the delivery of audiovisual content, but of information on the activities of the site owner<sup>23</sup>. The notion of 'principal purpose' could sometimes become difficult to determine. Equally vague, services are not covered if their audiovisual content is 'merely incidental'<sup>24</sup> and websites that contain audiovisual elements of 'ancillary nature' are neither covered.

In other words, the exact scope of application of the proposed Directive is difficult to identify, particularly when one takes the extraordinary pace of technological innovations into account. This could be foreseen – and inevitable, as the present depth of technological change makes any definition rather shaky.

---

<sup>21</sup> See F. Dehousse, T. Zgajewski et Y. Skaskevitch, *Le cadre réglementaire européen des communications électroniques de 2003*, Courriers hebdomadaires du CRISP, n° 1857, 2004, 43 pp.

<sup>22</sup> Art. 1(2) of the proposal.

<sup>23</sup> See "The Commission Proposal for a Modernisation of the Television without Frontiers Directive : Frequently Asked Questions", MEMO/05/475, p. 5, available from [http://europa.eu.int/information\\_society/newsroom/cf/itemlongdetail.cfm?item\\_id=2343](http://europa.eu.int/information_society/newsroom/cf/itemlongdetail.cfm?item_id=2343).

<sup>24</sup> Recital 14 of the Proposal.

### **3.1.3. The relationship with other Community regulations**

There also exists some degree of uncertainty as to the relationship between the proposed Directive and the so-called eCommerce Directive<sup>25</sup>. The latter instrument has created an internal market for information services, based on the country of origin rule. The two Directives might overlap to a certain extent and could impose an additional cost on internet service providers. For instance, Article 3.4 of the eCommerce Directive, which applies to on-demand services, allows Member States to derogate from the country of origin principle in order to protect public policy objectives.

## **3.2. The lighter regulatory approach**

### **3.2.1. The distinction between linear and non-linear services**

The proposed new Directive distinguishes between two categories of audiovisual content services: linear services and non-linear services<sup>26</sup>. On the one hand, linear services involve services where the editor decides upon the time when a programme is offered and upon the composition of programme schedules. It is as if the broadcaster 'pushes' the content to the viewers. Non-linear services, on the other hand, concern on-demand services where users decide upon the timing of the programme transmission on the basis of a choice of content selected by the media service provider. Here, it is the viewer who 'pulls' an audio-visual service from a network.

The Commission has tried to reach a compromise between the regulatory and non regulatory sides of the debate. On the one side, it maintains the present regulatory constraints on television services by covering expressly various forms of transmission. On the other side, it introduces a lighter approach for a lot of new services.

### **3.2.2. The two-tier approach regarding regulation**

The Commission proposes to introduce two levels of obligations. A first tier of rules would include basic obligations applicable to all audiovisual services, linear and non-linear<sup>27</sup>. These fundamental rules would reflect the safeguarding of certain public policy objectives such as the protection of minors and the prohibition of incitement to hatred. For instance, the Commission proposes that the identity of all audiovisual service providers must be easily, directly and permanently accessible to the recipient<sup>28</sup>.

---

<sup>25</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *OJ L 178*, 17 July 2000, p. 1.

<sup>26</sup> Art. 1(2) of the proposal.

<sup>27</sup> See recital (28) of the proposal.

<sup>28</sup> Article 1(6) of the Proposal.

The second level of obligations would only apply to linear audiovisual services. These rules for traditional television broadcasting are further modernised and simplified, particularly in the field of advertising.

In other words, the Directive would adopt, what has been described as a “light touch” of regulation for new audiovisual media, while offering them the opportunity to use the country of origin principle. No strict transmission quotas for these services are proposed, only the obligation to promote the production of and access to European works.

### **3.2.3. The remaining uncertainties regarding the definition of linear services**

The proposition’s distinction between linear and non-linear services is vague, whilst it may soon be outdated by technological changes. According to the Commission, the distinction would ultimately depend upon who decides when a specific programme is transmitted and whether schedules exist.

But one example already illustrates the potential difficulties. So-called “near-video-on-demand” (mind the terminology) is a pay-per-view service whereby a particular programme is advertised to start every 15 minutes or so over a particular channel. Once the viewer has paid electronically, he can select what time and day he wants to start watching the programme. On the one hand, it could be argued that this constitutes a linear pay-per-view service since it is the broadcaster who decides which programme will be offered at which moment.<sup>29</sup> He ‘pushes’ the schedule which the consumer can choose from. On the other hand, one could claim that it is the viewer who ultimately takes the decision when the programme is transmitted on the basis of a choice of content, making the service non-linear. Equally confusing is “subscription-video-on-demand”. Here, viewers can watch subscription-based movies and/or programme from a scheduled package at any time that it’s offered.

It is very likely that such audiovisual services will become more and more sophisticated in the future, enabling different legal interpretations and thus increasing legal uncertainty – precisely what the Commission wanted to tackle with the proposal. Moreover, it cannot be excluded that service providers will deliberately offer non-linear services in order to circumvent stricter rules.

### **3.2.4. The remaining uncertainties regarding internet broadcasting**

Introducing the country of origin principle for internet services is not without problems. Television broadcasts, which are relatively easy to regulate, essentially differ from internet broadcasts. How, for instance, is the country of origin principle to be applied for internet services? One can imagine the situation whereby the editorial responsibility does not take place in a specific country but in the virtual world, for instance when editors are established in different Member States and take decisions through email. Which will be the establishment criterion in this case? In other words,

---

<sup>29</sup> The Commission considers pay-per-view as a linear service. See “The Commission Proposal for a Modernisation of the Television without Frontiers Directive : Frequently Asked Questions”, MEMO/05/475, p. 4, available from [http://europa.eu.int/information\\_society/newsroom/cf/itemlongdetail.cfm?item\\_id=2343](http://europa.eu.int/information_society/newsroom/cf/itemlongdetail.cfm?item_id=2343).

the risk that internet broadcasts will systematically circumvent legislation is not taken into account in the new Directive.

### **3.3. The measures against the circumvention problem**

#### **3.3.1. A strict anti-circumvention regime**

The Commission proposes to give Member States the possibility to take appropriate measures against a provider established in another Member State that directs all or most of its activity to the territory of the first Member State in order to prevent abuse or fraudulent conduct.

However, the draft directive imposes strict conditions.<sup>30</sup> The receiving Member State will have to ask the Member State in which the provider is established to take measures first. If the latter fails to do so, the receiving Member State must notify the Commission of its intention to take measures. Within three months, the Commission shall decide upon the compatibility of these measures with Community law and eventually allow the measures. In any case, the measures must be non-discriminatory, necessary and proportionate.

#### **3.3.2. The remaining uncertainties**

The proposal aims to enable Member States to proceed against a broadcaster that deliberately evades their legislation by establishing itself in another Member State. The Commission therefore foresees the procedure as set out above, in which it reserves for itself the role as ultimate guardian of the single audiovisual market.

Nonetheless, the procedure raises various questions. First, what in case the Member State in which the malevolent broadcaster is established, has taken certain steps against the abuse which the receiving Member State does not consider sufficient. Does this Member State still have the right to take unilateral measures? Second, is a Member State allowed to take measures against a malicious broadcaster during the three months in which the Commission decides upon the compatibility of these measures? In other words, are Member States allowed to take action in urgent cases?

### **3.4. The advertising rules**

The Commission proposes a more flexible approach to advertisement breaks.<sup>31</sup> The present 20-minute minimum gap between advertising breaks would be abolished, giving broadcasters more freedom over when they can insert commercial breaks. For films, news and children's programmes, ad breaks would only be allowed every 35

---

<sup>30</sup> Art. 1(3)(g) of the proposal.

<sup>31</sup> Art. 1(6) of the proposal.

minutes (instead of the present 45 minutes). The new Directive would maintain the maximum of 12 minutes' advertising per hour but would abolish the 3-hour per day limitation.

The Commission also proposes a legal framework to regulate product placement<sup>32</sup> on a EU level. Various conditions will have to be fulfilled. First, product placement may not affect the responsibility and editorial independence of the service provider. Second, programmes which display or refer to a product in return for payment must be appropriately identified at the start of the broadcast. Third, the products may only be placed, not promoted. Finally, product placement is not allowed in news, current affairs and children's programmes, while tobacco products and prescription medicines are in any case excluded from product placement.

The proposal further supports new forms of advertising, such as split-screen, virtual and interactive advertising. The preamble of the proposal notably states that the separation principle, according to which the content of the programme should be clearly separated from advertising, should not prevent the use of these new advertising techniques.

### **3.5. News access clause**

The current Directive allows Member States to draw up a list of events which they consider 'of major importance to society' in order to guarantee the public free access to the broadcasts of those events<sup>33</sup>. The Commission's proposal extends this so-called right of information by introducing a new article on short news reports<sup>34</sup>. Member States must guarantee that providers of linear audiovisual services, established in another Member State, have access to 'events of high interest to the public' which are broadcast by a provider under their jurisdiction<sup>35</sup>. The cross-border access to short news extracts for use in information programmes should be fair, reasonable and non-discriminatory.

---

<sup>32</sup> See footnote 13.

<sup>33</sup> Article 3(1)a of the TVWF Directive. Such events are for example the inauguration, marriage or burial of a king or queen, important cultural and sports events, etc.

<sup>34</sup> Article 1(6) of the Proposal.

<sup>35</sup> Article 1(6) of the Proposal.

## **4. CONCLUSIONS**

### **4.1. The process of the revision**

It had long been anticipated that the revision of Directive 89/552 would be fraught with political difficulties. After all, the negotiation of the original text had been extremely difficult and conflict-ridden and, since 1989, the importance of television in the Member States has certainly not diminished. Furthermore, the development of information and communication technologies makes the balance of the 1989 regime not sustainable.

In this very difficult context, the Commission has made subtle manoeuvres to deflect the conflicts. With a very slow and broad consultation process, it has made the contradictory positions of various actors quite apparent. This has allowed the Commission to present later a careful compromise between various claims. For those who remember the fights around the 1989 text, this is a clear improvement.

### **4.2. The substance of the revision : an uncertain technological context**

In the run-up to a new “Television without Frontiers” Directive, the Commission has essentially been confronted with one dilemma which relates to the rapid technological changes in the audiovisual sector. It requires to balance between the need to introduce certain minimum rules in order to protect the public interest, and the need not to hinder the economic development of the audiovisual sector.

The chosen approach is not fully satisfactory since it can generate legal uncertainties among audiovisual services providers, and also among regulatory authorities. First, the scope of application of the Directive is not well defined, and, second, the division line between linear and non-linear services could create a large grey zone, possibly opening the door for circumvention techniques.

Nevertheless, one must also wonder whether it is possible to reach a more satisfactory solution in the present context of technological explosion. The nature, form and qualities of audiovisual services are changing very quickly. One is thus bound to use very general definitions. Legal provisions cannot eliminate all uncertainties engendered by technological progress.

All the same, the broad future orientation of the market is very clear. The next years will see a tidal wave of new technologies and new programs. The offer of services will be on the rise. The distribution paths will multiply. The transnational character of the distribution of television programs will increase. The ability of public authorities to control programming will consequently be on the wane. Broadcasting as an economic concept, and consequently as a legal concept, will most probably have some difficulties to survive this technology onslaught. The recent proposition of the Commission is but a first step into that direction.