

II

(Preparatory Acts)

COMMISSION

Proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities

*COM(86) 146 final/2**(submitted by the Commission to the Council on 30 April 1986)**(86/C 179/05)*

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community; and in particular Articles 57 (2) and 66 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the objectives of the Community as laid down in the Treaty include an ever closer union among the peoples of Europe and closer relations between the States belonging to the Community, ensuring the economic and social progress of its countries by common action to eliminate the barriers which divide Europe, the constant improvement of the living conditions of its peoples as well as the preservation and strengthening of peace and liberty;

Whereas for these purposes, the Treaty provides for establishing a common market, including the abolition, as between Member States, of obstacles to freedom of movement for services, the institution of a system ensuring that competition in the common market is not distorted, and the approximation of the provisions of Member States to the extent required for the proper functioning of the common market;

Whereas broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the principal means to promote the above objectives of the Community which are at the same time of political, economic, social, cultural and legal nature;

Whereas the attainment of the above objectives of the Community calls, almost 30 years after the establishment of the Community, for transition from the stage of the opening up of national markets for the production and distribution of broadcasts to the stage of one internal market for broadcasts;

Whereas the achievement of this common market presupposes, in addition to the elimination of obstacles to the free movement of broadcasts, the adaptation and promotion of the factors of production and distribution in the Community of broadcast programmes in order to ensure that the enlarged market for broadcast programmes will operate similarly to a domestic market;

Whereas for this purpose or, in the words of the Treaty, in order to make it easier for persons to take up and pursue activities as self-employed persons, including the activities of producing or distributing broadcast programmes, the Treaty provides for the issuing of directives for the coordination of the provisions concerning the taking up and pursuit of such activities;

Whereas the broadcasting of commercial advertisements is a service within the meaning of the Treaty because it is provided for remuneration; whereas the liberalization of this service helps to promote trade in goods and services and has therefore to be given priority under the Treaty;

Whereas the broadcasting of other messages is also a service within the meaning of the Treaty because this activity is normally provided for remuneration and is, by its nature, not 'goods' governed by the provisions of the Treaty relating to freedom of movement for goods such as other media like videocassettes, videodiscs, records, newspapers, magazines, periodicals and books;

Whereas the grant by a foreign broadcasting organization or other right holder to a domestic cable operator of the authorization required by copyright or other laws to relay the foreign programmes also constitutes a service within the meaning of the Treaty because it is normally provided for remuneration;

Whereas the Treaty does not exclude from its scope any such service, by reason of its particular nature, such as its cultural aspects or implications, but provides for the liberalization and free movement of all services normally provided for remuneration which are therefore and

without prejudice as to their cultural or other contents considered by the Treaty to be economic activities, a harmonious development of which is one of the objectives of the Community;

Whereas the Treaty guarantees freedom to provide services within the Community, including broadcasts, without restrictions in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended;

Whereas this individual right to provide broadcasts to recipients in other Member States, including cable operators, free of restrictions is a specific Community law manifestation of the more general European human right to freedom of expression which includes freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers, enshrined in Article 10 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all Member States;

Whereas, for this reason, freedom to provide broadcasts under Community law must be implemented, when applying the Treaty and issuing directives for the coordination of the provisions concerning the pursuit of the activities of broadcasters and cable operators, in the light of and at least to the extent guaranteed by the corresponding freedoms provided for in Article 10 (1) of the European Convention on Human Rights;

Whereas the same parallelism must be respected when applying the Treaty and issuing directives for the coordination of provisions limiting the exercise, on the one hand, of freedom to provide broadcasts which are authorized under Article 56 (1) of the Treaty or justified on grounds of general interest and, on the other, of the freedoms to receive and impart information and ideas through broadcasts which are authorized under Article 10 (2) of the European Convention on Human Rights;

Whereas the laws, regulations and administrative measures in Member States concerning the pursuit of activities as broadcasters and cable operators contain disparities in respect of their applicability and content, on producing and distributing programmes, on advertising and sponsoring, on protecting children and young persons, and on copyright, which may impede the free movement of broadcasts within the Community and may distort competition within the common market;

Whereas the disparities referred to in the field of broadcast advertising have the additional effect of impeding the free movement of goods and services inasmuch as the opportunities to advertise those goods and services throughout the Community, which are an integral part of the process of marketing them, are subject to variable restriction and prohibition;

Whereas the free movement of broadcasts within the Community is also impeded where the right to communicate a particular programme is assigned to different persons in different Member States, allowing the assignees to rely upon their rights to prohibit the cable re-transmission of a foreign broadcast in different Member States;

Whereas all such restrictions on freedom to provide broadcasting services within the Community shall be abolished under the Treaty both by virtue of Article 59 of the Treaty and, in so far as such restrictive rules treat broadcasting services identically whatever their origin or the nationality or place of establishment of the persons providing them and in so far as those laws are justified on grounds of general interest, by issuing directives for the coordination of the provisions concerning the pursuit of activities as self-employed persons, including activities of broadcasters and cable operators;

Whereas the purpose of this coordination is to make it easier for persons to pursue activities as self-employed persons, in particular, to make it easier for broadcasters and cable operators to pursue the transmission and the retransmission of broadcast programmes and advertisements and thus to abolish obstacles to the free movement of broadcasts and, more generally, to the free flow of information and ideas within the Community;

Whereas under the Treaty, nationals of Member States providing services from within a Member State to a person in another Member State may pursue their activities exclusively under the conditions imposed by the law of the first Member State;

Whereas for this reason, for the reason mentioned before the last recital and in order to avoid the cumulative application to the same broadcast, broadcaster or cable operator of the broadcasting law of all or several Member States, it is necessary but sufficient that all broadcasts comply with the law of the Member State in which they originate;

Whereas it is necessary in the common market that all broadcasts originating and intended for reception within the Community, and in particular those intended for reception in another Member State, should respect the law of the originating Member State applicable to broadcasts intended for reception by the public in that Member State and the provisions of this Directive in order to protect consumers as listeners and viewers, in particular young persons, as well as authors, producers, broadcasters and performers, advertisers and advertising agencies and the interests of the public in general;

Whereas checks on respect for national law as coordinated by this Directive in the originating Member State are sufficient under Community law to ensure free circulation of broadcasts without secondary control on the same grounds in each of the receiving Member States;

Whereas this Directive is without prejudice to existing or future Community acts of harmonization which are or will be necessary, in particular to satisfy mandatory requirements concerning the protection of consumers and the fairness of commercial transactions;

Whereas the coordination of national laws designed to secure and promote distribution and production of television programmes in respect of provisions that are not based upon grounds of general interest, public policy, public security or public health is not necessary since they cannot be invoked to restrict the free circulation of broadcasts within the Community;

Whereas such coordination is nevertheless needed at the Community level to make it easier for persons and industries producing programmes having a cultural objective to take up and pursue their activities;

Whereas minimum requirements in respect of all public or private Community television programmes for audiovisual productions originating in the Community are an effective means to promote production, independent production and distribution in the above-mentioned industries and are complementary to other instruments which are already or will be proposed to pursue the same objective;

Whereas the vulnerability of European cultural industries is not due to lack of creative talent, but to fragmented production and distribution systems and whereas it is therefore necessary to promote markets of sufficient size for television productions in the Member States to recover necessary investments not only by establishing common rules opening up national markets but also by offering productions from the Community of each kind an adequate part in television programmes of all Member States, which will at the same time promote the presence of other European cultures in the television programmes of each Member State;

Whereas the progressive establishment of a general preference for the distribution of television programmes of all kinds produced within the Community, and specific measures designed to promote employment and small and medium-sized enterprises within the Community's cultural industries, allows for the necessary adaptation of audiovisual production facilities to meet the increasing demand for television programmes;

Whereas, in particular, a preference for the first broadcast of new Community productions of a creative kind will promote actual and future employment in the industries mentioned in the preceding recitals;

Whereas, in addition, a preference for independent productions, made outside the broadcast undertaking, will stimulate new sources of television production, especially the creation of small and medium-sized enterprises and offer new opportunities and outlets to the marketing of creative talents and employment of cultural professions and workers;

Whereas the admission of advertising in cross-frontier broadcasts will create the conditions in which broadcast advertising should become lawful in all Member States, thereby establishing a common market for broadcast advertising throughout the Community;

Whereas Member States should limit the volume of broadcast advertising, so that it does not detract from the function of radio and television as media for information, education, culture and entertainment and so that demand for advertising in internal broadcasts of each Member State is largely met taking also into account the interests of other media;

Whereas in order to ensure that the interests of consumers as listeners and viewers of broadcasts are fully and properly protected, it is essential for broadcast advertising to be subject to a number of rules and standards, the compliance with which is checked prior to transmission;

Whereas the implementation of the free cross-frontier movement of broadcasts implies a legal framework at Community level containing certain minimum standards on advertising, but it is for the Member States to complete these provisions at the national level and whereas the Member States must retain the right to introduce stricter standards for domestic transmissions such as refusing to permit the broadcasting of advertisements on Sundays or public holidays;

Whereas it is necessary to ensure that consumer interests are respected, especially bearing in mind the considerable impact of advertising on listeners and viewers and thus it is necessary, in accordance with the solution adopted in the majority of Member States to prohibit all advertisements promoting cigarettes and tobacco products and to introduce strict rules relating to the advertisement of alcoholic beverages and to permit those Member States who so wish to prohibit such advertisements in their internal broadcasts;

Whereas, more particularly, advertisements can unduly influence younger people if special standards are not laid down to prevent it;

Whereas because of the constant rise in the cost of audio-visual programmes sponsorship is developing greatly and playing an increasing role in the financing of

programmes; whereas sponsorship should not be excluded from such financing, but it should be strictly ensured that sponsors do not exercise any improper influence on the contents of programmes and that there is no link between programmes and advertising within or around them which can be taken to suggest this;

Whereas, given the large degree of flexibility for Member States to fix the total volume of advertising time in internal broadcasts, Member States may restrict the retransmission of cross-frontier broadcast advertising exceeding 15 % of each broadcast receivable each day by the public in those Member States, in order to give a certain guarantee to consumers in receiving countries and to avoid important distortions of competition between broadcasters in the Community;

Whereas a lower limit than 15 % could have the effect of excluding certain existing broadcasters in some Member States from free provision of their services within the Community;

Whereas it is accepted that the protection of the physical, mental and moral development of children and young persons is in the general interest;

Whereas in a common market for broadcasting, broadcasters should be subject to similar obligations in relation to the protection of children and young persons against possible harmful effects of confrontation with inappropriate audio and audiovisual material;

Whereas the Community, while ensuring the free movement of broadcasts, must ensure respect for copyright and related rights;

Whereas a preference to arrive at this result by an agreement freely entered into by the various interested parties, that is a contractual solution, is generally recognized;

Whereas a sufficiently long period for negotiation should be allowed to permit these parties to conclude such agreements respecting the interests of each of them;

Whereas, nevertheless, in the absence of an agreement and if a cable operator has manifested his desire to retransmit a certain programme coming from another Member State, the balance between these interests has to be safeguarded by a system of legal licences providing for adequate remuneration which the particular Member State will be obliged to introduce under these circumstances,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I GENERAL PROVISION

Article 1

1. Each Member State shall ensure that all internal broadcasts originating on its territory comply with its law applicable to broadcasts intended for the public in that Member State.
2. Without prejudice to Article 14 and the provisions of Chapter V, Member States shall not restrict the reception and retransmission on their territories of broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.
3. This Directive shall not apply to broadcasts intended exclusively for reception in States other than Member States.

CHAPTER II

PROMOTION OF DISTRIBUTION AND PRODUCTION OF TELEVISION PROGRAMMES

Article 2

1. Member States shall ensure that internal broadcasters of television reserve at least 30 % of their programming time not consisting of news, sporting events and game shows, advertising or teletext services for broadcasts of Community works within the meaning of Article 4, of which in the case of initial transmissions at least one third shall be reserved for first broadcasts in the Community.
2. This percentage shall be progressively increased to reach at least 60 % after the expiry of three years from the date specified in Article 22.
3. For the purposes of this Article,
 - in cases of simultaneous, unaltered and unabridged retransmission, internal broadcasts from other Member States shall be regarded in their entirety as Community works;
 - in cases of co-produced Community works, the first broadcast by each of the co-producers shall be considered a first broadcast in the Community.

Article 3

1. Member States shall ensure that, as regards their initial transmissions, internal television broadcasters reserve at least 5 % of their programming budget for Community works, within the meaning of Article 4, created by independent producers.
2. This percentage shall be progressively increased to reach at least 10 % after the expiry of three years from the date specified in Article 22.

Article 4

Community works within the meaning of this Chapter are:

- (a) works made by producers from a Member State;
- (b) works made by producers from several Member States;
- (c) works made by producers from one or several Member States and non-member States where the Community proportion of total production costs is at least 70 %.

CHAPTER III

BROADCAST ADVERTISING AND SPONSORING

SECTION 1

Internal broadcasts

Article 5

Member States shall fix the amount of time allowed for broadcast advertising so that:

- (a) it does not detract from the function of radio and television as media for information, education, culture and entertainment; and
- (b) the demand for broadcast advertising can be largely met, also taking into account the interests of other media.

Article 6

1. Without prejudice to the provisions of other Community acts, Member States shall ensure that broadcast advertising in internal broadcasts is checked prior to transmission and is broadcast only if it complies with the rules of this section.

2. Member States shall ensure that, in the case of broadcasts that do not respect these requirements, appropriate measures sufficient to secure compliance with the rules are imposed on the broadcasters concerned.

Article 7

1. Broadcast advertising shall be clearly recognizable as such.

2. Broadcast advertising shall be grouped in blocks and kept quite separate from the other programme material.

3. Broadcast advertising shall not interrupt coherent programme items except where the interruption does not constitute an unreasonable interference because:

- (a) the advertising is scheduled in such a way as to avoid prejudice to the integrity and value of programmes or their natural continuity;
 - (b) the advertising is inserted in a natural break within the programme;
- and

- (c) the duration and nature of the programme is such as to permit that advertising break.

Article 8

Broadcast advertising shall not:

- (a) offend against prevailing standards of decency and good taste;
- (b) contain any racial or sexual discrimination;
- (c) be offensive to religious or political beliefs;
- (d) seek to rely on fear without justifiable reason;
- (e) encourage behaviour prejudicial to health or safety.

Article 9

Broadcast advertising for cigarettes and other tobacco products shall be prohibited.

Article 10

Broadcast advertising for alcoholic beverages shall comply with the following rules:

- (a) it shall avoid anything that might prompt or encourage children and young persons to consume alcohol;
- (b) it shall not link the consumption of alcohol to physical performance or to driving;
- (c) it shall not create the impression that the consumption of alcohol contributes to social or sexual success;
- (d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
- (e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
- (f) it shall not place undue emphasis on the alcoholic content of beverages.

Article 11

Broadcast advertising shall further comply with the following rules for the protection of children and young persons:

- (a) it shall not directly exhort children and young persons to buy a product or a service or exploit their immaturity of judgement and experience;
- (b) it shall not encourage children and young persons to persuade their parents or others to purchase the goods or services being advertised;
- (c) it shall not exploit the special trust children and young persons place in parents, teachers or other persons;
- (d) it shall not unreasonably show children and young persons in dangerous situations.

Article 12

Undertakings shall not exert improper influence over parts of the programme that do not consist of advertising. Nothing shall be included in any broadcast advertising or programme which could reasonably be taken to suggest or imply that undertakings, for advertising purposes, have influenced parts of the programme which are not an advertisement. In particular,

- (a) programmes shall not refer to specific undertakings, products or services in a way not necessary for their content;
- (b) programmes which are funded or co-funded by non-broadcasters shall be identified as such; however, the identification shall be restricted to a credit at the beginning and end of the programme;
- (c) programmes shall not contain any promotion equivalent to advertising, especially on behalf of those who funded or co-funded them;
- (d) advertising within or around programmes shall not be allowed if there is any link in content or presentation with the programme.

Article 13

1. Member States shall remain free to prohibit or restrict broadcast advertising on Sundays and Public Holidays and to prohibit all broadcast advertising for alcoholic beverages.

2. Member States shall remain free to apply more detailed or stricter rules with regard to Articles 7, 8 and 10, 11 and 12.

SECTION 2

Cross-frontier television broadcasts*Article 14*

Member States shall admit the reception and retransmission of advertising in cross-frontier television broadcasts which does not exceed 15 % of the broadcast receivable each day by the public in those Member States. Where a Member State allows one or several internal television broadcasters to carry advertising for more than 15 % of daily broadcasting time, it shall admit comparable types of cross-frontier broadcasts, which contain amounts of advertising that do not exceed those permitted for internal television broadcasts of the same category.

CHAPTER IV

PROTECTION OF CHILDREN AND YOUNG PERSONS*Article 15*

1. Member States shall ensure that internal broadcasts do not include programmes which might seriously harm the physical, mental or moral development of children and young persons, in particular, those that involve pornography, gratuitous violence or incitement to race hatred.

2. Member States shall ensure that internal broadcasts are checked prior to transmission and broadcast only if they comply with the requirements under paragraph 1. Member States shall further ensure that, in the case of broadcasts that do not respect these requirements, appropriate remedies sufficient to secure compliance with the rules are imposed on the broadcasters concerned.

Article 16

Member States shall remain free to apply to internal broadcasts more detailed or stricter rules for the protection of children and young persons.

CHAPTER V

COPYRIGHT*Article 17*

Member States shall ensure that the retransmission by cable in their territory of internal broadcasts from other Member States may take place with respect for applicable copyright and related rights, in particular on the basis of contractual agreements between right-owners and cable operators. When a cable operator retransmits a broadcast before a contractual agreement has been reached or a statutory licence is applied, he shall be subject to civil and penal sanctions, provided for in the law of the Member State where the retransmission takes place, sufficient to secure compliance with the rules.

Article 18

1. Where a cable operator notifies a Member State that the simultaneous, unaltered and unabridged retransmission by cable of an internal broadcast from another Member State has been prevented by the invocation of copyright or related rights, the Member State that has been so notified shall ensure, within a period of two years from the notification, that the retransmission is made possible by the application of a statutory licence. However, such a statutory licence need not be granted if, during the two year period, the obstacle to retransmission has been removed, in particular, by a contractual agreement between right owners and one or several cable operators.

2. Where the right invoked is a related right held by a broadcasting undertaking by virtue of the European Agreement on the Protection of Television Broadcasts of 22 June 1960, and the Agreement is an obstacle to the introduction of the statutory licence, the Member State shall denounce the Agreement to the extent necessary to permit the statutory licence to be introduced in accordance with paragraph 1.

Article 19

1. The statutory licence introduced in accordance with Article 18 shall secure an equitable remuneration for the holders of copyright and related rights.
2. In determining the remuneration, in particular all the following criteria shall be taken into account:
 - (a) the usual level of contractual licence fees for comparable cable transmissions;
 - (b) the usual level of remuneration paid for the first broadcast;
 - (c) the number of subscribers linked to the cable network and the level of fees paid by them;
 - (d) the likelihood and the extent of any impairment of other marketing opportunities, in particular the showing of films and the performance of dramatic or dramatico-musical works.
3. The remuneration may be claimed only by collecting societies.
4. In the absence of an amicable agreement, the remuneration shall be determined by the competent authority.
5. The competent authority may be a court, an administrative authority or an arbitration body. It shall be composed so as not to cast doubt on its impartiality. It shall give reasons for its decisions. Where it is not a Court, provision shall be made for procedures whereby improper or unreasonable exercise of the competent authority's powers or improper or unreasonable failure to exercise the said powers can be the subject of judicial review.

Article 20

The provisions of this chapter shall not affect the moral rights of copyright owners and equivalent personal rights of owners of related rights.

CHAPTER VI
FINAL PROVISIONS

Article 21

For the purposes of this Directive:

1. '*Broadcasting*' means the initial transmission or retransmission by wire or over the air, including those by satellite, in unencoded or encoded form, of radio and television programmes intended for reception by

the public. Except for the purposes of Chapter V, it includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services.

2. '*Broadcast advertising*' means an announcement in any form broadcast by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations. It does not include sponsored programmes.
3. '*Internal broadcasts*' means initial transmissions by public or private undertakings engaged in broadcasting on the territory of a Member State, including transmissions exclusively intended for reception in other Member States. It also includes the initial retransmission by such undertakings of broadcast transmissions originating from an undertaking engaged in broadcasting on the territory of a State other than a Member State.
4. '*Cross-frontier broadcasts*' means internal transmissions that can be received directly by the public in another Member State or by way of retransmission even where they are re-transmitted by an undertaking established in the territory of that other Member State.

Article 22

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than They shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the fields governed by this Directive.

Article 23

Before the end of the sixth year after the date given in Article 22, the Commission shall submit to the Council, the European Parliament and the Economic and Social Committee a report on the manner in which this Directive has operated and, if necessary, make further proposals to adapt it to developments in the broadcasting field.

Article 24

This Directive is addressed to the Member States.