Coordination of certain provisions in Member States concerning the pursuit of television broadcasting activities ('Audiovisual media services without frontiers')

2005/0260(COD) - 15/10/2007 - Council position

The common position reflects the outcome of informal contacts between the Parliament, the Commission and the Council. The Council states that, although the common position contains some significant changes with regard to the Commission's initial proposal, both in structure and substance, the basic approach proposed by the Commission, as well as all the principal elements contained in its proposal, have been retained.

Structural changes: the Commission proposed a new two-tier regulatory architecture comprising a core of rules applicable to all audiovisual media services and an additional layer of obligations applicable only to television broadcasting. The common position retains this basic philosophy but introduces significant structural changes (introducing new Chapters and reordering certain articles) to ensure that obligations applicable to all service providers are grouped separately from those applicable only to on-demand services, which are in turn grouped separately from those applicable only to televisions broadcasting. These structural changes greatly improve the readability and legal clarity of the text.

Substantive Changes

Scope: the common position clarifies the extension to the scope of the Directive proposed by the Commission. The philosophy is that the 'on-demand services' now included should compete for the same audience as television broadcasts. The most significant change to the Commission's proposal in this regard is the introduction of the notion of a "programme", whilst the notion of "editorial responsibility" has also been emphasised further. The common position has also sought to bring legal clarity regarding the relationship of the Directive with other legal instruments, in particular Directive 2000/31/EC (the eCommerce Directive).

Jurisdiction and free movement of services: the Council supports the basic approach of the Commission's proposal, i.e. that jurisdiction should continue to be determined on the basis of the establishment of the service provider (country of origin principle) but that there should be a mechanism for dealing with cases where a television broadcast is directed wholly or mostly towards a Member State other than the one where the broadcaster is established. The common position text develops the mechanism proposed by the Commission, creating a first non-binding" cooperation" phase, where mutually acceptable solutions are sought between the Member States involved, followed by a second "circumvention" phase where in certain well-defined cases binding measures can be taken. This second phase, to which a Community procedure is attached, effectively seeks to codify in secondary legislation existing case law of the Court of Justice. On the related question of free movement of services, and measures derogating from that principle, the common position maintains the legal status quo. With regard to on-demand services, the conditions and procedures for derogation (for a number of public policy reasons, including the need to protect minors) are exactly those of the eCommerce Directive 2000/31/EC.

Co- and self- regulation: the common position recognises the important role of such 'soft law' by including an obligation on Member States to encourage co- and/or self-regulatory regimes to the extent permitted by their legal systems.

Product placement: the Council establishes the principle that product placement be prohibited for all programmes produced after the transposition deadline for the Directive. However, exemptions to this principle are provided for certain types of programme (films, series, sports and light entertainment) subject to certain conditions. These exemptions will apply automatically unless a Member State opts out of them. The requirement to identify product placement at the moment that a programme resumes after an advertising break has also been added, and the specific case of 'thematic placement' has been addressed in a recital.

Other provisions on advertising, including that aimed at children: the common position essentially follows the philosophy of the Commission proposal, whereby a core of 'qualitative' rules on audiovisual commercial communication are applied to all audiovisual media services, whilst the 'quantitative' rules, which apply only to television broadcasting, have been simplified and streamlined compared to the rules of the existing Directive, with a view to creating a regulatory environment in which the 'free-to-air' broadcasting model can continue to compete with subscription-based television channels. The common position ensures additional protection for children. It requires Member States and the Commission to encourage the development of codes of conduct regarding advertising of 'junk food' aimed at children, whilst the quantitative rules on interruption of programmes are stricter for children's programmes.

Short news reports: the Commission proposed a provision seeking to ensure the non-discriminative application of national systems aimed at guaranteeing, for the purpose of short news reports, broadcasters' access to events of high interest to the public. The common position text is more ambitious, in that it creates an obligation on Member States to establish such a system, thus in effect creating a Community-wide right. The key aspects of this right are harmonised by the text, whilst the detailed modalities and conditions of its application are left to Member States to decide in accordance with the principle of subsidiarity.

Regulatory authorities: the common position text reflects a sensitive compromise between the European Parliament and the Council on this issue. The heart of this compromise is found in the new Article 23b dealing with cooperation and the exchange of information.

Protection of minors: whilst leaving the current provisions applicable to television broadcasting intact, the common position adds an obligation with regard to on-demand audiovisual media services. The obligation envisages that minors are protected by ensuring that are not normally able to access services which might seriously impair their physical, mental or moral development. The recitals refer to filtering systems and PIN codes as examples of measures that could be used. The recitals also draw attention to the Recommendation of 20 December 2006 on the protection of minors and human dignity and on the right to reply.

European Works: the provisions of the existing Directive applicable to television broadcasting are left untouched by the common position. With regard to on-demand audiovisual media services, however, media service providers have a new obligation to promote production of and access to European works.

Access of disabled persons to services: the common position contains an obligation on Member States to encourage service providers to ensure that their services are gradually made accessible to people with a visual or hearing disability.

Media literacy: a recital underlines the vital role of media literacy and also recalls the Recommendation of 20 December 2006 which contains significant content relating to media literacy. The Commission is now required, as part of its reporting obligations and when deciding on future proposals for adaptations of the Directive, to pay particular attention to media literacy levels in Member States.

Right of reply: the existing obligations relating to television broadcasting remain untouched. A recital explains that the right of reply could also be applied as a legal remedy in the online environment and recalls the Recommendation on the protection of minors and human dignity and on the right to reply.

The Council feels that the common position, the result of informal negotiations between the European Parliament, the Council and the Commission, maintains the approach and legal architecture proposed by the Commission with a view to adapting the regulation of the audiovisual sector to market and technological change. Important clarifications have been made to the scope of the Directive and to the provisions dealing with jurisdiction, and a number of other important adjustments have been made, including on sensitive questions such as product placement, advertising (particularly to children), extracts for short news reports, regulatory authorities and access of disabled persons to services.