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WRITTEN CONTRIBUTIONS OF THE ROMANIAN ASSOCIATION FOR AUDIOVISUAL COMMUNICATIONS (ARCA) WITHIN THE PUBLIC CONSULTATIONS ON THE REVIEW OF THE "TELEVISION WITHOUT FRONTIERS" DIRECTIVE

THEME 3: PROTECTION OF GENERAL INTERESTS IN TELEVISION ADVERTISING, SPONSORSHIP, TELESHOPPING AND SELFPROMOTION

Advertising could be considered as one of the instruments for building up daily civilization values, along with long term ones. Marshall McLuhan wrote: "The historians and archeologists will one day discover that ads of our times are the richest and most faithful daily reflections than any society ever made of its entire range of activities.".

If there is also such a thing as the "civilization of illiteracy" as defined by Professor Mihai Nadin, then audiovisual media and their advertising compound are probably among the main patterns of that new form of civilization.

This is why more consideration should be granted to audiovisual media and therefore to their main funding resource, advertising.

It should also be considered that direct balances with advertising are democracy, pluralism and freedom of information and expression. While private broadcasters revenues rely on advertising mainly, any attempt to put limits to advertising means limits to the services of public interest provided by broadcasters, as essential ingredient of democracy.

As Mc Luhan stated, media content are other media. Therefore, no analyst has the right to postulate a simple direct link between the medium and its message. Why not accept that the real action of audiovisual media is not their own message action, but the building up of the communication system itself. The fear that media content will damage the general interest, because of the content's action, is to be considered as non-consistent. Of course, all those considerations shall not invite us to the acceptance of any content going far beyond common-sense limits; it is only about the so called "specificity" of content issues related to audiovisual and its impact power, that we are discussing here.

Audiovisual media will have to overpass the switch to digital (some media, especially in accessing countries, the digital divide also). This will imply additional expenses to face the costs of new technology. Advertising will probably be no longer the main funding resource for audiovisual media, after the digital switch. Subscription fees will perhaps provide the main access of the audience to the interactive and complex data, information and entertainment products of the audiovisual media. Anyhow, even if advertising will diminish, the most appropiate moment to let the audiovisual undertakings develop, on basis of existing advertising resources, and let them strengthen enough to face the new challenges of media convergence, seems to be right now.

It is a matter of EC policy to conceive the review of the Directive as a relaxation of regulations. For the moment, as long as the questions proposed in the discussion papers don't seem to go so far, we would like to focus only on detailed revisions of the Directive's provisions, mostly related to interpretation of the text of the Directive. Some of these detail revisions

emerge from the European Court of Justice decisions, witch clarify interpretative aspects of the Directive (we realize, of course, that all the European Court decisions will be taken into account at the review of the Directive)

We also fully subscribe to the positions stressed during the hearings by ACTE and AER, witch are better entitled to propose to the Commission a more advanced review of the Directive.

Here are our comments:

1) Concepts and definitions (Article 1 c)-f))

Regarding the definition of sponsorship, there is a difference between the Directive's definition and the definition of sponsorship given by the European Convention on Transfrontier Television (ECTT): the Directive includes the possibility of the sponsor to finance television programmes "with a view to promoting its products", meanwhile the Convention does not includes it. This provision of the Directive is stressed also by rules set up in article 17 paragraph 1, where it is mentioned that the promotion of products shall not include promotional references, and also in paragraph 3 of the same article, by forbidding the promotion of products as a ban strictly applied only for the case medicinal products.

The interpretation according to which the ban on promotional references means ban on promoting of the products themselves, interpretation mentioned in the explanatory report of the ECTT, can not be extended to the Directive, due to the fact that the explanatory report is referring precisely to the definition of sponsorship given by ECTT, where the item "promoting its products" is missing. So, it is also obvious that we can not have in mind the explanatory report of ECTT in the understanding the treatment applied by the Directive to the promotion of products, as long as the idea of promotion of products does not exist in the ECTT. Actually, by stressing the idea that the Directive's definition of sponsorship includes the possibility to promote the sponsor's products, without encouraging the purchase of the product - in particular by making special promotional references, we will clarify the right of the sponsor (and of the broadcaster) to promote products through sponsorship, as an alternative to the banned "product placement".

2) General standards (Article 12) and those for the attention of minors (Article 16)

The Judgment of the European Court in joined cases C-34/95, C-35/95, and C-36/95; (Konsumentombudsmannen KO v De Agostini (Svenska) Forlag AB; Konsumentbodsmannen v TV Shop i Sverige AB /delivered on 9th July 1997) stated that: "The fact that the Directive provides a set of rules to govern TV advertising directed at minors precludes the operation of additional rules in this specific field by Member States." That interpretation should be extended to all similar provisions of the Directive, in order to avoid any abuse in the application of article 3 paragraph 1 of the Directive. We fully agree on the evaluations made during the hearings by the participants which stressed that abuses in application of art 3.1 can affect the main purpose of the Directive - a single European audiovisual market.

3) Form and presentation of television advertising and teleshopping (Article 10)

We fully agree with ACTE proposal to maintain "identification" as the main and only instrument to isolate/distinguish advertising in programmes. Of course, in that way split screen and virtual advertising, together with new techniques that could emerge form technological developments, will be better integrated in the concept of the Directive as accepted techniques of advertising.

We will also add that identification already includes the separation as a semantic act, beyond physical relationships (temporal or spatial) within programmes, and that the physical separation is somehow redundant.

As for the exceptional nature of isolated advertising and isolated teleshopping spots, we stress that there is a problem here. We might ask: “Does the understanding of isolated spot as an exception refer to a matter regarding its category or its case? Which is the extension of that exception? Of course, to treat the whole category of isolated spots as an exception will not be the most comprehensive approach. But, if the meaning of the exception is that only one case per day is allowed, as happens in Romanian secondary legislation, wich allows only one 30 seconds isolated spot per day, we consider that this is not the concept of the Directive. The Directive wasn't meant to provide a regulation specifically devoted to only 30 seconds of broadcasting per day. A more detailed view on the exceptional character should be taken into consideration, by allowing isolated spots at a certain rate or percentage per day, and/or in specific programmes.

As for the ban on the use of subliminal techniques in advertising and teleshopping, even if there was an opinion during the hearings saying that this is redundant - as long as advertising has to be clearly identified, we think that the ban shall be kept in force. It is obvious that in any advertising spot which is complying with all the provisions of the Directive, except this one, it will be possible to use subliminal techniques, at the same time with legal techniques.

4) Insertion of advertising and teleshopping spots (Article 11)

We refer here to the decision of the European Court of Justice - 28 October 1999 in Case C-6/98, which rules that: "Article 11(3) of 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, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, is to be construed as prescribing the gross principle, so that, in order to calculate the 45 minute period for the purpose of determining the number of advertising interruptions allowed in the broadcasting of audiovisual works such as feature films and films made for television, the duration of the advertisements must be included in that period."

The same should be considered as concerning paragraph 4 of art 11, i.e. the 20 minutes period shall be calculated by including the duration of advertisements.

We propose to consider also the interpretation provided by the Explanatory report of article 14.3 of ECTT (which, this time, is identical with art 11.3 of the Directive) at paragraph 249:" the broadcaster nevertheless remains free to determine at what point the interruption should occur provided the general requests in paragraph 1 and 4 are respected"

This means in total that, for instance, a movie could be interrupted for ads anywhere in the first 45 minutes, if 20 minutes are elapsed since the previous interruption (in the previous programme), etc.

This will allow broadcasters to better adapt insertion of advertising into the dramatic flow of the audiovisual works and of the audience expectations and will also increase the amount of advertising inserted in movies, which are the preferred vectors for advertising in television programmes.

5) Advertising and teleshopping for certain products (Articles 13, 14 and 15)

Any ban on advertising for certain products other that those mentioned in the Directive initiated by member states in compliance with article 3.1. could also lead to infringements of the principle of free movements of goods and services in Europe and to contradictions with the purpose of the Directive.

6) Duration

Any discussion on duration (and form of presentation limits too) of advertising shall depend on the Commission open-hearted to understand that the broadcaster himself is the first to evaluate the comfort of his audience in relation to the advertising flow.
So, the question referring to self regulation is the most inciting one in that respect.

7) Sponsorship (Article 17)

We refer here to the Judgment of the European Court (Sixth Chamber) of 12 December 1996 in joined cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 which ruled: "Directive 89/552, and in particular Article 17(1)(b) thereof, must be interpreted as permitting the insertion of the sponsor's name or logo at times other than the beginning and/or the end of the program."

This clarifies a confusion related to the Directive's provision that stated on the obligation to identify the sponsor at the beginning or at the end of the programme. In fact, as the Court ruled, the sponsor's name or logo can be inserted all over the programme (the explanatory report of ECTT mentions also this idea at paragraph 281). This does not exclude also that, according to the sponsorship definition, the sponsor can be also promote its products during programme. The obligation related to the sponsor identification responds to the need to inform the audience on the sponsored nature of the programme. It does not regulates the other compounds of the sponsorship interference in the programme, which can also occur, according to the sponsorship definition. We stress here again that the possibility to promote the sponsor by its products could be a legal acceptance of the so called controversial "product placement", which could (only) be accepted if the sponsorship definition and rules requirements are fulfilled.

It should be also stressed that the only restrictions on sponsorship are those provided for the categories of producers mentioned in the Directive. Any extend beyond these limits, as for instance "Loi Evin" in France or some secondary legislation forbidding alcohol sponsorship before 10.00 PM in Romania (Romanian Council's for Audiovisual Decision nr.36/2003) should be considered as contradicting the Directive.

8)New advertising techniques

We consider that the Bird &Bird study itself is the best pleading for the acceptance of new advertising techniques. "EBU preliminary views on regulatory aspects of new advertising techniques" together with "EBU memorandum on virtual advertising" are for instance other possible landmarks in that respect. As for interactive advertising, probably here we will attend the most impressive evolution which will accompany interactive programmes booming. A proper response of the Commission to those challenges will prove the understanding of all those as new instruments in building the human mind itself.

THEME 1 : EVENTS OF MAJOR IMPORTANCE FOR SOCIETY

Broadcasting events on exclusive basis is of course part of the definition of the freedom of the event producer to deal with its product. Limiting the right to exclusivity in case of events of major importance sets up the obligation for the event producer to accept either non exclusive broadcasting of the event or to look for a broadcaster having sufficient coverage in the audience and offer him exclusivity.

Relevant instruments and institutions are needed to evaluate population’s coverage extend for major broadcasters, in case of the second choice. The second case will exclude from transmitting such events most of the private broadcasters which do not have enough coverage. So, this second situation implies certain inconveniences.

Anyhow, it becomes important how high is set up the limit for necessary coverage in the audience. A higher limit will exclude most, if not all, private broadcasters - as a result, only public broadcasters will comply with those kind of requirements. Here a discrimination appears and it can be important if public broadcasters are deeply involved in the advertising market. This could be understood as unfair competition, because advantages are offered for public broadcasters. Is the public interest for access to major events motivating the weakening of private broadcasters and their capacity to serve the public himself? Our proposal is to set up

incentives for both broadcasters an event producers which should promote the non exclusive solution of broadcasting events of major importance.

THEME 2: PROMOTION OF CULTURAL DIVERSITY AND COMPETITIVENESS IN THE EUROPEAN PROGRAMME INDUSTRY

We propose that Article 9 ("This Chapter shall not apply to television broadcasts that are intended for local audiences and do not form part of a national network") shall be more precise concerning the identification of the television broadcast as belonging to a national network, licensed as such. It is possible for a license holder to have more local stations working in different locations, which could be identified by the regulatory authority as forming a national network, even if in fact the license holder never got a national network license, with all benefits related, but hardly developed a sum of simple local licenses.

THEME 4: PROTECTION OF MINORS AND PUBLIC ORDER - RIGHT OF REPLY

I. PROTECTION OF MINORS AND PUBLIC ORDER

Article 22 is quite confusing concerning the possibility to broadcast in encoded form programmes that might seriously impair minors. Paragraph 3 does not specify what is meant under the item "such programmes". Does it concern programmes mentioned in both paragraph 1 and 2 ? And what about the programmes mentioned in paragraph 1? Could they be broadcasted in encoded form? Yes, they could be. That interpretation is confirmed by practice in some European countries, where pornography is broadcasted on encoded basis. This confusion could also induce different interpretations in national legislation. For instance, in Romania, the ban on broadcasting porno programmes, even on encoded basis, applies only to initial transmission of programmes, but has no relevance to retransmission. Here a discrimination appears between local broadcasters, who can not broadcast programmes denominated in paragraph 1, and foreign broadcasters, who are broadcasting on encoded basis such programmes allowed for retransmission in cable networks, also on encoded basis. In fact, even if a local broadcaster will never be interested to broadcast encoded porno programmes, he has to face unfair competition with foreign porno programmes, even if not directly on the advertising market. Therefore, a clear ban on broadcasting on encoded basis porno programmes is needed.

Concerning the minor protection in advertising, we resume here our suggestion to take into consideration the approach in the Judgment of the European Court in joined cases C-34/95, C-35/95, and C-36/95 delivered on 9th July 1997, quoted before: "The fact that the Directive provides a set of rules to govern TV advertising directed at minors precludes the operation of additional rules in this specific field by Member States." As it happened in Romania, the national regulatory authorities could be tempted to go very far in additionally “regulating” minor protection in advertising. In that respect, minor protection should not be confused with Public Health Prevention. We also refer here to the opinion of Advocate General Jacobs in Gourmet case in expressing strong doubts on the proportionality of the alcohol advertising ban in the defense of public health. Jacobs suggested that the same effect could be ensured by other measures that would have less effect on Internal Market trade and that could be less restrictive to commercial communication. The Court ruled that "a prohibition on the advertising of alcoholic beverages is allowed unless it is apparent that, (...) the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade."

Finally, we fully agree with the discussion paper's evaluation that "a possible solution to the problems of lack of resources for classifying broadcasts and of the watershed problem may lie in the increased use of self regulation".

Within the case of movies clasification, we still have a problem: it is hard to connect classifications made by commercial undertakings to the administrative actions (including fines) of the regulatory authorities against broadcasters which are not using the same classification patterns or are not respecting watershed rules based on such classifications. This thing happens because even these undertakings, as BBFC, stress that their classification system has no regulatory extension and that they provide mearly commercial servicies.

II- RIGHT OF REPLY

Given the significant differences between the English and the French versions of article 23 paragraph 1 of the Directive ("a la suite d'une allégation incorrecte faite au cours d'une émission télévisée" versus "by an assertion of incorrect facts in a television programme") it should be clarified that value judgments are not inducing responsibilities regarding the right of reply. The English version is closer to the needed interpretation according to which only false statements of facts shall be considered. In that respect, case-law of the European Court for Human Rights is relevant. In defamation cases the Court has deemed it necessary to distinguish between facts and value judgments: "the existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof"

THEME 6: ACCESS TO SHORT EXTRACTS OF EVENTS SUBJECT TO EXCLUSIVE RIGHTS

Although we already have in Romanian legislation such provisions granting the right to 3 minutes of short reports on events under exclusive regime, we consider that still certain aspects should be evaluated in connection with reasonable rules which can regulate the direct or indirect access to the event. There is indeed a problem for the producer of the event to offer access for all potential broadcasters interested for short extracts, and this can also imply inconvenience for the broadcasters themselves. Another problem is that the events concerned by those kinds of regulations could be all either events subject to exclusive rights, or events of general interest, or events of major importance. For instance, the Romanian Audiovisual law, which already has such kind of provisions, is quite confusing while choosing "events of general interest" to be concerned by the short extracts regulations. Those events are not the same with "events of major importance", as defined by the Directive and by the Romanian law either, as subject to be listed by the Government. The question is who defines which events are "of general interest" versus "major importance events", and who provides the list of those events.

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