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Note to Mr Moavero Milanesi
Head of Cabinet Mr Monti

Subject: Media ownership Directive

As agreed with Mr Monti, please find enclosed some proposals relating to the provisions of the draft Directive.

1. As you know the key technical problems raised, in particular by the President, focus on the modalities of the general exemption clause ("flexibility clause"). More specifically three issues have been raised concerning the cross border case (i.e. where the MS responsible for applying this derogation is not the MS where the thresholds are exceeded): (i) the condition that the thresholds should be exceeded in *only one MS* is a problem for CLT/UFA; (ii) the obligation to take "*appropriate measures*" to maintain pluralism in the Member State where the thresholds are exceeded is vague and could lead to discretionary powers; (iii) the *conciliation procedure* is too complex and the role of the Commission too sensitive.

2. On the first two issues, the following changes could be proposed:

- the condition that the thresholds are exceeded solely in one MS could be removed. The removal of this condition would have a concrete effect only on one operator (CLT/UFA). In terms of protection of pluralism it would not create a loophole given that in any case "appropriate measures" to maintain pluralism in MSs where the thresholds are exceeded should be taken and this obligation has been reinforced (see below)

- in order to define "appropriate measures" and to reinforce this obligation, it could be provided that the measures should relate to the *programming* or to the *structure of the broadcaster*. This obligation could be easily checked by the Commission (e.g. participation in a fund promoting the film industry would not be an appropriate measure).

3. As regards the conciliation procedure and the role of the Commission, two options are possible:

- *Option A (Commission decision on the applicability of the derogation)*

  Given that it is difficult to accept the statement that the conciliation procedure is too complex, it should be possible to keep the envisaged conciliation procedure whilst making certain changes to permit its application in the case where the thresholds are exceeded in more than one MS.

  Advantages:

  - The Commission would keep a key role given that in the last resort (no agreement between the MS concerned) it would have to decide on the applicability of the derogation;

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- the Commission would be able to verify more easily if the condition was fulfilled given that "appropriate measures" would have been more clearly defined;

- the free movement of broadcasts between MS would in any case be ensured (contrary to option B);

Drawbacks:

- the procedure has not been "simplified" by the changes proposed and the involvement of the Commission which could be seen as advantageous could also be seen as a drawback;

- *Option B (Commission decision on the restriction of broadcasts)*

The envisaged conciliation procedure would be removed. In the case where a MS manifestly, seriously and gravely infringes the obligation to adopt "appropriate measures", the MS of reception would be able to apply its own rule and therefore to restrict free retransmission of broadcast. This restriction would need to be compatible with Community law (Article 59); in this case the Commission would have to decide within 2 months on the compatibility of the restrictive measure with Community law. Thus, contrary to option A, the Commission would not authorise the competent MS to apply the derogation but would authorise the MS of reception where the thresholds are exceeded to restrict the free movement of broadcast.

Advantages:

- it would enable a MS which considers that "appropriate measures" have not been taken by the MS of origin to apply its own rules and thus it would counter the argument that the Directive would prevent a MS from reacting vis-à-vis a problem of pluralism due to a broadcaster coming from another MS;

- the role of the Commission and the procedure (2 months delay, condition of a serious infringement, notification of measures, etc.) would correspond closely to the solution adopted in the revised Television Without Frontiers Directive in respect of an infringement of the Article relating to the protection of minors;

- in practice the MS of origin would have a clear interest in taking into account the opinion of the MS of reception in order to avoid the broadcaster it licenses being subject to restrictive measures.

Drawbacks

- contrary to option A restriction of the free movement of broadcasts between MS would still be possible;

- the argument of legal insecurity could be invoked by operators;

- even if from a legal point of view this solution is defensible (rules on media ownership aiming to protect pluralism against media concentration are not a "field coordinated" by the Television Without Frontiers Directive), M. Oreja (or DG X) could be hesitant given that it would give the impression of minimising the role of the Directive Television Without Frontiers for ensuring the free movement of broadcasts.

Comments on option B

The consistency and the added value of the Directive would be preserved :

- In terms of the *Internal Market*, the added value is for all operators below the thresholds given that (i) they would no longer be submitted to any media ownership rules in particular those limiting the shareholding in a media company and the number of media that the same person may control (dismantling and liberalisation effect) and (ii) the free movement of media between MS would be guaranteed. The possibility of imposing restrictions under the "appropriate measures" condition or restricting retransmission of

TV/radio broadcast coming from another MS would apply only to operators above the thresholds. This could be explained by the fact that the Directive would not harmonise sufficiently the "appropriate measures" to allow a full application of the principle of the country of origin.

- In terms of *protection of pluralism*, the Directive would still create binding Community rules which do not exist currently: in cases where the thresholds are exceeded Member would be under an obligation either (i) to forbid the operation or (ii) to take appropriate measures to protect pluralism; moreover the other advantages are still there: obligation for MS to measure the impact thorough the Community (and not only on its own territory) of the licences it grants, obligation to cooperate between MS, and more generally a benchmarking effect to compare the level of media concentration across the Community.

4. As regards the other questions raised in various position papers I think that the latest changes have already met most concerns, in particular the legal insecurity of the flexibility clause (removal of the 10 year period), the definition of the zone and of the part of the zone (defined within the definitions of the Directive);

5. As regards the cross media ownership rules, vis-à-vis our Internal Market objective it is necessary to cover this type of rules given that (i) they exist in many MS and the Internal Market would still be fragmented; (ii) this fragmentation could even increase given that new media ownership rules adopted recently by MS cover cross media ownership in very different ways; (iii) a MS would be able to invoke the non respect of its cross media ownership rules to restrict free movement of broadcasts coming from another MS (e.g. a newspaper company launching a satellite channel from another MS); (iv) in some MS the cross media ownership rules are archaic and should be modernised and relaxed; (v) it would allow uneven treatment of multimedia players according to each MS and thus distortion of competition. From a tactical point of view, leaving the press out would trigger intense lobbying from those who are still in i.e. radio and television operators. Finally, the increase of the multimedia threshold to 12% is a clear positive signal vis-à-vis the press.

6. Some comments on the lobbying against the draft proposal:

- the lobbying against the draft is not surprising given the issue we are dealing with. It is mainly fuelled by existing big players (in particular News international, CLT/Bertelsmann, Axel Springer, and ITV) which have clearly influenced the position of the associations EPC, ACT , ENPA;

- contrary to what is sometimes repeated there are operators in favour of the initiative, not only the EBU or the Italian publishers but also others which are however reluctant to send formal letters (e.g. Canal plus, Time Warner, MTV, Kirch);

- most of the position papers simply oppose the principle of having a Directive rather than commenting on the details of the content. It confirms that for these big players any Directive would be a problem;

- informal contacts with operators against the proposal show that many are convinced that a proposal for a Directive will be in any case be presented shortly and therefore the radical positions are a tactical way to obtain concessions (ask a lot to obtain a little).

7. **Finally, in terms of** how we should proceed **it seems to me important that we should proceed rapidly to avoid new lobbying and to give the feeling that a fundamentally different approach has been adopted; secondly direct bilateral contacts between Mr Monti and Mr Santer, and then with other Commissioners (in particular Messrs Bangemann, Oreja, Van Miert, Liikanen, and Ms Cresson, Gradin, Bonino) are crucial; it is essential to avoid any new special chef de cabinet meeting and the initiative must be put directly onto the agenda of a meeting of the College.**

John F. Mogg

Copies: [redacted]

Propositions de modifications

Article 5 ***(Dérogations)***

3. Les Etats membres peuvent prévoir dans leur législation qu'en cas de dépassement des limites relatives aux parts d'audience et aux parts de consommation des médias fixées à l'article 3, la création d'un service de radiodiffusion, le renouvellement d'une autorisation d'un service de radiodiffusion et la prise de contrôle d'un média sont possibles si ~~les conditions suivantes sont respectées:~~

~~a) les parts d'audience et les parts de consommation des médias du contrôleur des médias visés à l'article 3 sont dépassées uniquement dans un seul Etat membre, et~~

~~b)~~ des mesures appropriées relatives à la programmation ou à la structure des organismes de radiodiffusion en cause et visant à maintenir le pluralisme dans l'Etat membre visé au paragraphe a, sont prises par l'Etat membre compétent en vertu de l'article 2.

Option A

4. Les Etats membres notifient par écrit à la Commission tous les cas où l'autorité compétente a l'intention d'appliquer les dérogations visées aux paragraphes 1, 2 et 3 ainsi que toutes les informations permettant de vérifier si les conditions qui y sont visées sont bien respectées. Sans préjudice du paragraphe 5, la décision d'appliquer ces dérogations ne peut être prise par l'autorité nationale compétente qu'après un délai de trois mois à compter de la notification. La Commission peut transmettre les informations notifiées aux autres Etats membres.

5. Dans le cas où les parts d'audience et les parts de consommation sont dépassées dans un ou plusieurs Etats membres autres que l'Etat membre compétent pour appliquer la dérogation prévue au paragraphe 3:

   a) la notification doit être adressée en même temps qu'à la Commission aux Etats membres dans lequel les parts d'audience et les parts de consommation sont dépassées. Ceux-ci donne un avis qui est communiqué à la Commission et à l'Etat membre compétent;

   b) si un Etat membre dans lequel les parts d'audience et les parts de consommation sont dépassées estime dans son avis que les mesures visées au paragraphe 3 ne sont pas appropriées et que l'Etat membre compétent souhaite malgré cet avis négatif appliquer la dérogation, le délai prévu au paragraphe 4 est prolongé d'un mois afin de permettre aux deux Etats membres de rechercher un accord compatible avec le droit communautaire; à cet effet, une réunion entre les autorités compétentes des deux Etats membres est convoquée par la Commission à laquelle participe cette dernière;

   c) si à l'expiration du délai prévu au paragraphe b un accord n'a pas été trouvé, la Commission, statue, dans un délai d'un mois sur la compatibilité avec le droit communautaire de la dérogation envisagée par l'Etat membre compétent. En cas de décision négative, l'Etat membre compétent ne peut pas appliquer la dérogation.

Option B

4. Les Etats membres notifient par écrit à la Commission tous les cas où l'autorité compétente a l'intention d'appliquer les dérogations visées aux paragraphes 1, 2 et 3 ainsi que toutes les informations permettant de vérifier si les conditions qui y sont visées sont bien respectées. ~~**Sans préjudice du paragraphe 5,**~~ La décision d'appliquer ces dérogations ne peut être prise par l'autorité nationale compétente qu'après un délai de trois mois à compter de la

notification. La Commission peut transmettre les informations notifiées aux autres Etats membres.

5. Dans le cas où les parts d'audience et les parts de consommation sont dépassées dans un ou plusieurs Etats membres autres que l'Etat membre compétent pour appliquer la dérogation prévue au paragraphe 3:

a) la notification doit être adressée en même temps qu'à la Commission aux Etats membres dans lequel les parts d'audience et les parts de consommation sont dépassées. Ceux-ci donnent un avis relatif au caractère approprié des mesures qui est communiqué à la Commission et à l'Etat membre compétent;

b) dans le cas où l'Etat membre compétent applique la dérogation en ayant enfreint d'une manière manifeste, sérieuse et grave l'obligation de prendre des mesures appropriées prévues au paragraphe 3, les Etats membres dans lesquels les parts d'audience et les parts de consommation sont dépassées peuvent, par dérogation à l'article 2 paragraphe 1, prendre des mesures conformes au droit communautaire pour restreindre la réception ou la retransmission du service de radiodiffusion concerné sur son territoire. L'Etat membre notifie au préalable à la Commission, à l'Etat membre compétent et à l'organisme de radiodiffusion concerné les mesures qu'il a l'intention de prendre;

c) la Commission statue, dans un délai de deux mois à compter de la notification prévue au point b) sur la compatibilité des mesures avec le droit communautaire. En cas de décision négative, il sera demandé à l'Etat membre de mettre fin d'urgence aux mesures en question.

L'exposé des motifs serait adapté en conséquence et précisera que l'Etat membre concerné peut prendre les mesures restrictives dès leur notification à la Commission, que l'application de telles restrictions est sans préjudice de la mise en oeuvre d'un recours en manquement contre l'Etat membre compétent (parce qu'il n'a pas pris les mesures appropiées) et que cette approche est pleinement cohérente avec la solution qui a été retenue en matière de protection des mineurs à l'article 2 bis de la directive télévision sans frontières.

le considérant 17 précisera que les éventuelles entraves à la réception et à la retransmission d'un service de radiodiffusion doivent être conformes au droit communautaire, notamment, l'article 59 du traité, et que conformément à la jurisprudence de la Cour, elles doivent être proportionnées à l'objectif de protection du pluralisme poursuivi.