

# AVMSD

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EN

**Draft Audiovisual Media Services Directive****CONSOLIDATED TEXT****including EP First Reading amendments accepted in full and the amended Commission proposal****NON-BINDING WORKING DOCUMENT**

This compilation reproduces provisions from different sources (COM initial proposal, EP first reading, Amended COM proposal) at different stages of the co-decision procedure, references are therefore not entirely consistent throughout all stages of the procedure:

Arial – Com Proposal

**Times bold** – EP 1<sup>st</sup> reading Amendment accepted as such

*Times italic* – EP Amendment as redrafted in Commission's amended proposal

**RECITALS**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2) and 55 thereof,

Having regard to the proposal from the Commission<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Having regard to the opinion of the Committee of the Regions<sup>3</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>4</sup>,

Whereas:

- (1) *Directive 89/552/EEC coordinates certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities. However, new technologies in the transmission of audiovisual media services call for adaptation of the regulatory framework to take account of the impact of structural change, the spread of information and communication*

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<sup>1</sup> OJ C [...], [...], p. [...].

<sup>2</sup> OJ C [...], [...], p. [...].

<sup>3</sup> OJ C [...], [...], p. [...].

<sup>4</sup> OJ C [...], [...], p. [...].

*technologies (ICT) and technological developments on business models, especially the financing of commercial broadcasting, and to ensure optimal conditions of competitiveness and legal certainty for Europe's information technologies and its media industries and services, as well as respect for cultural and linguistic diversity.*

- (2) The laws, regulations and administrative measures in Member States concerning the pursuit of television broadcasting activities are already coordinated by Directive 89/552/ECC, whereas the rules applicable to activities such as on-demand audiovisual media services contain disparities, some of which may impede the free movement of these services within the European Union and may distort competition within the common market. In particular, Article 3(4) of Directive 2000/31/EC provides that Member States may derogate from the country of origin principle for specific public policy reasons.
- (3) *Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services.*
- (3a) *In its resolutions of 1 December 2005, 4 April and 27 April 2006 the European Parliament has underlined the international dimension of audiovisual services and the fact that cultural activities, goods and services have both an economic and a cultural nature.*
- (4) **Traditional audiovisual media services – such as television – and emerging on-demand audiovisual media services offer significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and stimulate economic growth and investment. Bearing in mind the importance of a level playing-field and a true European broadcasting market, the basic principles of the common market, such as competition law and equal treatment, should be respected in order to ensure transparency and predictability in media markets and to achieve low entry barriers.**
- (5) *The basic principles of Directive 89/552/EEC, namely the transmitting state principle and common minimum standards, have proved their worth and should therefore be retained. But legal uncertainty and a non-level playing field exist for European companies delivering audiovisual media services as regards the legal regime governing emerging on-demand services. It is therefore necessary, in order to avoid distortions of competition, to improve legal certainty, to help complete the internal market and to facilitate the emergence of a single information area, to apply to all audiovisual media services, both linear and non-linear, a basic tier of coordinated rules.*
- (6) *The Commission has adopted a Communication on the future of European regulatory audiovisual policy, in which it stresses that regulatory policy in the sector has to safeguard certain public interests, such as cultural diversity, the right to information, the importance of media pluralism, the protection of minors and consumer protection and action to enhance public awareness and media skills .*

- (6a) *The country of origin principle is crucial to the emergence and further development of a pan-European audiovisual market with a strong industry producing European content. Moreover, the principle safeguards the viewer's rights to choose from a wide variety of European programmes, and thus contributes to media pluralism.*
- (7) **The Commission has adopted the initiative “i2010: European Information Society” to foster growth and jobs in the information society and media industries. i2010 is a comprehensive strategy designed to encourage the production of European content, the development of the digital economy and the uptake of ICT, against the background of the convergence of information and media services, networks and devices, by modernising and deploying all EU policy instruments: regulatory instruments, research and partnerships with industry. The Commission has committed itself to creating a consistent internal market framework for information society services and media services by modernising the legal framework for audiovisual services, starting with a Commission proposal in 2005 to modernise the Television without Frontiers Directive and transform it into a Directive on Audiovisual Media Services. The goal of the i2010 will in principle be achieved by allowing industries to grow with minimal regulation, as well as allowing small start-up businesses, which are the wealth and job creators of the future, to flourish, innovate and create employment in a de-regulated market.**
- (8) **On 6 September 2005, the European Parliament adopted a Resolution on the application of Articles 4 and 5 of Directive 89/552/EEC, as amended by Directive 97/36/EC, for the period 2001-2002 (Weber Report). This Resolution – like the resolutions of 4 September 2003 and 22 April 2004 – calls for the adaptation of the existing Television without Frontiers Directive to structural changes and technological developments while fully respecting its underlying principles, which remain valid. In addition, it in principle supports the general approach of basic rules for all audiovisual media services and additional rules for linear (“broadcasting”) services.**
- (9) *This Directive enhances compliance with fundamental rights and is fully in line with the principles, rights and freedoms laid down in the Charter of Fundamental Rights of the European Union, in particular Article 11 thereof. In this context, Member States should set up independent regulatory authorities in the fields covered by this Directive, if they have not already done so. Member States may decide whether it is appropriate to have a single regulatory authority for all audiovisual media services or several separate authorities for each category of service (linear or non-linear). Furthermore, this Directive does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.*
- (10) **The requirement that the originating Member State should ensure compliance with national law as coordinated by this Directive is sufficient under Community law to ensure free movement of audiovisual media services without secondary control on the same grounds in the receiving Member State; however, the receiving Member State may exceptionally and under specific conditions, derogate from this requirement in the event of serious violations of Articles 22(1), 22(2), 3d or 3e of Directive 89/552/EEC, taking into account the fact that respect**

for fundamental rights forms an integral part of the general principles of Community law.

- (11) Directive 2002/21/EC of the European Parliament and the Council<sup>5</sup> according to its Article 1(3) is without prejudice to measures taken at Community or national level, to pursue general interest objectives, in particular relating to content regulation and audiovisual policy.
- (11a) **Directive 2003/31/EC (the eCommerce Directive) contains no specific substantive provisions governing audiovisual media services and leaves the Member States the option of derogating from the country of origin principle on specific matters of public policy on a case-by-case basis and in accordance with a notification procedure. By imposing additional minimum standards for non-linear audiovisual media services with a view to the protection of minors and the promotion of cultural diversity, this Directive extends the field of harmonised Community law. To that extent this Directive builds on the eCommerce Directive in these areas to cover a specific subset of non-linear audiovisual services which are of particular importance for society and are characterised by their cultural dimension. For these services the degree of coordination of national rules is higher and the internal market is more complete.**
- (12) *No provision of this Directive should require or encourage Member States to impose new systems of licensing or administrative authorisation on any type of audiovisual media service.*
- (13) *The definition of audiovisual media services covers only audiovisual media services, whether scheduled or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Audiovisual media services are made up of programmes. Examples of programmes include feature-length films, sports events, situation comedy, documentary, children's programmes and original drama. The scope is limited to services as defined by the Treaty and therefore covers any form of economic activity, including that of public service enterprises, but does not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest. The definition excludes all services not intended for the distribution of audiovisual content, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose.*
- (14) **The definition of audiovisual media services covers mass media exercising editorial responsibility in their function to inform, entertain and educate the general public, and includes audiovisual commercial communications but excludes any form of private correspondence, such as e-mails sent to a limited number of recipients. The definition also excludes all services whose principal purpose is not the distribution of audiovisual content, i.e. where any audiovisual content is merely incidental to the service. Examples include websites that contain**

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<sup>5</sup> OJ L 108, 24.4.2002, p. 33.

audiovisual elements only in an ancillary manner, such as animated graphical elements, small advertising spots or information related to a product or non-audiovisual service. It also excludes games of chance involving a stake representing a sum of money, including lotteries and betting, provided that their main purpose is not that of distributing audiovisual content. Further examples are online games and search engines, as long as the principal purpose of the audiovisual media service is not reached.

- (14a) Television broadcasting services, i.e. linear services, currently include in particular analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example, is one of the on-demand, i.e. non-linear services. For linear audiovisual media services or television programmes which are also offered on a live or deferred basis as non-linear services by the same media service provider, the requirements of this Directive are deemed to be met by the linear transmission. However, where different kinds of services are offered in parallel, without one part being clearly subordinate to another, this Directive should still apply to those distinguishable parts of the service which fulfil all the criteria of an audiovisual media service.
- (15) This Directive does not cover electronic versions of newspapers and magazines.
- (16) *For the purposes of this Directive, the term “audiovisual” refers to moving images with or without sound, so includes silent films but does not cover audio transmission, radio services or stand-alone text-based services. In the context of television broadcasting, the notion of simultaneous viewing also entails quasi simultaneous viewing because of the variations in the short timelag which occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process.*
- (17) The notion of editorial responsibility is essential for defining the role of the media service provider and thereby for the definition of audiovisual media services. “Editorial responsibility” means responsibility for the selection and organisation, on a professional basis, of the content of an audiovisual offer. This may apply to an individual content or a collection of contents. Such editorial responsibility applies to the composition of the schedule, in the case of television programmes, or to the programme listing, in the case of non-linear services. This Directive is without prejudice to the liability exemptions established in Directive 2000/31/EC.
- (17a) *The criteria laid down in the definition of audiovisual media services, as set out in Article 1(a) of Directive 89/552/EEC and expanded in Recitals 13 to 17 of this Directive, must all be fulfilled at the same time.*
- (18) *In addition to advertising and teleshopping, the wider definition of audiovisual commercial communication is introduced. It comprises images with or without sound which are transmitted as part of an audiovisual media service, form part of or accompany programmes and are designed to promote, directly or indirectly, the goods, services or image or a natural or legal entity pursuing an economic activity and therefore it does not include public service announcements and charity appeals broadcast free of charge.*

- (19) The country of origin principle remains the core of this Directive, as it is essential for the creation of an internal market. This principle must therefore be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of these services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.
- (19a) To promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the European Union, it remains essential that only one Member State should have jurisdiction over an audiovisual media service provider and that pluralism of information should be a fundamental principle of the European Union.**
- (20) **Technological developments, especially with regard to digital satellite programmes, mean that subsidiary criteria need to be adapted in order to ensure suitable regulation and effective implementation and to give players genuine power over the content of an audiovisual media service.**
- (21) As this Directive concerns services offered to the general public in the European Union, it should apply only to audiovisual media services that can be received directly or indirectly by the public in one or more Member States with standard consumer equipment. The definition of “standard consumer equipment” should be left to the competent national authorities.
- (22) Articles 43 to 48 of the Treaty lay down the fundamental right to the freedom of establishment. Therefore, audiovisual media service providers are in general free to choose the Member States where they are established. The European Court of Justice has also emphasised that “the Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established”<sup>6</sup>.
- (23) *Member States must be able to apply stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring that those rules are consistent with Community Law. To prevent abuse and fraudulent conduct, the codification of the case law of the European Court of Justice, combined with a more efficient procedure, is an appropriate solution that takes account of Member State concerns without calling into question the proper application of the country of origin principle.*
- (23a) *In order for a Member State to argue on a case-by-case basis that a broadcast by a media service provider established in another Member State is wholly or mostly directed towards its territory, that Member State may cite indicators such as the origin of the advertising and/or subscription revenues, the main language of the service or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received. In addition, in the context of the circumvention procedure, that Member State has to prove the*

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<sup>6</sup> Case C-56/96 VT4, paragraph 22; Case C-212/97 Centros v. Erhvervs-og Selskabsstyrelsen; see also: Case C-11/95 Commission v Kingdom of Belgium and Case C-14/96 Paul Denuit.

*abuse or fraudulent conduct of the media service provider established in the other Member State.*

- (24) *Under this Directive, notwithstanding the application of the country of origin principle, Member States may still take measures that restrict the freedom of movement of television broadcasting or non-linear audiovisual media services, but only under certain conditions listed in Article 2a of this Directive and following the procedures laid down in this Directive. However, the European Court of Justice has consistently held that any restriction of the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively. With respect to non-linear audiovisual services, the possibility of taking measures under Article 2a of Directive 89/552/EEC replaces the possible measures which could have hitherto been taken by the Member State concerned as set out in Article 3(4) and/or Article 12 (3) of Directive 2000/31/EC within the area coordinated by Articles 3d and 3e of Directive 89/552/EEC.*
- (25) *In its Communication to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Union the Commission stressed that a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self regulation should be considered. Furthermore, experience showed that both, co- and self-regulation instruments, implemented in accordance with different legal traditions of Member States can play an important role in delivering a high level of consumer protection. Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector will be more effective if they are taken with the active support of the service providers themselves. Thus self regulation constitutes a type of voluntary initiative, which enables the economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves. Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislation and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive. However, while self-regulation might be a complementary method of implementing certain provisions of this Directive, it cannot constitute a substitute for the obligation of the national legislator. Co-regulation gives, in its minimal form, a "legal link" between self-regulation and the national legislator in accordance with the legal traditions of the Member States.*
- (26) Entertainment rights for events of public interest may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming across the European Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.
- (26a) *Media literacy refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people will be able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They will be better able to protect themselves and their families from harmful or offensive*

*material. Therefore development of media literacy in all sections of society should be promoted and monitored.*

- (27) *Therefore, in order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the European Union are fully and properly protected, those exercising exclusive rights concerning an event of high public interest must grant other broadcasters and intermediaries, where they are acting on behalf of broadcasters, the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking due account of exclusive rights. Such terms should be communicated in a timely manner before the event of public interest takes place to give others sufficient time to exercise such a right. Broadcasters may freely choose short extract from the transmitting broadcasters' signal with, unless impossible for reasons of practicality, at least the identification of their source. Such short extracts should not exceed 90 seconds and be transmitted before the event concludes, or for sports events before the end of a single day's play - whichever is the sooner.*

*These provisions of shall apply without prejudice to the obligation of individual broadcasters to respect the relevant community legislation and international conventions regarding copyright.*

*Typically, Member States shall facilitate access to events by granting access to the broadcaster's signal. However, they may choose other equivalent means. Such means include, inter alia, granting access to the venue of these events.*

*The right to trans-frontier news access should apply only where it is necessary; accordingly, if another broadcaster in the same Member State has acquired exclusive rights to the event in question, access must be sought from that broadcaster.*

- (28) **Non-linear services are different from linear services with regard to choice and control the user can exercise and with regard to the impact they have on society. This justifies imposing lighter regulation on non-linear services, which only have to comply with the basic rules provided for in Articles 3c to 3h. For linear audiovisual media services or television broadcasting services which are also offered on a live or deferred basis as non-linear services by a media service provider, the requirements of Directive 89/552/EEC are deemed to be met by the linear transmission.**
- (29) **Because of the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions, it is essential for users to know exactly who is responsible for the content of these services. It is therefore important for Member States to ensure that users have access to information about the ways in which editorial responsibility for the content is exercised and by whom. It is for each Member State to decide the practical details as to how this objective can be achieved without prejudice to any other relevant provisions of Community law.**
- (30) **In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market and fully respect the principles**

laid down in the Charter of Fundamental Rights of the European Union. Where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as audiovisual media services are concerned, Directive 89/552/EEC must promote a high level of protection of objectives of general interest, in particular the protection of minors, the rights of persons with disabilities and human dignity.

- (31) Harmful content and conduct in audiovisual media services continue to be a concern for law-makers, industry and parents. There will also be new challenges, especially in connection with new platforms and new products. It is therefore necessary to introduce rules to protect the physical, mental and moral development of minors as well as human dignity in all audiovisual media services and in audiovisual commercial communication.
- (32) *Measures taken to protect minors and human dignity must be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union. The aim of these measures, such as PIN codes (personal identification numbers) or labelling, should however be to ensure an adequate level of protection of minors and human dignity, especially with regard to non-linear services, by means of an obligation to clearly draw attention to the specific nature of certain programmes before they are transmitted and in accordance both with Article 1 and Art 24 of the Charter of Fundamental Rights of the European Union.*
- (32a) *Audiovisual media service providers under the jurisdiction of one of the Member States will in any case be subject to criminal law provision banning the dissemination of child pornography.*
- (33) None of the provisions of this Directive that concern the protection of minors and public order necessarily requires that the measures in question be implemented through prior control of audiovisual media services.
- (34) Article 151(4) of the Treaty requires the Community to take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures and languages, and also to encourage mutual understanding.
- (35) *Non-linear audiovisual media services have the potential to partially replace linear services. Accordingly, they should where practicable, promote the production and distribution of European works and thus actively contribute to the promotion of cultural diversity. Such support for European works might, for example, take the form of a minimum share of European works proportionate to economic performance, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides. It will be important to regularly re-examine the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports set out in Article 3f paragraph 3, Member States shall also take into account notably the financial contribution by such services to the production and rights acquisition of European works; the share of European works in the catalogue of audiovisual media services as well as in the effective users' consumption of European works proposed by such services.*

- (36) When implementing the provisions of Article 4 of Directive 89/552/EEC as amended, Member States should make provision for broadcasters to include an adequate share of co-produced European works or of European works of non-domestic origin.
- (37) It is important to ensure that cinematographic works are transmitted within periods agreed between right holders and audiovisual media service providers.
- (38) The availability of non-linear services increases the choice of the consumer. Detailed rules governing audiovisual commercial communication for non-linear services thus appear neither to be justified nor to make sense from a technical point of view. Nevertheless, all audiovisual commercial communication should respect not only the identification rules but also a basic tier of qualitative rules in order to meet clear public policy objectives.
- (39) As has been recognised by the Commission in its Interpretative Communication on certain aspects of the provisions on advertising in the “Television without frontiers” Directive, the development of new advertising techniques and marketing innovations has created new effective opportunities for commercial communications in traditional broadcasting services, potentially enabling them to better compete on a level playing field with on-demand innovations<sup>7</sup>. This Interpretative Communication remains valid to the extent that it refers to provisions of the Directive that are unaffected by the amending Directive.
- (40) **Commercial and technological developments give users increased choice and responsibility in their use of audiovisual media services. To remain proportionate with the goals of general interest, regulation must allow a certain degree of flexibility with regard to linear audiovisual media services: the separation principle should be limited to advertising and teleshopping, product placement should be allowed under certain circumstances in certain cases determined on the basis of a positive list, and some quantitative restrictions should be abolished. However, where product placement is surreptitious, it should be prohibited. The separation principle should not prevent the use of new advertising techniques.**
- (41) *Apart from the practices that are covered by the present Directive, Directive 2005/29/EC applies to unfair commercial practices, such as misleading and aggressive practices occurring in audiovisual media services. Moreover, as Directive 2003/33/EC, which prohibits advertising and sponsorship for cigarettes and other tobacco products in printed media, information society services and radio broadcasting, is without prejudice to 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; in view of the special characteristics of audiovisual media services, the relation between Directive 2003/33/EC and Directive 89/552/EEC should remain the same after the entry into force of the present Directive. Article 88(1) of Directive 2001/83/EC which prohibits advertising to the general public of*

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<sup>7</sup> OJ C 102, 28.4.2004, p. 2.

*certain medicinal products applies, as provided in paragraph 5 of the same Article, without prejudice to Article 14 of Directive 89/552/EEC; the relation between Directive 2001/83/EC and Directive 89/552/EEC should remain the same after the entry into force of the present Directive. Furthermore, this Directive is without prejudice to Regulation .../... of the European Parliament and of the Council on nutrition and health claims made on foods.*

- (42) *Given the increased use of new technologies such as personal video recorders and the increased choice of channels, detailed regulation with regard to the insertion of spot advertising with the aim of protecting viewers is no longer justified. This Directive gives flexibility to broadcasters with regard to its insertion where this does not unduly impede the integrity of programmes.*
- (43) The Directive is intended to safeguard the specific character of the European television landscape and therefore limits possible interruptions for cinematographic works and films made for television as well as for some categories of programmes that still need specific protection.
- (44) The limitation on the amount of daily advertising was largely theoretical. The hourly limit is more important since it also applies during prime time. Therefore the daily limit should be abolished, while the hourly limit should be maintained for advertising and teleshopping spots; also the quantitative restrictions on the time allowed for teleshopping or advertising channels seem no longer justified given increased consumer choice. However, the limit of 20% of advertising per clock hour remains applicable, except for more time consuming forms of advertising such as telepromotions and teleshopping windows that require more time on account of their inherent characteristics and method of presentation<sup>8</sup>.
- (45) Surreptitious advertising is a practice prohibited by this Directive because of its negative effect on consumers. The prohibition of surreptitious advertising does not cover legitimate product placement within the framework of this Directive.
- (46) *Product placement is a reality in cinematographic works and in audiovisual works made for television, but Member States regulate this practice differently. To ensure a level playing field, and thus enhance the competitiveness of the European media industry, it is necessary to adopt rules for product placement. It is useful to have a positive list which authorises product placement in the types of content whose paramount function is not to influence opinion and in cases in which no - or only negligible - consideration is provided in return. The definition of product placement covers any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, normally in return for payment or for similar consideration. It is subject to the same qualitative rules and restrictions applying to advertising. It should, furthermore, meet specific requirements. The editorial responsibility and independence of the media service provider must not be*

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<sup>8</sup> Cases Reti Televisive Italiane SpA (RTI) C-320/94; Radio Torre C-328/94; Rete A Srl C-329/94; Vallau Italiana Promomarket Srl C\_337/94; Radio Italia Solo Musica Srl and Others C-338/94 and GETE Srl C\_339/94 v Ministero delle Poste e Telecomunicazioni, ECR I-06471.

*jeopardised. In particular, the way the product is included in the programme must not create the impression that the product is endorsed by the programme or its presenters. Furthermore, the product must not be given 'undue prominence'. This means prominence which is not justified by the editorial requirements of the programme, or the need to lend verisimilitude. The decisive criterion distinguishing sponsorship and product placement is the fact that in product placement the reference to a product is built into the action of a programme. Sponsor references in contrast may be shown during the programme but are not part of the plot.*

- (46b) **'Undue prominence'** is given when the repeated representation of the brand, good or service or the nature of its presentation is such as to give undue prominence to products in the context of production props or product placement, taking account of the content of the programmes in which they appear.
- (47) *Regulators should be independent from national governments as well as from audiovisual media service providers in order to be able to carry out their work impartially and transparently and to contribute to pluralism. Close cooperation between competent national authorities and the Commission is necessary to ensure the correct application of this Directive. Similarly, close cooperation between Member States and between Member States' regulatory authorities is particularly important with regard to the impact that broadcasters established in one Member State might have in another Member State. In the case that licensing procedures are provided for in national law and if more than one Member State is concerned, it is desirable that contacts between the respective authorities take place before licences are granted. This cooperation should cover all the fields coordinated by Directive 89/552/EEC and in particular Articles 2, 2a and 3 thereof.*
- (47a) *Cultural diversity, freedom of expression and media pluralism of means of communication are some important aspects of the European audiovisual sector and are therefore preconditions for democracy and diversity.*
- (47b) *The right of persons with a disability and the elderly to participate and integrate in the social and cultural life of the community is inextricably linked to the provision of accessible audiovisual media services. The accessibility of audiovisual media services includes, but is not restricted to, sign language, subtitling, audio-description and easily understandable menu navigation.*

## Draft Audiovisual Media Services Directive

### OPERATIVE PART

#### DIRECTIVE [ ] OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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

Text with relevance for EEA

The title is amended as follows:

*“Directive [No] of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)”.*

#### CHAPTER I

##### Definitions

##### Article 1

(1) For the purpose of this Directive:

*(a) ‘audiovisual media service’ means a service as defined by Articles 49 and 50 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council.*

*Such audiovisual media services are either television broadcasts as defined in paragraph (c) of this Article or on-demand services as defined in paragraph (e) of this Article and/or audiovisual commercial communication.*

*(aa) ‘programme’ means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting.*

**(b) ‘media service provider’ means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.**

**It does not include natural or legal persons who merely transmit content for which the editorial responsibility lies with third parties;**

*(c) 'television broadcasting' or 'television broadcast' (i.e. a linear audiovisual media service) means an[...]audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;*

*(d) 'broadcaster' means provider of linear audiovisual media services;*

*(e) 'on-demand service' (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider;*

*(f) 'audiovisual commercial communication' means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.*

*(g) 'television advertising' means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes 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, in return for payment;*

*(h) 'surreptitious audiovisual commercial communication' means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration;*

*(i) 'sponsorship' means any contribution made by a public or private undertaking or natural person not engaged in providing audiovisual media services or in the production of audio-visual works, to the financing of audiovisual media services or programmes with a view to promoting its name, its trade mark, its image, its activities or its products;*

*(j) 'teleshopping' means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment;*

*(k) 'product placement' means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within audiovisual media services, normally in return for payment or for similar consideration.*

**(kc)'co-regulation' means a form of regulation based on cooperation between public authorities and self-regulating bodies.**

**(kd) ‘editorial responsibility’ means responsibility for the composition of the schedule or the compilation of programmes intended for the general public, in a professional capacity, in order to deliver the media content within a set time frame or to allow it to be ordered from a catalogue.**

*(2) In defining the term ‘independent producer’, Member States shall take account notably of the ownership and proprietary rights of the production firm and of the number of programmes provided to the same broadcaster.*

## CHAPTER II

### General provisions

#### Article 2

1 Member State shall ensure that all *audiovisual media services transmitted by media service providers* under its jurisdiction comply with the rules of the system of law applicable to *audiovisual media services* intended for the public in that Member State.

2. For the purposes of this Directive the *media service providers* under the jurisdiction of a Member State are:

(a) those established in that Member State in accordance with paragraph 3;

(b) those to whom paragraph 4 applies.

3. For the purposes of this Directive, a *media service provider* shall be deemed to be established in a Member State in the following cases:

(a) the *media service provider* has its head office in that Member State and the editorial decisions about *the audiovisual media service* are taken in that Member State;

(b) if a *media service provider* has its head office in one Member State but editorial decisions on *the audiovisual media service* are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the *audiovisual media service activity* operates; if a significant part of the workforce involved in the pursuit of the *audiovisual media service activity* operates in each of those Member States, the *media service provider* shall be deemed to be established in the Member State where it has its head office; if a significant part of the workforce involved in the pursuit of the *audiovisual media service activity* operates in neither of those Member States, the *media service provider* shall be deemed to be established in the Member State where it first began *its activity* in accordance with the system of law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;

(c) if a *media service provider* has its head office in a Member State but decisions on *audiovisual media service* are taken in a third country, or vice-versa, it shall be deemed to be established in the Member State concerned,

provided that a significant part of the workforce involved in the pursuit of the *audiovisual media service activity* operates in that Member State.

4. *Media service providers* to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:

- (a) they use a satellite up-link situated in that Member State.
- (b) *although they do not use a satellite up-link situated in that Member State, they use a satellite capacity appertaining to that Member State;*

5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the *media service provider* is established within the meaning of Articles 52-43 and following of the Treaty establishing the European Community.

6. This Directive does not apply to *media service provider* intended exclusively for reception in third countries and which are not received *with standard user equipment* directly or indirectly by the public in one or more Member States.

#### Article 2a

1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of *audiovisual media services* from other Member States for reasons which fall within the fields coordinated by this Directive.

***2. Member States may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled:***

***(a) an audiovisual media service coming from another Member State manifestly, seriously and gravely infringes Article 22 (1) or (2), Art 3d, or Article 3e;***

***(b) during the previous 12 months, the media service provider has infringed the provision(s) referred to in (a) on at least two prior occasions;***

***(c) the Member State concerned has notified , in writing, the media service provider, the Member State in which it is established and the Commission of the alleged infringements and of the measures it intends to take should any such infringement occur again;***

***(d) consultations with the Member State of establishment and the Commission have not produced an amicable settlement within 15 days of the notification provided for in (c), and the alleged infringement persists.***

***The Commission shall, within two months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Community law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.***

**3. In respect of on-demand services, a Member State may, in urgent cases, provisionally take measures to derogate from paragraph 1 without fulfilling the conditions set out in points (b), (c) and (d) of paragraph 2. If it does so, the measures shall be notified in the**

shortest possible time to the Commission and to the Member State in which the media service provider is established, with an indication of the reasons for which the first Member State considers that the case is urgent.

4. The Commission shall, within two months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Community law. If it decides that they are not, the Member State shall be required to withdraw the measures in question as a matter of urgency.

5. Paragraph 2 shall be without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the media service provider concerned.

### Article 3

*1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive, provided that such rules are in compliance with Community Law.*

2. In cases where a Member State:

(a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules; and

(b) where such rules are justified for reasons of public policy, including the protection of minors or public security or public health or the protection of cultural diversity; and

(c) that Member State considers that a broadcaster under the jurisdiction of another Member State takes advantage of this Directive in abusive or fraudulent manner in order to circumvent such rules,

it may contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed. On receipt of a substantiated request by the first Member State, the Member State having jurisdiction shall request the broadcaster to comply with the rules in question. The Member State with jurisdiction shall inform the first Member State of the results obtained within two months of the request.

3. Where the first Member State considers:

(a) that the results achieved through the application of paragraph 2 are not satisfactory; and

(b) that the media service provider concerned has established itself in the Member State having jurisdiction in order solely to avoid the stricter rules, in the fields coordinated by this Directive, to which it would be subject if it were established in the first Member State,

it may adopt appropriate measures against the media service provider concerned, in order to prevent abuse or fraudulent conduct.

**Such measures shall be objectively necessary, applied in a non-discriminatory manner, be suitable for attaining the objectives which they pursue and may not go beyond what is necessary to attain them.**

**4. A Member State may take measures pursuant to paragraph 3 only if all of the following conditions are met:**

**(a) it has notified the Commission and the Member State in which the media service provider is established of its intention to take such measures while substantiating the grounds on which it proposes to adopt the measures and**

**(b) the Commission decides that the measures are compatible with Community law, and in particular that the reasons for which that Member State proposes to take the measures under paragraphs 2 and 3 are well-founded.**

**5. The Commission shall decide within three months following notification under paragraph 4(a). If the Commission decides that the measures are incompatible with Community law, the Member State in question shall refrain from taking the proposed measures.**

6. Member States shall, by appropriate means, ensure, within the framework of their legislation, that *media service providers* under their jurisdiction effectively comply with the provisions of this Directive.

**7. Member States shall encourage self- and/or co-regulatory regimes at national level in the fields coordinated by this Directive. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member State concerned and provide for effective enforcement.**

**8. If the provisions of this Directive conflict with a provision of another Community act governing aspects of access to an activity relating to audiovisual media services, or the exercise of that activity, the provisions of this Directive shall prevail.**

#### Article 3a

1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of three months from the notification, the Commission shall verify that such measures are compatible with

Community law and communicate them to the other Member States. It shall seek the opinion of the Committee established pursuant to Article 23a. It shall forthwith publish the measures taken in the Official Journal of the European Communities and at least once a year the consolidated list of the measures taken by Member States.

3. Member States shall ensure, by appropriate means, within the framework of their legislation that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters following the date of publication of this Directive in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with the preceding paragraphs via whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.

#### *Article 3b*

*1. Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Community has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction. The broadcaster granting such access shall be entitled to appropriate compensation for costs incurred.*

**2. Broadcasters may freely choose short extracts from the transmitting broadcaster's signal with at least the identification of their source. Such extracts shall be used exclusively for general news programmes.**

*3. Without prejudice to the other paragraphs of this Article, Member States shall ensure, in accordance with their legal systems and practices, that the modalities and conditions regarding the use of such short extracts are reasonably defined, in particular any compensation arrangements.*

*4. As an alternative to paragraph 2, a Member State may establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means.*

#### *Article 3c*

*Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of the service at least the following information:*

- (a) the name of the media service provider;*
- (b) the geographic address at which the media service provider is established;*
- (c) the details of the media service provider, including his electronic mail address or website, which allow him to be contacted rapidly in a direct and effective manner;*
- (d) where applicable, the relevant regulatory or supervisory institution.**

#### *Article 3d*

*Member States shall take appropriate measures to ensure that audiovisual media*

services under their jurisdiction are not made available in such a way that might seriously impair the physical, mental or moral development of minors.

#### **Article 3e**

**Member States shall ensure by appropriate means that audiovisual media services provided by providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.**

#### **Article 3f**

**(1) Member States shall ensure that on-demand services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes proposed by the service.**

**2. Member States shall ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders.**

**3. Member State shall report to the Commission, no later than the end of the fourth year after the adoption of this Directive and every three years thereafter on the implementation of the measure set out in paragraph 1.**

**(4) The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.**

#### **Article 3g**

**(1) Member States shall ensure that audiovisual commercial communications provided by providers under their jurisdiction comply with the following requirements:**

**(a) audiovisual commercial communications must be readily recognizable as such and be distinguishable from editorial content. Surreptitious audiovisual commercial communication shall be prohibited.**

**(b) audiovisual commercial communications must not use subliminal techniques;**

**(c) audiovisual commercial communications must not:**

**(i) prejudice respect for human dignity**

**(ii) include any discrimination on grounds of race, sex or nationality;**

**(iii) be offensive to religious or political beliefs;**

**(iv) encourage behaviour prejudicial to health or to safety;**

*(v) encourage behaviour grossly prejudicial to the protection of the environment;*

*(d) all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited;*

*(e) audiovisual commercial communications for alcoholic beverages must not be aimed specifically at minors and may not encourage immoderate consumption of such beverages;*

*(f) audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;*

*(g) audiovisual commercial communications must not cause moral or physical detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations;*

*(2) Member States and the Commission should encourage audiovisual service provider to develop a code of conduct regarding children's programming containing or being interrupted by advertising, sponsorship or any marketing of unhealthy and inappropriate foods and drinks such as those high in fat, sugar and salt and of alcoholic beverages.*

#### Article 3h

**1. Audiovisual media services or programmes that are sponsored shall meet the following requirements:**

**(a) their content and, in the case of television broadcasting, their scheduling, may in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;**

*(b) they must not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;*

**(c) viewers must be clearly informed of the existence of a sponsorship agreement. Sponsored programmes must be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or the end of the programmes.**

**2. Audiovisual media services or programmes must not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.**

**3. The sponsorship of audiovisual media services or programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking but may not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.**

**4. News and current affairs programmes shall not be sponsored.**

*Art. 3i*

*(1) Product placement shall be prohibited.*

*(2) By way of derogation from paragraph 1, unless Member States decide otherwise, product placement shall be admissible in*

- cinematographic works, films and series made for audiovisual media services, light entertainment and sports programmes; or*
- in cases where no payment is made but certain goods or services are merely provided free of charge.*

*The derogation in the first indent shall not apply to programmes for children.*

*(3) The programmes that contain product placement shall meet at least all of the following requirements:*

*(a) their content and, in the case of television broadcasting, their scheduling, shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;*

*(b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;*

*(c) they shall not give undue prominence to the product in question;*

*(d) viewers shall be informed of the existence of product placement. Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.*

*In cases where the payment or similar consideration for the product placement has not been paid to the media service provider, Member States may choose to waive the requirements set out in (d) above.*

*(4) In any case programmes must not contain product placement of:*

*- tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products; or*

*- specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls*

*(5) The provisions of this Article apply only to programmes produced after [date: transposition deadline for the Directive].*

*Article 3j*

*(1) The Member States shall take appropriate measures to ensure that audio-visual media services under their jurisdiction are gradually and where feasible made accessible to people with a visual or hearing disability.*

*(2) In its report according to Article 26 the Commission shall also describe the progress made in achieving the objectives of paragraph 1.*

## CHAPTER III

### **Promotion of distribution and production of television programmes**

#### Article 4

1. Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

2. Where the proportion laid down in paragraph 1 cannot be attained, it must not be lower than the average for 1988 in the Member State concerned.

However, in respect of the Hellenic Republic and the Portuguese Republic, the year 1988 shall be replaced by the year 1990.

3. From 3 October 1991, the Member States shall provide the Commission every two years with a report on the application of this Article and Article 5.

That report shall in particular include a statistical statement on the achievement of the proportion referred to in this Article and Article 5 for each of the television programmes falling within the jurisdiction of the Member State concerned, the reasons, in each case, for the failure to attain that proportion and the measures adopted or envisaged in order to achieve it.

The Commission shall inform the other Member States and the European Parliament of the reports, which shall be accompanied, where appropriate, by an opinion. The Commission shall ensure the application of this Article and Article 5 in accordance with the provisions of the Treaty. The Commission may take account in its opinion, in particular, of progress achieved in relation to previous years, the share of first broadcast works in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audiovisual production capacity or restricted language area.

4. The Council shall review the implementation of this Article on the basis of a report from the Commission accompanied by any proposals for revision that it may deem appropriate no later than the end of the fifth year from the adoption of the Directive. To that end, the Commission report shall, on the basis of the information provided by

Member States under paragraph 3, take account in particular of developments in the Community market and of the international context.

#### Article 5

Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping or alternately, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to broadcasters' informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria; it must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five years of their production.

#### Article 6

1. Within the meaning of this chapter, 'European works' means the following:

(a) works originating from Member States;

(b) works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 2;

*(c) works co-produced in the framework of agreements related to the audiovisual sector concluded between the European Community and third countries and fulfilling the conditions defined in each of these agreements.*

Application of the provisions of (b) and (c) shall be conditional on works originating from Member States not being the subject of discriminatory measures in the third countries concerned.

2. The works referred to in paragraph 1 (a) and (b) are works mainly made with authors and workers residing in one or more States referred to in paragraph 1 (a) and (b) provided that they comply with one of the following three conditions:

(a) they are made by one or more producers established in one or more of those States; or

(b) production of the works is supervised and actually controlled by one or more producers established in one or more of those States; or

(c) the contribution of co-producers of those States to the total coproduction costs is preponderant and the co-production is not controlled by one or more producers established outside those States.

3. Works that are not European works within the meaning of paragraph 1 but that are produced within the framework of bilateral coproduction treaties concluded between Member States and third countries shall be deemed to be European works provided that the Community co-producers supply a majority share of the total cost of

production and that the production is not controlled by one or more producers established outside the territory of the Member States.

#### 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.

### CHAPTER IV

#### Television advertising, sponsorship and teleshopping

##### Article 10

**(1) Television advertising and teleshopping shall be readily recognizable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme service by optical and/or acoustic and/or spatial means.**

2. Isolated advertising and teleshopping spots, *other than in sports programmes*, shall remain the exception.

##### Article 11

*(1) Member States shall ensure, where advertising or teleshopping is inserted during programmes, that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme, and the rights of the right holders are not prejudiced.*

*(2) The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by advertising and/or teleshopping once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided the scheduled duration of the programme is greater than 30 minutes. No advertising or teleshopping may be inserted during religious services*

##### Article 14

1. [...]

2. Teleshopping for medicinal products which are subject to a marketing authorization within the meaning of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products (1), as well as teleshopping for medical treatment, shall be prohibited.

##### Article 15

Television advertising and teleshopping for alcoholic beverages shall comply with the following criteria:

- (a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;
- (b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;
- (c) it shall not create the impression that the consumption of alcohol contributes towards 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 emphasis on high alcoholic content as being a positive quality of the beverages.

#### Article 18

1. The proportion of *short forms of advertising such as* advertising spots and teleshopping spots within a given clock hour shall not exceed 20 %.
2. *Paragraph 1 does not apply to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes, sponsorship announcements and product placements.*

#### *Article 18a*

*Teleshopping windows shall be clearly identified as such by optical and acoustic means and be of an uninterrupted minimum duration of 15 minutes.*

#### Article 19

The provisions of this Directive shall apply *mutatis mutandis* to television broadcasts exclusively devoted to *advertising* and teleshopping as well as to *television broadcasts exclusively devoted to self-promotion*. Chapter 3 as well as Article 11(*rules on insertion*) and Article 18 (duration of advertising and teleshopping) do not apply to these broadcasts.

#### Article 20

**Without prejudice to Article 3, Member States may, with due regard for Community law, lay down conditions other than those laid down in Article 11(2) and Article 18 in respect of television broadcasts intended solely for the national territory which cannot be received, directly or indirectly by the public, in one or more other Member States.**

#### CHAPTER V

#### **Protection of minors and public order**

## Article 22

1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.

2. The measures provided for in paragraph 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.

3. Furthermore, when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.

## CHAPTER VI

### **Right of reply**

#### Article 23

1. Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.

2. A right of reply or equivalent remedies shall exist in relation to all broadcasters under the jurisdiction of a Member State.

3. Member States shall adopt the measures needed to establish the right of reply or the equivalent remedies and shall determine the procedure to be followed for the exercise thereof. In particular, they shall ensure that a sufficient time span is allowed and that the procedures are such that the right or equivalent remedies can be exercised appropriately by natural or legal persons resident or established in other Member States.

4. An application for exercise of the right of reply or the equivalent remedies may be rejected if such a reply is not justified according to the conditions laid down in paragraph 1, would involve a punishable act, would render the broadcaster liable to civil law proceedings or would transgress standards of public decency.

5. Provision shall be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.

## CHAPTER VIa

## Contact committee

### Article 23a

1. A contact committee shall be set up under the aegis of the Commission. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and meet either on his initiative or at the request of the delegation of a Member State.

2. The tasks of this committee shall be:

(a) to facilitate effective implementation of this Directive through regular consultation on any practical problems arising from its application, and particularly from the application of Article 2, as well as on any other matters on which exchanges of views are deemed useful;

(b) to deliver own-initiative opinions or opinions requested by the Commission on the application by the Member States of the provisions of this Directive;

(c) to be the forum for an exchange of views on what matters should be dealt with in the reports which Member States must submit pursuant to Article 4 (3), on the methodology of these, on the terms of reference for the independent study referred to in Article 25a, on the evaluation of tenders for this and on the study itself;

(d) to discuss the outcome of regular consultations which the Commission holds with representatives of broadcasting organizations, producers, consumers, manufacturers, service providers and trade unions and the creative community;

(e) to facilitate the exchange of information between the Member States and the Commission on the situation and the development of regulatory activities regarding *audiovisual media services*, taking account of the Community's audiovisual policy, as well as relevant developments in the technical field;

(f) to examine any development arising in the sector on which an exchange of views appears useful.

### Article 23b

*(1) Member States shall take appropriate measures to establish national regulatory bodies and institutions in accordance with national law, to guarantee their independence and to ensure that they exercise their powers impartially and transparently.*

*(2) National regulatory authorities shall provide each other and the Commission with the information necessary for the application of the provisions of this Directive. National regulatory authorities shall cooperate closely in the resolution of problems arising from the application of this Directive.*

## CHAPTER VII

### Final provisions

## Article 24

In fields which this Directive does not coordinate, it shall not affect the rights and obligations of Member States resulting from existing conventions dealing with telecommunications or broadcasting.

## Article 26

*Not later than [...], and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive as amended. This report shall describe the general level of compliance with the Directive and to which extend the objectives of this Directive have been achieved in particular with regard to:*

- *European and independent production (Art 5, 6 and 3f)*
- *Accessibility for people with disabilities (Art 3 j).*

*If necessary, the Commission should make further proposals to adapt it to developments in the field of audiovisual media services, in particular in light of recent technological developments, the competitiveness of the sector and levels of media literacy in all Member States.*

## Article 2 of the amending Directive

Regulation 2006/2004/EC<sup>9</sup> is hereby amended as follows

Annex 'Directives and Regulations' covered by Article 3(a) No 4 of this Regulation is replaced by the following:

*"4. 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: Articles 3g to 3h<sup>10</sup> and Articles 10 to 20<sup>11</sup>. Directive as last amended by Directive XXXX/XXXX/EC of the European Parliament and of the Council<sup>12</sup>."*

## Article 3 of the amending Directive

1. *Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [Two years after the entry into force of this Directive] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.*

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<sup>9</sup> OJ L 364, 9.12.2004, p. 1

<sup>10</sup> OJ L xxxx, p xxx

<sup>11</sup> OJ L 298, 17.10.1989; p.23

<sup>12</sup> OJ L xxxxx, p xxx

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

*Article 4 of the amending Directive*

*This Directive shall enter into force on the [...] day following that of its publication in the Official Journal of the European Union.*

*Article 5 of the amending Directive*

*This Directive is addressed to the Member States.*

*Done at Brussels, [...]*

*For the European Parliament*

*The President*

*[...]*

*For the Council*

*The President*

*[...]*