

Amended TVWF Directive

(presented as a Consolidated Text for ease of reading)

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 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 Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

¹ OJ C [...], [...], p. [...].

² OJ C [...], [...], p. [...].

³ OJ C [...], [...], p. [...].

⁴ OJ C [...], [...], p. [...].

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 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.
- (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 and 4 April 2006 on the Doha Round and on the WTO Ministerial Conferences, the European Parliament calls for basic public services, such as audiovisual services, to be excluded from liberalisation under the GATS negotiations. In its resolution of 27 April 2006, Parliament supports the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states in particular that ‘cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value’. The Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions¹ approved the UNESCO Convention on behalf of the Community. The Convention entered into force on 18 March 2007.
- (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 market for audiovisual media services, 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 markets for audiovisual media services and to achieve low entry barriers.
- (5) 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, help complete the internal market and facilitate the emergence of a single information area, to apply to all audiovisual media services, both linear and non-linear, at least a basic tier of coordinated rules. The basic principles of Directive 89/552/EEC, namely the country of origin principle and common minimum standards, have proved their worth and should therefore be retained.

¹ OJ L 201 of 25.7.2006

- (6) The Commission has adopted a Communication on the future of European regulatory audiovisual policy¹, 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 literacy, now and in the future.
- (6a) The Resolution concerning public service broadcasting² reaffirmed that the fulfilment of the public service broadcasting's mission must continue to benefit from technological progress. The co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.
- (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 only the necessary 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 free market.

¹ Communications from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. The future of European regulatory audiovisual policy - COM(2003) 784, 15.12.2003.

² O. J. C 30 , 5.2.1999, p. 1.

- (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)¹. This Resolution- like the resolutions of 4 September 2003² and 22 April 2004³ - 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 recognised by the Charter of Fundamental Rights of the European Union, in particular Article 11 thereof. In this regard, 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) [...] This Directive does not affect the obligations on Member States arising from the application of Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC. Accordingly, draft national measures applicable to on-demand audiovisual media services of a stricter or more detailed nature than those required to simply transpose the present Directive would be subject to the procedural obligations established under Article 8 of Directive 98/34/EC⁴.

¹ European Parliament resolution on the application of Articles 4 and 5 of Directive 89/552/EEC (“Television without Frontiers”), as amended by Directive 97/36/EC, for the period 2001-2002, A6-0202/2005.

² P5_TA(2003)0381.

³ P5_TA(2004)0373.

⁴ OJ L 178, 17. 7. 2000, p. 1.

- (11) Directive 2002/21/EC of the European Parliament and the Council¹ 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.
- (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. 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.

¹ OJ L 108, 24.4.2002, p. 33.

- (13a) It is characteristic of on-demand services that they are "television-like", i.e. that they compete for the same audience as television broadcasts and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. On this basis in order to prevent disparities as regards free movement and competition, the notion of programme should be interpreted in a dynamic way taking into account developments in television broadcasting.
- (14) The definition of audiovisual media services covers mass media in their function to inform, entertain and educate the general public, and includes audiovisual commercial communication 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 provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain 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. For these reasons, also excluded from the scope of the Directive are games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance.
- (14a) The definition of media service provider does not include natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.

- (14b) 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 an on-demand, i.e. non-linear services. In general, for linear audiovisual media services or television programmes which are also offered as non-linear services by the same media service provider, the requirements of this Directive are deemed to be met by the fulfillment of the requirements applicable to the linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, the Directive will apply to each of the services concerned.
- (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 or radio services. Whilst the principal purpose of an audiovisual media service is the provision of programmes, i.e. sets of moving images with or without sound, the definition of such a service also covers text-based content which accompanies such programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services do not fall within the scope of this Directive, which does not affect Member States' freedom to regulate such services at national level in accordance with the Treaty.

- (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. A definition of editorial responsibility is therefore also required. Member States may further specify aspects of this definition, notably the notion of 'effective control', when adopting provisions to implement this Directive. This Directive is without prejudice to the liability exemptions established in Directive 2000/31/EC.
- (17a) In the context of television broadcasting the notion of simultaneous viewing also entails quasi simultaneous viewing because of the variations in the short time lag which occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process.
- (17b) The criteria laid down in the definition of audiovisual media services, as set out in Article 1(a) of Directive 89/552/EEC as amended 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 moving images with or without sound which accompany or are included in a programme 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”¹.
- (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 general principles of Community law. To deal with situations where a broadcaster under the jurisdiction of one Member State provides a television broadcast which is wholly or mostly directed towards the territory of another Member State, a requirement for Member States to cooperate with one another and, in cases of circumvention, the codification of the case law of the European Court of Justice², 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. The notion of rules of general public interest has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and includes, inter alia, rules on the protection of consumers, the protection of minors and cultural policy. The requesting Member State should ensure that the specific national rules in question are objectively necessary, applied in a non-discriminatory manner, suitable for attaining the objectives which they pursue and do not go beyond what is necessary to attain them.

¹ 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*.

² Case C-212/97 *Centros v. Erhvervs-og Selskabsstyrelsen*; Case C-33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging*; Case C-23/93 *TV 10 SA v. Commissariaat voor de Media*, paragraph 21.

- (23a) A Member State, when assessing on a case-by-case basis whether a broadcast by a media service provider established in another Member State is wholly or mostly directed towards its territory, may refer to 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.
- (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, but only under certain conditions listed in Article 2a of this Directive and following the procedure 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 restrictively¹.
- (24a) With respect to on-demand audiovisual media services, restrictions to their free provision are only possible in accordance with conditions and procedures replicating those already established by Articles 3(4), (5) and (6) of Directive 2000/31/EC.

¹ Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 28; Case C-348/96 *Calfa* [1999] ECR I-0011, paragraph 23.

(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. Co-regulation should retain the possibility for State intervention in the event that its objectives are not met. Without prejudice to Member States' formal obligations regarding transposition, this Directive encourages the use of such instruments. This neither obliges Member States to set up co- and/or self-regulatory regimes nor disrupts or jeopardises current co- or self-regulatory initiatives which are already in place within Member States and which are working effectively.

- (25a) 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 the development of media literacy in all sections of society should be promoted and progress followed closely. The Recommendation on the protection of minors and human dignity and on the right of reply ¹ contains already a series of possible measures for promoting media literacy such as, for example, continuing education of teachers and trainers, specific Internet training aimed at children from a very early age, including sessions open to parents, or organisation of national campaigns aimed at citizens, involving all communications media, to provide information on using the Internet responsibly.
- (26) Entertainment rights for events of high interest to the public 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.
- (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 interest to the public should grant other 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 high interest to the public takes place to give others sufficient time to exercise such a right. A broadcaster may exercise this right through an intermediary acting specifically on its behalf on a case by case basis. As a general rule, such short extracts may be used for EU-wide broadcasts by any channel including dedicated sports channels and should not exceed 90 seconds.

¹ *Official Journal L 378*, 27/12/2006 P. 0072 - 0077

The right of access to short extracts shall apply on a trans-frontier basis only where it is necessary. Therefore a broadcaster must first seek access from a broadcaster established in the same Member State having exclusive rights to the event in question.

The notion of general news programmes does not cover the compilation of short extracts into programmes serving entertainment purposes.

The country of origin principle applies to both the access and the use of the short extracts. In a trans-border case, this means that the different laws would be applied sequentially: Firstly, for access to the short extracts, it is the law of the Member State where the broadcaster supplying the initial signal (i.e. giving access) is established that applies. This is usually the Member State where the event takes place. Where a Member State has established an equivalent system of access to the event the law of this Member State applies in any case. Secondly, for transmission of the short extracts, it is the law of the Member State where the broadcaster using (i.e. transmitting) the short extracts is established that applies.

(27a) The requirements of this Directive regarding access to events of high interest to the public for the purpose of short news reports are without prejudice to Directive 2001/29/EC and the relevant international conventions in the field of copyright and neighbouring rights. Typically, Member States shall facilitate access to events by granting access to the broadcaster's signal within the meaning of paragraph 2 of Article 3j. However, they may choose other equivalent means within the meaning of paragraph 3 of the same article. Such means include, inter alia, granting access to the venue of these events prior to granting access to the signal. This provision does not prevent broadcasters from concluding more detailed contractual agreements.

- (27b) It should be ensured that the practice of media service providers to provide their live television broadcast news programmes in the on-demand mode afterwards is still possible without having to tailor the individual programme (i.e. omit the short extracts). This possibility is restricted to the on-demand supply of the identical television broadcast programme by the same media service provider, so it may not be used to create new on-demand business models based on short extracts.
- (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 society¹. This justifies imposing lighter regulation on non-linear services, which only have to comply with the basic rules provided for in Articles 3a to 3h.
- (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 easy and direct access at any time to information about the natural or legal person who has editorial responsibility for the choice of the audiovisual content of a service. 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. 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 ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity and should promote the rights of persons with disabilities.

¹ See e.g. Case C- 89/04, Mediakabel.

- (31) The availability of harmful content 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, including 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 the use of PIN codes (personal identification numbers), filtering systems or labelling, should thus be to ensure an adequate level of protection of minors and human dignity, especially with regard to non-linear services.

The Recommendation on the protection of minors and human dignity and on the right of reply¹ already recognises the importance of filtering systems and labelling and includes a number of possible actions for the benefit of minors such as for example systematically supply of the users with an effective, updatable and easy-to-use filtering system when they subscribe to an access provider or the access to services specifically intended for children which are equipped with automatic filtering systems.

¹ *Official Journal L 378*, 27/12/2006 P. 0072 - 0077.

- (32a) Audiovisual media service providers under the jurisdiction of the Member States are in any case subject to the ban on the dissemination of child pornography according to the provisions of Council Framework Decision 2004/68/JHA of 22 December 2003¹ on combating the sexual exploitation of children and 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 by public bodies 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.
- (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 financial contributions by such services to the production and rights acquisition of European works, 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.

¹ O.J. L 13, 20/01/2004, p.44-48

- (35a) When defining "producers who are independent of broadcasters" as referred to in Article 5 of Directive 89/552/EEC, Member States should take appropriate account notably of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights.
- (36) When implementing the provisions of Article 4 of Directive 89/552/EEC as amended, Member States should encourage 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 on-demand services increases the choice of the consumer. Detailed rules governing audiovisual commercial communication for on-demand 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.
- (38a) The right of reply is an appropriate legal remedy for television broadcasting and could also be applied in the online environment. The Recommendation on the protection of minors and human dignity and on the right of reply¹ already includes appropriate guidelines for the implementation of measures in domestic law or practice so as to ensure sufficiently the right of reply or equivalent remedies in relation to on-line media.

¹ *Official Journal L 378*, 27/12/2006 P. 0072 - 0077

- (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 innovations¹.
- (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, unless a Member State decides otherwise, 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.

¹ OJ C 102, 28.4.2004, p. 2.

- (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/EC¹ which prohibits advertising to the general public of certain medicine 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 1924/2006 of the European Parliament and of the Council² on nutrition and health claims made on foods.
- (42) Given the increased possibilities for viewers to avoid advertising through use of new technologies such as digital personal video recorders and 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 does not increase the hourly amount of admissible advertising, it gives flexibility to broadcasters with regard to its insertion where this does not unduly impede the integrity of programmes.

¹ As amended last by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use (OJ L 136, 30.4.2004 p. 34).

² OJ L 12, 18.1.2007, p.3.

- (43) The Directive is intended to safeguard the specific character of the European television landscape, where advertising is preferably inserted between programmes, 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 television 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 television 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 television advertising spots and teleshopping spots per clock hour remains applicable. The notion of a television advertising spot should be understood as television advertising in the sense of Article 1(g) of a duration of not more than 12 minutes.
- (45) Surreptitious audiovisual commercial communication 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, where the viewer is adequately informed of the existence of product placement; this can be done by signalling the fact that product placement is taking place in a given programme, for example by means of a neutral logo.

Furthermore, sponsorship and product placement are prohibited where they influence the content of programmes in such a way as to affect the responsibility and the editorial independence of the media service provider. This is the case with regard to thematic placement.

- (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. The definition of product placement introduced here 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, in return for payment or for similar consideration. The provision of goods or services for free, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value. Product placement is subject to the same qualitative rules and restrictions applying to advertising. 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 which is why the definition in Article 1(k) contains the word "within".

Sponsor references in contrast may be shown during a programme but are not part of the plot.

- (46a) Product placement should, in principle, be prohibited. However, derogations are appropriate for some kinds of programme genres, on the basis of a positive list. Member States should be able to opt-out of these derogations, totally or partially, for example by permitting product placement only in programmes which have not been produced exclusively inside their Member State.

- (46b) 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.
- (46c) According to the duties conferred upon Member States by the Treaty, they are responsible for the implementation and effective compliance with this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and notably the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.

- (47) Close cooperation between competent national bodies and the Commission is necessary to ensure the correct application of this Directive. Similarly close cooperation between Member States and between Member States' regulatory bodies is particularly important with regard to the impact broadcasters established in one Member State might have on 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 bodies take place before such licences are granted. This cooperation should cover all fields coordinated by this Directive and in particular Articles 2, 2a and 3 thereof.
- (47a) In accordance with point 34 of the Interinstitutional agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

HAVE ADOPTED THIS DIRECTIVE:

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

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, to 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.¹

(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. Examples of programmes include feature-length films, sports events, situation comedy, documentary, children's programmes and original drama.

¹ OJ L 108, 24.04.2002, p.33.

- (ab) 'Editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.
- (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;
- (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 a media service provider of television broadcasts
- (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 or natural person 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 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 audiovisual 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 a programme, in return for payment or for similar consideration.
- (l) (ex art 6)

- (i) 'European works' means the following:
- works originating from Member States;
 - works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of point (ii);
 - 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 the second and third indents above shall be conditional on works originating from Member States not being the subject of discriminatory measures in the third countries concerned.

- (ii) The works referred to in the first and second indents of point (i) are works mainly made with authors and workers residing in one or more States referred to in the first and second indents of point (i) provided that they comply with one of the following three conditions:
- they are made by one or more producers established in one or more of those States; or
 - production of the works is supervised and actually controlled by one or more producers established in one or more of those States; or
 - 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.

- (iii) Works that are not European works within the meaning of point (i) 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 coproducers 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.

CHAPTER II
General provisions

Article 2

- 1 Each 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 43 and following of the Treaty establishing the European Community.
- 6. This Directive does not apply to audiovisual media services 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.
- 7. [...]
- 8. [...]
- 9. [...]
- 10. [...]

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. In respect of television broadcasting, Member States may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled:
 - (a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22 (1) or (2) and/or Articles 3b;
 - (b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in (a) on at least two prior occasions;
 - (c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again;
 - (d) consultations with the transmitting Member State 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. 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 broadcaster concerned.
4. In respect of on-demand services, Member States may take measures to derogate from paragraph 1 in respect of a given service if the following conditions are fulfilled:
 - (a) the measures shall be:¹
 - (i) necessary for one of the following reasons:
 - public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
 - the protection of public health,
 - public security, including the safeguarding of national security and defence,
 - the protection of consumers, including investors;
 - (ii) taken against an on-demand service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;
 - (iii) proportionate to those objectives;

¹ Replication of Articles 3 (4), (4) and (6) of Directive 2000/31/EC.

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State under whose jurisdiction the service provider falls to take measures and the latter did not take such measures, or they were inadequate,
- notified the Commission and the Member State under whose jurisdiction the service provider falls of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State under whose jurisdiction the service provider falls, indicating the reasons for which the Member State considers that there is urgency.
6. Without prejudice to the Member State's possibility of proceeding with the measures referred to in paragraphs 4 and 5, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

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.
 - 1a. In cases where a Member State:
 - (a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and
 - (b) assesses that a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory

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 of general public interest in question. The Member State with jurisdiction shall inform the first Member State of the results obtained following this request within two months. Either Member State may invite the Contact Committee established under Article 23a to examine the case.

1b. Where the first Member State assesses:

- (a) that the results achieved through the application of paragraph 1a are not satisfactory;
and
- (b) that the broadcaster in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established within the first Member State, it may adopt appropriate measures against the broadcaster concerned.

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.

1c. Member States may take measures pursuant to paragraph 1b only if all of the following conditions are met:

- (a)
- (b)
- (c) it has notified the Commission and the Member State in which the broadcaster is established of its intention to take such measures while substantiating the grounds on which it bases its assessment and
- (d) the Commission decides that the measures are compatible with Community law, and in particular that assessments made by the Member State taking these measures under paragraphs 1a and 1b are correctly founded.

1d. The Commission shall decide within three months following notification under paragraph 1c(c). If the Commission decides that the measures are incompatible with Community law, the Member State in question shall refrain from taking the proposed measures.

2. 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.

3. Member States shall encourage co- and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.

4. Directive 2000/31/EC on certain aspects of information society services, in particular electronic commerce, in the Internal Market, applies fully except as otherwise provided for in this Directive. In the event of a conflict between a provision of Directive 2000/31/EC and a provision of this Directive, the provisions of this Directive shall prevail, unless otherwise provided for in this Directive.

CHAPTER IIa

Provisions applicable to all audiovisual media services

Article 3a (ex-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 competent regulatory or supervisory bodies.

Article 3b (ex-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 3ba

Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.

Article 3c (ex- Article 3j)

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

Article 3d (ex- 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. 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
 - (i) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;;
 - [...]
 - (iii) encourage behaviour prejudicial to health or to safety;
 - (iv) 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;
 - (ea) [ex art 14(1)]
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.

- (f) 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 shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programming, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

Article 3e (ex-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 a 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. Member States may choose to prohibit the showing of a sponsorship logo during childrens' programmes, documentaries and religious programmes.

Article 3f (ex-Article 3i)

1. Product placement shall be prohibited.
2. By way of derogation from paragraph 1, product placement shall be admissible, unless a Member State decides otherwise, in
 - cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes; or
 - cases where there is no payment but only provision of certain goods or services for free, such as production props and prizes, with a view to their inclusion in a programme.

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

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 is in no circumstances influenced in such a way as to affect the responsibility and editorial independence of the media service provider;

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

(ba) they do not give undue prominence to the product in question;

(c) viewers are clearly informed of the existence of product placement. Programmes containing product placement are 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.

As an exception, Member States may choose to waive the requirements set out in (c) above provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.

3. 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

4. The provisions of paragraphs 1, 2 and 3 apply only to programmes produced after [date: transposition deadline for the Directive].

CHAPTER IIb

Provisions applicable only to on-demand services

Article 3g (ex-Article 3d)

Member States shall take appropriate measures to ensure that on-demand services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way that ensures that minors will not normally hear or see such on-demand services.

Article 3h (ex-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.
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 four 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.

CHAPTER IIc

Exclusive rights and short news provisions in television broadcasting

Article 3i (ex-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 3j (ex-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.
 - 1a If another broadcaster established in the same Member State as the broadcaster seeking access has acquired exclusive rights to the event in question, access must be sought from that broadcaster.
2. Member States shall ensure that such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal with, unless impossible for reasons of practicality, at least the identification of their source.

3. 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.
4. Such extracts shall be used solely for general news programmes and may be used in on-demand services only if the same programme is offered on a deferred basis by the same media service provider.
5. Without prejudice to paragraphs 1 to 4 above, Member States shall ensure, in accordance with their legal systems and practices, that the modalities and conditions regarding the use provision of such short extracts are defined, in particular any compensation arrangements, the maximum length of extracts and time limits regarding their transmission. Where compensation is provided for, it shall not exceed the additional costs directly incurred in providing access.

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 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

Article 7

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 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 transmissions of sports events, shall remain the exception.
3. [...]
4. [...]

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.

- 3- 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 12

[...]

Article 13

[...]

Article 14

1. [moved to Art 3d]
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, 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 16

[...]

Article 17

[...]

Article 18

1. The proportion of [...] 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 shall be of a minimum uninterrupted duration of 15 minutes.

Article 19

The provisions of this Directive shall apply mutatis mutandis to television channels exclusively devoted to advertising and teleshopping as well as to television channels 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 channels.

Article 19a

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 Articles 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 in television broadcasting

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.

Article 22a

[...]

CHAPTER VI

Right of reply in television broadcasting

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 *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.

CHAPTER VIb

Cooperation between National Regulatory Bodies

Article 23 b

1. [...]
2. Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular Articles 2, 2a and 3 thereof, notably through their competent independent regulatory bodies.

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 25

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

This Report shall also assess the issue of advertising accompanying or included in children's programmes, and in particular whether the quantitative and qualitative rules contained in this Directive have afforded the level of protection required.

Article 2 of the amending Directive

Regulation 2006/2004/EC¹ 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 3h² and Articles 10 to 20³. Directive as last amended by Directive XXXX/XXXX/EC of the European Parliament and of the Council⁴."

¹ OJ L 364, 9.12.2004, p. 1

² OJ L xxxx, p xxx

³ OJ L 298, 17.10.1989; p.23

⁴ OJ L xxxxx, p xxx

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 .

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.

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

[...]