

# EUROPEAN PARLIAMENT

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## **POSITION OF THE EUROPEAN PARLIAMENT**

adopted at first reading on 13 December 2006 with a view to the adoption of Directive 2007/.../EC 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 (EP-PE\_TC1-COD(2005)0260)

PE 381.890

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## POSITION OF THE EUROPEAN PARLIAMENT

adopted at first reading on 13 December 2006

**with a view to the adoption of Directive 2007/.../EC 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 EEA relevance)

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*,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Having regard to the opinion of the Committee of the Regions<sup>2</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>3</sup>,

Whereas:

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<sup>1</sup> *OJ C 318, 23.12.2006, p. 202.*

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

<sup>3</sup> *Position of the European Parliament of 13 December 2006.*

- (1) Directive 89/552/EEC<sup>1</sup> 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 the regulatory framework to be adapted* to take account of ***the spread of information and communication technologies (ICT) and*** the impact of structural change 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. The laws, regulations and administrative measures should be as unobtrusive and simple as possible to allow new and existing audiovisual media services to develop and flourish, thus allowing for job creation, economic growth, innovation and cultural diversity to be nurtured.***
- (2) The laws, regulations and administrative measures in Member States concerning the pursuit of television broadcasting activities are already coordinated by Directive 89/552/EEC, whereas the rules applicable to activities such as ***on-demand media services are only coordinated in relation to their distribution by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)***<sup>2</sup> and in relation to trading by ***Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market***<sup>3</sup> (the ***Electronic Commerce Directive***); ***the content of the new audiovisual media services is still governed by the legislation of the Member States. Some of these disparities impede*** the free movement of these services within the European Union and may distort competition within the common ***market.***

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<sup>1</sup> 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 (OJ L 298, 17.10.1989, p. 23). Directive as last amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

<sup>2</sup> OJ L 108, 24.4.2002, p. 33.

<sup>3</sup> OJ L 178, 17.7.2000, p. 1.

- (3) *Audiovisual media services are as much cultural goods as they are economic goods. 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, and the enforcement of those rules, notably in order to preserve the fundamental rights and freedoms laid down in the Charter of Fundamental Rights of the European Union, the European Convention for Protection of Human Rights and Fundamental Freedoms and the United Nations Covenant on Civil and Political Freedoms, and in order to ensure the protection of minors and vulnerable and disabled people.*
- (4) *In its resolutions of 1 December 2005 on preparations for the Sixth Ministerial Conference of the World Trade Organization in Hong Kong<sup>1</sup> and of 4 April 2006 on the assessment of the Doha Round following the WTO Ministerial Conference in Hong Kong<sup>2</sup>, the European Parliament called for basic public services, such as health, education and audiovisual services to be excluded from liberalisation under the GATS negotiations. In its resolution of 27 April 2006 on the proposal for a Council decision on the conclusion of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>3</sup>, the European Parliament approved the UNESCO Convention, 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’.*
- (5) *Media education should serve to provide citizens with the means to bring a critical interpretation to bear on, and use, the ever-expanding volume of information with which they are assailed, as laid down in Council of Europe Recommendation 1466 (2000). Helped by such a learning process, citizens will be in a position to formulate messages and select the media best suited to impart them and thus become able to exercise their right to freedom of information and expression to the full.*

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<sup>1</sup> OJ C 285 E, 22.11.2006, p. 126.

<sup>2</sup> OJ ...

<sup>3</sup> OJ ...

- (6) Traditional audiovisual media services, *such as television*, and emerging on-demand *audiovisual media* services offer significant employment opportunities in the *European Union*, 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.*
- (7) Legal uncertainty and a non-level playing field exist for European companies delivering audiovisual media services *in terms of* 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, for all audiovisual media services, both linear and non-linear, irrespective of whether they are transmitted on the basis of a set programme schedule or on demand, to comply with* at least a basic tier of coordinated rules *aimed at guaranteeing, inter alia, a sufficient level of protection of minors, the vulnerable and the disabled and respect for fundamental rights and freedoms . 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.*
- (8) The Commission has adopted a Communication on the future of European regulatory audiovisual policy<sup>1</sup>, in which it stresses that *audio-visual regulatory policy must* safeguard certain public interests, such as cultural diversity, the right to information, *the need for media pluralism*, the protection of *minors*, *consumer* protection *and action to enhance public awareness and media skills and the principle of universal access for all sectors of the public, including the most disadvantaged*, now and in the future.

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<sup>1</sup> COM(2003)0784.

- (9) *The co-existence of private and public service broadcasters is of considerable importance in the audiovisual media market, where public service broadcasters may equally benefit from the advantages of the digital economy.*
- (10) *The country of origin principle is crucial to the emergence 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.*
- (11) The Commission has adopted the initiative “i2010: European Information Society”<sup>1</sup> to foster growth and jobs in the information society and media industries. *The i2010 initiative 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 Directive 89/552/EEC **and transform it into a directive on audiovisual media services. The goal of the i2010 initiative 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.***
- (12) On 6 September 2005, the European Parliament adopted a 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<sup>2</sup>. That Resolution – *like its resolution on Television without Frontiers of 4 September 2003*<sup>3</sup> – calls for Directive 89/552/EEC to be adapted to structural changes and technological developments while fully respecting its underlying principles, which remain valid. In addition, *in principle it supports the general approach of basic rules for all audiovisual media services and additional rules for linear (“broadcasting”) services.*

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<sup>1</sup> COM(2005)0229.

<sup>2</sup> OJ C 193 E, 17.8.2006, p. 117.

<sup>3</sup> OJ C 76 E, 25.3.2004, p. 453.

- (13) This Directive enhances compliance with fundamental rights and *seeks to incorporate 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 one or more independent regulatory authorities, if they have not already done so. Such authorities should act as the guarantors of fundamental rights in the provision of audiovisual media services. 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, e.g. linear and non-linear. Furthermore,* this Directive does not in any way prevent Member States from applying their constitutional rules *or regulatory arrangements* relating to freedom of the press and freedom of expression in the media.
- (14) *The requirement that the originating Member State should ensure compliance with its 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 3d, 3e, 22(1) and (2) 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.*
- (15) *The Framework Directive created a uniform legal framework for all transmission networks and services but,* 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 *with a view to separating the regulation of transmission from the regulation of content.*

- (16) *The Electronic Commerce Directive contains no specific substantive provisions governing audiovisual media services and leaves to 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 Electronic Commerce Directive in those 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.*
- (17) 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.
- (18) The definition of audiovisual media services covers all audiovisual mass-media services *the content of which is suitable for television broadcasting irrespective of the delivery platform, whether the editorial approach and responsibility of the provider are reflected in a programme schedule or in a selection catalogue.* However, its scope is limited to services as defined by the Treaty and therefore covers any form of economic activity, including that of public service enterprises. *The economic element must be significant to justify the application of this Directive. Economic activities are normally provided for remuneration, intended for a certain period and characterised by a certain continuity; the assessment of the economic element should be subject to the criteria and rules of the country of origin. Accordingly, the definition of audiovisual media services does not cover non-economic activities which are normally not provided for remuneration, such as weblogs and other user-generated content, or any form of private correspondence, such as e-mails and private websites.*

- (19) The definition of audiovisual media services covers mass media *over which editorial responsibility is exercised* 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 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. *Moreover, in accordance with the Electronic Commerce Directive, it 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 their principal purpose is not the distribution of audiovisual content.*
- (20) *Television broadcasting services, i.e. linear services, currently include in particular analogue and digital television, live webstreaming, 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 broadcasting services 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 apply only to the linear transmission. However, where different kinds of services are offered in parallel, without one part being clearly subordinate to another, this Directive should nevertheless apply to those distinguishable parts of the service which fulfil all the criteria of an audiovisual media service.*
- (21) *The definitions in this Directive, in particular the definitions of television broadcasting, linear and non-linear services, are laid down purely for the purposes of this Directive and Directive 89/552/EEC and do not affect the underlying rights protected by copyright and neighbouring rights legislation. The scope and regime of such rights are not prejudiced by those definitions and continue to be regulated independently by the relevant legislation.*

- (22) This Directive does not cover electronic versions of newspapers and magazines.
- (23) *For the purposes of this Directive, the* term “audiovisual” refers to moving images with or without sound, *and therefore* includes silent films but *excludes* audio transmission or radio *services*.
- (24) *An audiovisual media service consists of programmes, i.e. a discrete succession of moving images with or without sound which are subject to editorial responsibility and are either transmitted by a media service provider in accordance with a set time schedule or arranged in the form of a catalogue.*
- (25) The notion of editorial responsibility is essential for defining the role of the media service provider and *accordingly for defining* audiovisual media services. *“Editorial responsibility” means responsibility for the selection and organisation, in a professional capacity, of the content of an audiovisual offer. It may be exercised over 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 *the Electronic Commerce Directive*.
- (26) *The mere technical delivery, by terrestrial means or by satellite, of an audiovisual media service does not in itself confer the status of a media service provider within the meaning of this Directive; the same principle applies where a selection decision is made, provided that a third party under the jurisdiction of a Member State clearly bears that editorial responsibility.*
- (27) *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 18 to 26 to this Directive, must be fulfilled simultaneously.*

- (28) In addition to advertising and teleshopping, the wider definition of audiovisual commercial communication is introduced. It comprises moving images with or without sound which ***are transmitted as part of an audiovisual media service and form part of or accompany programmes*** and are designed to promote, directly or indirectly, the goods, services or image or a natural or legal *person* pursuing an economic activity and therefore it does not include public service announcements *or* charity appeals broadcast free of charge.
- (29) The country of origin principle remains the core of *Directive 89/552/EEC*, 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 *such* services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market. ***The application of this principle cannot exclude consideration of the criteria of the origin of the resources of a service with a view to ensuring the conditions for fair competition.***
- (30) ***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.***
- (31) ***It is therefore essential that the Member States prevent the emergence of dominant positions that would lead to a reduction in pluralism and restrictions on freedom of media information as well as on the information sector as a whole, for instance by taking measures to secure non-discriminatory access to audiovisual media service offerings in the public interest, e.g. through must-carry rules.***

- (32) 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.
- (33) 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.
- (34) Articles 43 to 48 of the Treaty lay down the fundamental right *to freedom* of establishment. Therefore, audiovisual media service providers are in general free to choose the Member State where they are established. The Court of Justice of the European Communities (ECJ) 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>1</sup>.
- (35) Member States must be *free* 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 competition law**. To ensure that such rules are not circumvented, the codification of the case law of the ECJ<sup>2</sup>, 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.

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<sup>1</sup> Case C-56/96 *VT4 Ltd v Vlaamse Gemeenschap* [1997] ECR I-03143, paragraph 22; Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-01459; see also: Case C-11/95 *Commission v Kingdom of Belgium* [1996] ECR I-04115, and Case C-14/96 *Paul Denuit* [1997] ECR I-02785

<sup>2</sup> Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen*; Case C-33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299; Case 23/93 *TV 10 SA v Commissariaat voor de Media* [1994] ECR I-04795, paragraph 21.

- (36) *In order for a Member State to prove on a case-by-case basis that a media service provider established in another Member State is circumventing its rules, 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.*
- (37) Under this Directive, notwithstanding the application of the country of origin principle, Member States may *nevertheless* 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 *Directive 89/552/EEC* and following the procedure laid down in *that* Directive. However, the *ECJ* 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<sup>1</sup>. *Particular consideration should also be given to the protection of minors and health, but nevertheless the prior control of ideas or opinions should not be permitted under any circumstances. With respect to non-linear audiovisual services, the possibility of a Member State taking measures under Article 2a of Directive 89/552/EEC replaces the possible measures which could have been taken by that Member State as set out in Article 3(4) and/or Article 12 (3) of the Electronic Commerce Directive within the fields coordinated by Articles 3d and 3e of Directive 89/552/EEC.*

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

- (38) In its Communication to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Union<sup>1</sup>, the Commission stressed that a careful analysis of 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 has shown that *both* co- and self-regulation instruments implemented in accordance with the 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 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 effective 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.*

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<sup>1</sup> COM(2005)0097.

- (39) *The generic term “co-regulation” covers regulatory instruments which are based on cooperation between State bodies and self-regulating bodies, and vary widely in terms of their designations and structures at national level. The actual form which such instruments take reflects the specific tradition of media regulation in the individual Member States. What co-regulation systems have in common is that tasks and objectives which were originally the preserve of the State are achieved in cooperation with the players affected by regulation. It is for the participants themselves, designated or authorised by the State, to guarantee the achievement of the regulatory objective. In every case the systems are founded on a State legal framework which lays down instructions as to content, organisation and procedures. On this basis, the interested parties create further criteria, rules and instruments, compliance with which they themselves monitor. Self-regulation as thus defined enables specialist knowledge to be exploited directly for administrative tasks, and bureaucratic procedures to be avoided. It is necessary for all, or at least the most influential, players to participate in or recognise the system. Co-regulation operates by combining instructions to the interested parties with opportunities for State intervention should those instructions not be carried out.*
- (40) 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.

- (41) 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. As a general rule, such short extracts should not: exceed 90 seconds; **be transmitted before the event concludes, or for sports events before the end of a single day's play - whichever is the sooner; be screened later than 36 hours after the event; be used to create a public archive; omit the logo or other identifier of the host broadcaster; or be used in non-linear services other than if offered on a live or deferred basis by the same media service provider. 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. For pan-European broadcasters, the relevant legislation is that of the Member State in which the event takes place.**
- (42) **Media literacy refers to the skills, knowledge and understanding needed to enable consumers to use the media effectively. Media-literate people will be capable of exercising informed choices; understanding the nature of content and services; taking advantage of the full range of opportunities offered by new communications technologies, and better protecting themselves and their families from harmful or offensive material. It is therefore of crucial importance that Member States and national regulatory authorities actively promote the development of media literacy in all sections of society and that they conduct regular research to monitor it and to inform their approach to content regulation.**

- (43) Non-linear services *differ* from linear services *in terms of the choice and control which the user can exercise and with regard to the impact which they have on society*<sup>1</sup>. *Such difference justifies imposing lighter regulation on non-linear services, which have to comply only with the basic rules provided for in Articles 3c to 3h of Directive 89/552/EEC.*
- (44) Because of the specific nature of audiovisual media services, especially *their* impact on the way *in which* people form their opinions, it is essential for users to know exactly who is responsible for the content of *the* 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.
- (45) 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 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.*
- (46) Harmful content and conduct in audiovisual media services continue to be a concern for law-makers, industry and parents. *In this regard it would seem necessary to educate not only children, but also their parents, teachers and educators, to make the best use of all the communications media, particularly audiovisual media services, however they may be delivered.* 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, *advertising, telesales, sponsorship, product placement and any other technically feasible means of communication.*

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<sup>1</sup> Case C.89/04 *Mediakabel* [2005] ECR I-4891.

- (47) *Member States should ensure that their respective national curricula and further education courses provide for a critical appreciation of the media.*
- (48) 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 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 draw attention clearly to the specific nature of certain programmes before they are transmitted and in accordance both with Article 1 of the Charter of Fundamental Rights of the European Union, recognising that human dignity is inviolable and must be respected and protected, and with Article 24 of that Charter, which states that children shall have the right to such protection and care as is necessary for their well-being, and that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
- (49) *Minors and the vulnerable and disabled, including the mentally disabled, may be particularly undermined and psychically or psychologically upset and disturbed by programmes which feature scenes of verbal, physical or moral violence or by scenes which offend against human dignity, or incite racial hatred or any other form of discrimination. Insofar as one of the objectives of this Directive is to protect such persons in general, Member States are strongly encouraged to remind audiovisual media service providers of this overriding need and to require them to clearly indicate the particular nature of such programmes prior to their being broadcast.*
- (50) 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 *any* prior control of audiovisual media services.
- (51) Article 151(4) of the Treaty requires the Community to take cultural aspects into account in its action under other provisions of *the* Treaty. In *particular*, the diversity of its cultures *and languages* should be respected and promoted, *and mutual understanding encouraged.*

- (52) 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 referred to in Article 3f(3) of Directive 89/552/EEC, Member States shall also take into account *such matters as* 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. ***In those reports, appropriate account should also be taken of the works of independent producers.***
- (53) ***Persons who merely bundle or transmit audiovisual media services or offer for sale packages of such services, for which they do not have any editorial responsibility, should not be considered as media service providers. Thus, mere bundling, transmission or onward selling of content offers, for which they do not have any editorial responsibility, do not fall within the scope of this Directive.***
- (54) When implementing the provisions of Article 4 of Directive 89/552/EEC as amended, Member States should ***adopt appropriate measures to encourage*** broadcasters to include an adequate share of co-produced European works or of European works of non-domestic origin.
- (55) ***Media service providers should also include in their services the works of independent producers, while respecting the rights attaching to repeat showings of such works and the fair apportionment of contributors' rights.***
- (56) It is important to ensure that cinematographic works are transmitted within periods agreed between *rights-holders* and audiovisual media service providers.

- (57) The availability of non-linear services increases *choice for the consumer*. **Member States should therefore make provision in their national curricula and further education courses for sufficient education in critical use of the media, to avoid the need to introduce detailed rules governing audiovisual commercial communication.** 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.
- (58) **The right of reply is a particularly appropriate legal remedy in the online environment, since it is possible to correct the contested information immediately. However, the right should be exercised within a reasonable period after receipt of the request, at a time and in a form which appears appropriate in view of the particular programme to which the request relates. The reply must in particular be given the same weight as the contested information, so as to reach the same circle of users with the same effects.**
- (59) As has been recognised by the Commission in its interpretative communication on certain aspects of the provisions on *televised* advertising in the “Television without frontiers” Directive<sup>1</sup>, 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. This interpretative communication remains valid to the extent that it refers to provisions of Directive 89/552/EEC that are unaffected by *this* Directive.
- (60) 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.

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<sup>1</sup> OJ C 102, 28.4.2004, p. 2.

- (61) ***It is necessary to ensure coherence between this Directive and existing Community law. Accordingly, in the event of conflict between the provisions of this Directive and a provision of another Community act governing specific aspects of access to or exercise of an audiovisual media service activity, the provisions of this Directive should prevail. This Directive consequently complements the Community acquis. Thus, apart from the practices that are covered by this Directive, Directive 2005/29/EC<sup>1</sup> applies to unfair commercial practices, such as misleading and aggressive practices occurring in audiovisual media services. Moreover, as Directive 2003/33/EC<sup>2</sup>, which prohibits advertising and sponsorship for cigarettes and other tobacco products in printed media, information society services and radio broadcasting, is without prejudice to Directive 89/552/EEC, in view of the special characteristics of audiovisual media services, the relationship between Directive 2003/33/EC and Directive 89/552/EEC should remain the same after the entry into force of this Directive. Article 88(1) of Directive 2001/83/EC<sup>3</sup> which prohibits advertising to the general public of certain medicine products applies, as provided in paragraph 5 of that Article, without prejudice to Article 14 of Directive 89/552/EEC; likewise the relationship between Directive 2001/83/EC and Directive 89/552/EEC should remain the same after the entry into force of this Directive. Furthermore, this Directive is without prejudice to Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods<sup>4</sup>.***
- (62) ***Given the growing use of new technologies such as personal video recorders and the wider 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 the insertion of such advertising where it does not unduly affect the integrity of programmes.***

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<sup>1</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive") (OJ L 149, 11.6.2005, p. 22).

<sup>2</sup> Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, p. 16).

<sup>3</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311, 28.11.2001, p. 67).

<sup>4</sup> OJ L 404, 30.12.2006, p. 9.

- (63) *This Directive is intended to safeguard the specific character of the European television landscape. Advertising and teleshopping spots may be inserted during programmes only in such a way as not to prejudice the integrity and value of the programme, taking into account natural breaks and the duration and nature of the programme, or the rights of the rights-holders.*
- (64) 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 *no longer* seem 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>1</sup>.
- (65) 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.

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<sup>1</sup> Case C-320/94; *Reti Televisive Italiane SpA (RTI)*; Case C-328/94 *Radio Torre* ; Case C-329/94 *Rete A Srl* ; Case C-337/94 *Vallau Italiana Promomarket Srl*; Case C-338/94 *Radio Italia Solo Musica Srl and Others* C-338/94 and Case C-339/94 *GETE Srl v Ministero delle Poste e Telecomunicazioni*, [1996] ECR I-06471.

- (66) 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 would be 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 may consist in placing at a person's disposal services or items having a monetary value, for the acquisition of which the recipient would otherwise have had to use his own financial, personal or material resources.*** Product placement 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 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' which means such prominence as is not justified by the editorial requirements of the programme, or the need to lend verisimilitude. Undue prominence may also mean the repeated appearance of the brands, goods or services in question or the manner in which they are given prominence. Account should also be taken of the content of the programme in which they are introduced.***
- (67) ***'Production props' means the mentioning or presentation of goods or services for editorial reasons without payment or similar consideration. In order to draw the distinction between production props and product placement within the meaning of this Directive, the legal framework for the use of production props permitted in all programme formats should be clarified.***

- (68) *'Undue prominence' is given when the repeated representation of the brand, good or service or the nature of its presentation is such as to feature such products to an inordinate extent in the context of production props or product placement, taking account of the content of the programmes in which they appear.*
- (69) 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 among national regulatory 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 which broadcasters established in one Member State might have in another Member State. Where licensing procedures are provided for in national law and if more than one Member State is involved, it is desirable that contacts between the respective authorities should take place before licences are granted. Such cooperation should cover all the fields coordinated by Directive 89/552/EEC and in particular Articles 2, 2a and 3 thereof.*
- (70) *Cultural diversity, freedom of expression and pluralism of means of communication are some important aspects of the European audiovisual sector and are therefore indispensable preconditions for democracy and diversity.*
- (71) *The right of persons with disabilities, the elderly and non-EU nationals whose mother-tongue is different from the language of their host country to participate and integrate in the social and cultural life of the community in accordance with Articles 25 and 26 of the Charter of Fundamental Rights of the European Union is inextricably linked with the provision of accessible audiovisual media services. The accessibility of audiovisual media services includes, but is not limited to, sign language, subtitling, audio-description and easily understandable menu navigation,*

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 89/552/EEC is hereby amended as follows:

(1) The title is replaced by the following:

“Directive 2007/.../EC 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)”.

(2) Article 1 is replaced by the following:

“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 ***provided under the editorial responsibility of a media service provider*** the principal purpose of which is the provision of ***programmes consisting of*** moving images with or without sound, 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 ***and/or of audiovisual commercial communications. It does not include services where the provision of audiovisual content is merely incidental to the service and not its principal purpose, nor does it include the press in printed or electronic form.***

- (b) ‘media service provider’ means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of *an* 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 broadcast’ or ‘linear service’ means *an* audiovisual media service where a ***chronological sequence of programmes is transmitted to an indeterminate number of potential viewers, at a time decided on by the media service provider according to a set programme schedule;***
- (d) ‘broadcaster’ means provider of linear audiovisual media services;
- (e) ‘on-demand service’ or ‘non-linear service’ means an audiovisual media service ***consisting of an offer of audiovisual content, edited or compiled by a media service provider, and where the user, on an individual basis, requests the transmission of a particular programme from a choice of content and at a time of his choice, or which is not covered by the definition of a linear service in point (c);***
- (f) ‘audiovisual commercial communication’ means moving images with or without sound which ***are transmitted as part of an audiovisual media service or, in cases such as dedicated teleshopping channels, as an audiovisual media service, with the aim of promoting,*** directly or indirectly, the goods, services or image of a natural or legal *person* pursuing an economic activity;
- (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 advertising’ 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) ***‘product integration’ and ‘thematic placement’ mean the intervention in the plot of a film or fictional programme of any undertaking seeking to promote in particular a product, service or brand;***
- (j) ‘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 ***direct or indirect*** financing of audiovisual media services, with a view to promoting its name, its trade mark, its image, its activities or its products;
- (k) ***‘telepromotion’ means a form of advertising consisting of the display of goods or services or of a spoken or visual presentation of the goods and services of a goods producer or services supplier, transmitted as part of a programme to promote the supply of the goods or services presented or displayed in return for payment;***
- (l) ‘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;

- (m) ***‘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, with or without payment or similar consideration to the media service provider. It does not include, however, communications resulting from independent editorial decisions to use products, without undue prominence, which are integral to a programme and facilitate its production, such as prizes awarded in programmes, branded merchandising products and incidental objects and props;***
  - (n) ***‘production props’ means goods or services made available without payment or other consideration and used for editorial reasons;***
  - (o) ***‘programme’ means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established or compiled by a media service provider;***
  - (p) ***‘co-regulation’ means a form of regulation based on cooperation between public authorities and self-regulating bodies;***
  - (q) ***‘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.’’***
- (3) Article 2 is amended as follows:
- (a) In paragraph 1, the expression “television broadcasts transmitted by broadcasters” is replaced by the expression “audiovisual media services transmitted by media service providers” and the expression “broadcasts” is replaced by the expression “audiovisual media services”;

- (b) In paragraph 2, the word “broadcasters” is replaced by the expression “media service providers”;
- (c) In paragraph 3, the word “broadcaster” is replaced by the expression “media service provider”; the expression “editorial decision about programme schedules” is replaced by the expression “editorial decision about the audiovisual media service”; the expression “television broadcasting activity” is replaced by the expression “audiovisual media service activity” and the expression “where it first began broadcasting” is replaced by the expression “where it first began its activity”, the expression “decisions on programme schedules” is replaced by “decisions on audiovisual media service”.
- (d) Paragraph 4 is replaced by the following:

“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 a Member State, they use a satellite capacity *allocated* to that Member State.”
- (e) In paragraph 5, the word “broadcaster” is replaced by the expression “media service provider” and “Article 52” is replaced by “Article 43”.
- (f) Paragraph 6 is replaced by the following:

“6. This Directive does not apply to audiovisual media *services which* are not received with standard consumer equipment directly or indirectly by the public in one or more Member *States*.”

- (4) *Article 2a* is replaced by the following:

*“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. A Member State may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled:*

- (a) an audiovisual media service originating in another Member State manifestly, seriously and gravely infringes Articles 3d or 3e and/or Article 22(1) or (2);*
- (b) during the preceding twelve months, the provider of the audiovisual media service concerned has infringed the provision(s) referred to in point (a) on at least two prior occasions;*
- (c) the Member State concerned has notified the media service provider, the Member State in which it is established and the Commission in writing of the alleged infringements and of the measures which it intends to take should any such infringement be repeated;*
- (d) consultations with the Member State in which the media service provider concerned is established and the Commission have not resulted in a friendly settlement within 15 days of the notification provided for in point (c), and the alleged infringement is repeated.*

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 concerned, decide whether the measures are compatible with Community law. If it decides that they are not, that 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 applicable to the infringements in question in the Member State which has jurisdiction over the media service provider concerned."*

(5) Article 3 is replaced by the following:

#### 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 comply with Community law and do not distort competition.*

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 on the grounds 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 media service provider under the jurisdiction of another Member State has taken advantage of this Directive in an 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 media service provider 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 1a are not satisfactory; and*
- (b) *that the media service provider concerned has established itself in the Member State having jurisdiction solely in order 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 appropriate 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 take its decision 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.**

**9. Member States shall, by appropriate means, promote the development of media literacy amongst consumers.”**

- (6) The following Articles 3b to 3l are inserted:

“Article 3b

1. *Pursuant to the principle of freedom of access to information as enshrined, in particular, in Article 11 of the Charter of Fundamental Rights of the European Union, and without prejudice to existing contractual agreements between broadcasters and without undermining exclusive rights, each Member State shall ensure that, for the purposes of short news reports, including reports intended for pan-European broadcasts, broadcasters established in other Member States are not deprived of access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted by a broadcaster under their jurisdiction. The broadcaster granting such access shall be entitled to appropriate compensation for the technical 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. *The provisions of this Article shall be without prejudice to the obligation of individual broadcasters to comply with copyright legislation, including Directive 2001/29/EC<sup>1</sup>, and/or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 26 October 1961, and the Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as subsequently revised and amended.*

4. *Member States shall ensure that the modalities and conditions governing the use of such short extracts are defined, in particular their maximum length, time limits regarding their transmission and requirements for the identification of the transmitting broadcaster.*

5. *Broadcasters may, in accordance with the law of the Member State concerned and for the purpose of transmission, themselves gain access to the event concerned.*

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<sup>1</sup> *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).*

### 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

***1.*** Member States shall ensure *by appropriate means* 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. ***This Article shall apply in particular to programmes containing pornography and gratuitous acts of violence. The Commission and the Member States should encourage the relevant players in the media sector to promote a Community-wide labelling, assessment and filtering system as a further measure to protect minors. Member States shall promote measures to give parents and other carers greater control over the pornographic and gratuitously violent content of programmes.***

2. *Member States shall ensure that audiovisual media service providers under their jurisdiction provide filtering systems for content which may be damaging to the physical, mental or moral development of minors and inform users of their existence.*

3. *The Commission and the Member States shall encourage audiovisual media service providers, regulatory authorities and all parties concerned to consider the technical and legal feasibility of developing a harmonised system of content symbols promoting better filtering and classification at source, regardless of the delivery platform used, with a view to providing greater protection for minors.*

4. *Member States shall ensure that audiovisual media service providers under their jurisdiction do not in any circumstances broadcast any child pornography under penalty of administrative and/or penal sanctions.*

5. *Member States shall ask audiovisual media service providers under their jurisdiction to promote information campaigns to prevent violence against women and minors, where possible in collaboration with public and private associations and entities involved in this field.*

#### Article 3e

Member States shall ensure by appropriate means that audiovisual media services and audiovisual commercial communications provided by providers under their jurisdiction do not contain any incitement to hatred based on sex, *race*, ethnic origin, religion or belief, disability, age or sexual orientation *or offend against human dignity in any other manner.*

#### Article 3f

1. Member States shall ensure that media service providers under their jurisdiction promote, where practicable and by appropriate means, ***and taking due account of the various means of delivery, the development,*** production of and access to European works within the meaning of Article 6. ***For non-linear audiovisual media services, support and promotion might take the form of a minimum number of European works proportionate to economic performance, a minimum share of European works and of European works created by producers who are independent of broadcasters in video-on-demand catalogues, or the attractive presentation of European and works created by such independent producers in electronic programme guides.***
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 States shall report to the Commission, no later than the end of the fourth year after 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 ***every three years*** on the application of paragraph 1, taking into account the market, technological developments ***and the objective of cultural diversity.***

#### Article 3g

Member States shall ensure that audiovisual commercial communications provided by providers under their jurisdiction comply with ***the principles laid down in the Charter of Fundamental Rights of the European Union and, in particular,*** the following requirements:

- (a) audiovisual commercial communications *shall* be clearly identifiable as such *and be distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising, teleshopping and telepromotions shall be kept quite distinct from other parts of the programme service by optical and/or acoustic and/or spatial means.* Surreptitious audiovisual commercial communication shall be prohibited;
- (b) *audiovisual commercial communications shall respect the integrity of and natural breaks in the programme in the course of which they are transmitted;*
- (c) audiovisual commercial communications *shall* not use subliminal techniques. *Accordingly, the sound volume of advertisements, and of the programmes or sequences which precede and follow them, shall not exceed the average sound volume of other parts of the programme service. This obligation shall be as much the responsibility of advertisers as it is of broadcasters, which shall ensure that advertisers comply with it when supplying their advertising material;*
- (d) audiovisual commercial communications *shall comply with the principles laid down in the Charter of Fundamental Rights of the European Union and, in particular* they *shall* not:
  - (i) *offend against human dignity;*
  - (ii) *be offensive* on grounds of *discrimination by* race, *gender*, nationality, *disability, age, or sexual orientation;*
  - (iii) *violate children's rights as defined in the UN Convention on the Rights of the Child;*
  - (iv) encourage behaviour prejudicial to health or to safety;
  - (v) encourage behaviour *grossly* prejudicial to the protection of the environment.

- (e) all forms of audiovisual commercial *communications for* cigarettes and other tobacco products shall be prohibited;
- (f) *pornography, including depictions likely to incite hatred on the grounds of sex, shall be prohibited in all forms of audiovisual commercial communications and teleshopping;*
- (g) audiovisual commercial communications for alcoholic beverages *shall* not be aimed at minors and may not encourage immoderate consumption of such beverages;
- (h) *audiovisual commercial communications 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;*
- (i) audiovisual commercial communications *shall* not cause moral or physical *harm* to minors. Therefore they shall not directly exhort minors to buy 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 show* minors in dangerous situations;
- (j) *the Member States and the Commission shall encourage media service providers to develop a code of conduct regarding children's programming containing or 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* shall 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.

*Article 3i*

*1. Product placement shall be prohibited. In particular news and current affairs programmes, children's programmes, documentaries and programmes of advice may not contain product placement.*

*Product integration and thematic placement shall be prohibited in principle.*

*2. However, unless Member States decide otherwise, product placement shall be permitted in cinematographic works, films and series made for television and sports broadcasts.*

*Production props where no payment is made but certain goods or services are merely provided free of charge with a view to their inclusion in a programme shall be permitted.*

*Programmes containing product placement or production props shall meet 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 or 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 clearly 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 by a signal at least every 20 minutes during the programme in order to avoid any confusion on the part of the viewer.*

*The viewer shall be informed of the use of any production props by appropriate means.*

3. *In any event programmes shall not contain product placement or production props for:*

- *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 shall apply only to programmes produced after the date by which this Directive is required to be brought into force by the Member States.*

#### *Article 3j*

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 shall not apply to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes or to sponsorship announcements.*

### *Article 3k*

- 1. Member States shall take appropriate measures to ensure that audiovisual media services under their jurisdiction are gradually made accessible to people with a visual or hearing disability.*
- 2. As from no later than ...\*, Member States shall submit a national report to the Commission every two years on the application of this Article. The report shall include, in particular, statistics on the progress made towards achieving the goal of accessibility described in paragraph 1. It shall describe any obstacles and describe the measures needed to overcome them.*

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*\* 3 years from the adoption of this Directive.*

### *Article 3l*

- 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 but not limited to reputation and good name, have been affected by an assertion of facts in an audiovisual media service shall have a right of reply or equivalent remedies.*
- 2. A right of reply or equivalent remedies shall exist in relation to all media service providers under the jurisdiction of a Member State.*
- 3. Member States shall adopt the measures needed to establish the right of reply or equivalent remedies and shall determine the procedure to be followed for the exercise thereof. In particular, they shall ensure that a sufficient period of time is allowed and that the procedures are such that the right or equivalent remedies may be exercised appropriately by natural or legal persons resident or established in other Member States.*

**4. An application for the exercise of a right of reply or equivalent remedies may be rejected when it is not justified having regard to the conditions set out in paragraph 1, if it involves a punishable act, if its broadcasting involves the civil liability of the media service provider or if it contravenes standards of public decency.**

**5. Member States shall ensure that disputes concerning the exercise of the right of reply or equivalent remedies are subject to judicial review.**

**6. The right of reply shall be without prejudice to other means of redress available to persons whose rights to dignity, honour, good reputation or private life have not been respected by a media service provider."**

**(7) In Article 5, the following new paragraph is added:**

***"In defining the term 'independent producer', Member States shall take appropriate account of the following three criteria: ownership and proprietary rights of the production firm; number of programmes provided to the same media service provider and ownership of secondary rights."***

**(8) Article 6 is amended as follows:**

**(a) Paragraph 1(c) is replaced by the following:**

***"(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 within each of these agreements."***

**(b) Paragraph 3 is deleted.**

**(c) Paragraph 4 becomes paragraph 3.**

**(d) Paragraph 5 is deleted.**

(9) Article 7 is deleted.

(10) Article 10 is replaced by the following:

“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.”

(11) Article 11 is replaced by the following:

“Article 11

1. Advertising ***and*** teleshopping ***spots may be*** inserted ***between programmes. Advertising and teleshopping spots may also be inserted*** during programmes, ***in a manner which does not jeopardise their integrity, taking into account natural interruptions in the programme, in such a way*** that the rights of the *rights-holders* are not prejudiced.

2. The transmission of films made for television (excluding series, serials, light entertainment programmes and documentaries), cinematographic works, children’s programmes and news programmes may be interrupted by advertising and/or teleshopping once for each ***scheduled*** period of ***30 minutes***.

No advertising or teleshopping may be inserted during religious services.”

- (12) Articles 12 and 13 are deleted.
- (13) Articles 16 and 17 are deleted.
- (14) Article 18 is replaced by the following:

“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 *shall* not apply to announcements made by the broadcaster **advertising** its own programmes **or to teleshopping, sponsored programmes or, where applicable,** product placement.”

- (15) Article 18a *is replaced by the following:*

**"Article 18a**

***Audiovisual commercial communication windows such as teleshopping, teleshopping windows and telepromotions shall be clearly identified as such by optical and acoustic means."***

- (16) Article 19 is replaced by the following:

“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, ***which shall be readily recognisable as such by optical and/or acoustic means.*** Chapter 3 as well as Article 11 (rules on insertion) and Article 18 (duration of advertising and teleshopping) *shall* not apply to these broadcasts.”

(17) Article 19a is deleted.

(18) Article 20 is replaced by the following:

“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*.”

(19) *Article 22(1) is replaced by the following:*

***“1. Member States shall take appropriate measures to ensure that programmes broadcast by media service providers under their jurisdiction do not contain anything which might seriously impair the physical, psychological and moral development of minors, particularly programmes showing pornography or senseless violence.”***

(20) Articles 22a and 22b are *replaced by the following:*

***"Article 22a***

***(1) Member States shall promote the production and programming of audiovisual media services and programmes which are suitable for minors and intended to improve their knowledge of communication media.***

***(2) Such measures shall seek to facilitate educational action by parents, teachers and educators to create awareness of the effects of programmes that minors may watch by:***

- *setting up appropriate rating systems;*
- *encouraging policies to raise awareness and knowledge of the media, which should include the participation of educational establishments and make it possible to produce European programmes suitable for family viewing or aimed at children and adolescents;*
- *taking account of experience gained in this field in Europe or elsewhere and of the opinion of interested parties, such as broadcasters, producers, parents, educators, communication experts and associations concerned.*

(3) *Member States' respective legislation shall further stipulate that new television sets shall be equipped with technical devices to enable certain programmes to be filtered out."*

(21) Article 23a is amended as follows:

In paragraph 2 (e) the expression “television broadcasting services” is replaced by the expression “audiovisual media services”.

(22) The following Articles 23b *and 23c are* inserted:

“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, *to ensure that women and men are represented equally in them* and to ensure that they exercise their powers impartially and transparently.

2. *Member States shall entrust to national regulatory authorities the task of ensuring that media service providers comply with the provisions of this Directive, in particular those relating to freedom of expression, media pluralism, human dignity, the principle of non-discrimination and the protection of minors, the vulnerable and the disabled.*

3. National regulatory *bodies* shall *cooperate more closely and* provide each other and the Commission with the information necessary for the application of the provisions of this Directive.

### *Article 23c*

*Member States shall adopt the measures needed to ensure pluralism of information in the television broadcasting sector.*

*Member States shall, in compliance with Community law, promote measures, in order that media service providers under their jurisdiction as a whole reflect the necessary pluralism of the relevant values and options within their society which are in accordance with the principles of the Charter of Fundamental Rights of the European Union.”*

(23) Articles 25 and 25a are deleted.

(24) Article 26 is replaced by the following:

“Article 26

Not later than ...\*, and every two 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, ***including the reports referred to in Articles 3f(3) and 3k(2) and in particular with regard to the implementation of the measures set out in Articles 3f(1)***, 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 the promotion of cultural diversity***.

\* ***The end of the fifth year after adoption of this Directive.***”

Article 2

Regulation (EC) No 2006/2004 of *the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer cooperation)*<sup>1</sup> is hereby amended as follows:

*In the Annex , point 4 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 and Articles 10 to 20 (*OJ L 298, 17.10.1989, p. 23*). Directive as last amended by Directive 2007/.../EC of the European Parliament and of the Council (*OJ ...* ).”

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<sup>1</sup> OJ L 364, 9.12.2004, p. 1. *Regulation as amended by Directive 2005/29/EC (OJ L 149, 11.6.2005, p. 22).*

### Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive **by ...** \* 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.

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

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

### Article 5

This Directive is addressed to the Member States.

Done at ,

For the European Parliament

For the Council

The President

The President

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\* *Two years after the entry into force of this Directive.*