

Centre for Antitrust and Regulatory Studies

Ewelina D. Sage

**European Audiovisual
Sector:**
Where business meets
society's needs

Warsaw 2011



University of Warsaw
Faculty of Management Press

Textbooks and Monographs

European Audiovisual Sector:

Where business meets
society's needs



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LIST OF ACRONYMS

AMS	= Audiovisual Media Service
AVMSD	= Audiovisual Media Services Directive
CoJEU	= Court of Justice of the EU
CoJ	= Court of Justice
CFI	= Court of First Instance
CIP	= Competition and Innovation Programme
EAS	= European Audiovisual Sector
EC	= European Community
EU	= European Union
ECJ	= European Court of Justice
ECL	= European Competition Law
FP7	= 7 th Framework Programme
Kbps	= Kilobits per second
Mbps	= Megabit per second
EBU	= European Broadcasting Union
NCA	= National Competition Authority
SIEC	= Significant Impediment of Effective Competition
HHI	= Herfindahl-Hirschman Index
TEU	= Treaty on European Union
ICT	= Information and Communication Technology
ICT PSP	= Information and Communication Technology Policy Support Programme
IPR	= Intellectual Property Right
MR	= Merger Regulation
MS	= Member State of the EU
MSP	= Media Services Provider
PSB	= Public Service Broadcaster
SGEI	= Services of General Economic Interest
SME	= Small and Medium Enterprise
SSNIP	= Small but Significant & Non-transitory Increase in Price
TFEU	= Treaty on the Functioning of the European Union
TWFD	= Television Without Frontiers Directive

INTRODUCTION

The purpose of this book is to introduce its readers to the general framework of **EU intervention in the European Audiovisual Sector** (hereafter: EAS). The first part of the discussion will focus on the primary aim of European Audiovisual Policy – officially known as EU Audiovisual and Media Policy – **to facilitate the creation of an ‘inclusive’ internal European audiovisual market** accessible and beneficial to the entire EU society both in economic as well as social terms. Emphasis will be placed here on particular goals and forms of EU intervention that affect not only the shape but also the effectiveness of the EAS overall. The following part of the discussion will focus on EU efforts meant **to strengthen the internal market**. Considered here will be the various forms of direct aid granted to the EAS by the EU meant to facilitate its internal growth as well as its protectionist measures meant to support and shield it from external competition. The final part will be devoted to the influence exercised by the EU on the internal working of the EAS in order **to preserve its competitiveness**. Presented first will be the balancing act between EU and Member States’ (hereafter: MS) intervention in the context of state aid to Public Service Broadcasters (hereafter: PSBs) providing Services of General Economic Interest (hereafter: SGEI). Limits placed on the conduct of individual businesses by way of European Competition Law (hereafter: ECL) will be outlined in the final chapter. This part of the analysis will focus on specific direct and indirect influences that can be exercised by the EU through ECL enforcement on the formation of business strategies in the audiovisual field.

It is essential to note that the boundaries of this discussion are fundamentally blurred by the fact that **European Audiovisual Policy** (hereafter: EAP) **has no clear or firm structure**. Its fluidity can be traced back primarily to:

- a complicated, politically sensitive division of competences between the EU and its MS;
- the realisation that both the EU and its MS pursue in this field a great variety of goals often aimed at purely economic objectives but sometimes also at essentially social goals;

- the fact that it often overlaps with other EU policies, in particular those affecting the traditional Media field that focuses on ‘high’ culture as well as on Information and Communication Technology (hereafter: ICT) which focuses on convergence and interoperability;
- its complex nature that encompasses legal, financial, as well as many other instruments of intervention;
- the fact that it applies to an economic sector which in itself is very difficult to define both in technological as well as temporal terms.

A **flexible analytical structure** is used in this book without insisting on rigid delineations to reflect the **fluidity of the topic of this discussion**. The impact of the EU on the shape and internal workings of the EAS could be organised according to its instruments of intervention into: legal and para-legal (directives and soft laws), financial (the MEDIA programme), and other instruments. Alternatively however, a division reflecting the goals of EU intervention could be applied whereby social aims such as ‘inclusiveness’ or plurality are separated from its economic goals such as making the EAS more competitive globally. Neither of these classifications is without its own advantages and shortcomings. The same instrument of intervention frequently serves more than one purpose – the MEDIA programme helps EU producers create appealing content as well as improve viewer choice. On the other hand, the same goal is often pursued by more than one instrument – viewer choice is facilitated by the MEDIA programme as well as European works transmission quotas. The great multitude of both goals and instruments of EU intervention as well as the complexity of their interrelationships complicate the analysis further.

To provide as much clarity as possible, the book will commence with key general considerations including applicable definitions. Its individual chapters will focus on particular instruments of EU intervention, stressing their characteristics and consequences. Chapters will be grouped into three main parts according to the key impact exercised on the EAS into:

PART I: SOCIO-ECONOMIC GOALS OF THE EAS

PART II: INTERNAL GROWTH & EXTERNAL STRENGTH

PART III: INTERNAL COMPETITIVENESS

1. European Audiovisual Sector (EAS)

Unlike traditional retail or manufacturing industries, defining the audiovisual sector is a largely intuitive and subjective endeavour. Definitions can vary due to the context of the analysis being performed or the policy approach being applied. Most of all, they remain fluid over time, reflecting

PART I

SOCIO-ECONOMIC GOALS OF THE EAS

As the fundamental objective of the EU (formerly EC), **MARKET INTEGRATION remains at the heart of EU intervention into the EAS**. What differentiates the EAS from the European economy in general is the profound impact which this industry exercises on the development of societies when it comes to democracy & pluralism, culture & heritage, education & employment, and finally health & safety. Thus, **the EAS can be said to be a special industry where major economic interests come into direct proximity**, and potentially conflict, **with key social objectives**. The ‘public hand’ of the EU takes extensive economically driven actions directed at market integration and supporting its competitive strength. It however equally often engages in socially motivated interventions which focus on protectionism and inclusiveness. Those market players that wish to act on European audiovisual markets (created, supported and supervised by the EU) must therefore ensure the compliance of their business practices and strategies with both the economic and social objectives pursued by the EU in this special industry.



While the particular economic and social goals pursued by the EU and its individual MS might somewhat differ – the EU helps the ‘European’ while MS support the ‘domestic’ – **the fact that economic and social goals of public intervention are very closely intertwined in the audiovisual field is as true for the EU as it is for its individual MS.**

While economically-motivated interventions in the EAS might be more direct, widespread and generous than in other industries, they are similar to the impact exercised by the EU on its economy as a whole – they are meant to create jobs, widen markets to improve their global standing and ensure their competitiveness. The **scale of its socially-motivated intervention** in this sector **is** however something **unprecedented**. Indeed, it can be argued that no other industry experiences the impact of social values on the working of

the market in such a direct and extensive way as the EAS does. To illustrate, those creating artistic works with European appeal can get funding from the EU – similar subsidies are not available to commercial content; those contracting and creating advertisements must shape them specifically so as not to endanger the development of children; those showing advertising are not allowed to ‘overuse’ viewers by advertising too much; those selling key sports rights might need to compromise their profit levels to ensure general accessibility. Thus, the direct influence exercised by the EU on specific market practices taking place in the growingly integrated European audiovisual field cannot be underestimated.

Facilitating the creation of the internal market is the primary economic aim pursued in the framework of EAP. Its impact is complemented by Europe’s support to industrial growth as well as ECL enforcement which provides the Commission with a practical means of preserving its internal competitiveness. Dealing with the social side of the internal market remains an equally important objective of EAP’s whereby the EU tries to ensure that the economic benefits of market integration are not overshadowed by its potential negative repercussions for the well being of minors for instance. In practice, **the EU also intervenes to ensure that the internal market being created is socially responsible, inclusive and safe.** It thus takes extensive socially-motivated actions:

- to preserve Europe’s cultural diversity and national heritage alongside harmonisation; to facilitate advancements in culture & education;
- to ensure media plurality (making sure that everyone can be heard) & public service obligations (making sure that everyone can hear) considered to be essential prerequisites of an inclusive and democratic society; and
- to promote social responsibility and an inclusive society which cover paternalism (eg ensuring that alcohol is equated to as an image enhancer) and efforts to ensure that progress is felt by the entire society irrespective of age, education or location.



The EU fully acknowledges that its **cultural diversity** gives it an important economic advantage over more ‘cohesive’ areas. Europe’s cultural diversity **gives the EAS the resources and creative potential needed to produce varied content which is key to the development of new technologies.**

CHAPTER 1

BASIS OF THE INTERNAL MARKET

1.1. EU Law

EU LAW is a supranational legal system which **operates alongside the laws of its 27 MS**. This fact is of key importance to this discussion because the competences of the EU and its MS closely intertwine in the audiovisual field. Some types of EU law take effect directly without the need for any legal actions to be taken by the MS. For that reason, directly applicable EU rules, such as the basic freedoms, do not need national equivalents to be valid and enforceable. Similarly to international treaties, certain types of EU law must however be ‘transposed’ into the legal systems of each and every MS – given a national equivalent – creating a complex pattern of similar legal rules applicable on the EU level and in MS.

Being able **to identify the addressee of a given act of EU law is essential to decide who is bound by it**. Some EU laws have many addressees including MS, citizens and even individual companies and their associations. Other acts are directed to MS only and thus they do not normally ‘bind’ companies as such – it is the national rules that are promulgated by individual MS in order to transpose these EU law that are binding on companies established in that MS. Some acts of EU laws are legally binding on specific **MS, companies, or even individuals** only. They can have widespread consequences however, both as a source of precedence and due to the scale of the effects that an individually-binding measure can have on the market overall.

1.1.1. Primary and Secondary EU Law

EU law consists of its primary law, in other words the two existing Treaties, and EU secondary legislation (EU Regulations, Directives and Decisions accompanied by the non-binding Recommendations and Opinions) issued on their basis. **Primary law of the EU forms its constitutional framework** by

establishing the institutions, decision-making procedures and competences of the EU. Primary law is **created by the governments of its MS** (acting by consensus) and thus it is the most difficult type of EU law to promulgate and subsequently change. Primary law status is now also associated with the numerous annexes and protocols attached to the Treaties. Moreover, the Charter of Fundamental Rights of the EU has now gained a legally binding status through the amendments of TEU brought about by the Lisbon Treaty in most MS (but not in the UK for instance). As a result, the obligation it contains to protect human dignity has become a primary legal rule of the EU. As such, it must be observed by all and at all times. It is essential to remember that the ‘four basic freedoms of the internal market’ constitute primary legal rules of the EU.

Chronologically, the list of European Treaties includes:

- **1951 Treaty establishing the European Coal and Steel Community**
- **1957 Treaty establishing the European Economic Community (TEEC)**, known as the Treaty of Rome
Re-named in 1992 into Treaty on the European Community (TEC) by the Maastricht Treaty
Re-named in 2007 into Treaty on the Functioning of the European Union (TFEU) by the Lisbon Treaty
- 1957 Treaty establishing the European Atomic Energy Community
- 1987 Single European Act – in preparation of the EU
- **1992 Treaty on European Union (TEU)** – a new and separate Treaty introduced by the Treaty of Maastricht which contains the institutional framework and decision-making procedures of the newly created EU
- 1995 Treaty of Amsterdam – amended and renumbered the original TEC
- 2001 Treaty of Nice – focused on EU institutions
- 2007 Treaty of Lisbon – amended some of the institutional rules of TEU; somewhat amended and renamed TEC into TFEU.



EU primary law contains two separate Treaties:

- **Treaty on the European Union (TEU)** from 1992 which contains its institutional rules and
- Treaty of Rome from 1957 → revised & renamed in 1992 into Treaty on European Community (TEC) → revised & renamed by the Lisbon Treaty of 2007 = **Treaty on the Functioning of the European Union (TFEU)**

CHAPTER 2

SOCIAL OBJECTIVES

The social issues considered in the *Mediawet I* case and their relationship with the freedom to provide broadcasting services in Europe provide a good introduction to the following discussion. Chapter 2 will be devoted to EU initiatives taken in the European Audiovisual Sector (EAS) in order to ensure that essential social values continue to enjoy a minimal common level of protection in light of growing market integration. This Chapter will focus on the AVMSD, the EU's most important legal instrument formulated specifically to shape its audiovisual field. Other acts will also be noted including the Charter of Fundamental Rights of the European Union (hereafter: Charter) as well as some important soft laws that either precede or complement binding EU legislation. The latter includes most importantly the *Communication from the Commission on the protection of consumers, in particular minors* (hereafter: *Video Games Communication*).

Communication from the Commission on the future of European regulatory audiovisual policy states that aside from its primary economic goals, the EU also **safeguards** certain public interests that are of particular relevance to the EAS. The list of social values protected within the framework of the European Audiovisual Policy (EAP) includes:_

- **Europe's cultural diversity**
- **right to information & media pluralism**
- **protection of minors**
- **consumer protection** in their capacity as viewers
- creation of an **'informed' digital society**
- **media literacy**

Some of these social objectives, such as media literacy for instance, are pursued mostly by way of non-binding instruments of EU intervention. Others, most of all the protection of minors and consumers in their capacity as viewers, are pursued with the help of the legally binding Audiovisual Media Services Directive (AVMSD). Indeed, the Directive explicitly states

that its objective is to create an area without internal frontiers for audiovisual media services (AMSs) ensuring simultaneously a high level of protection of general interest objectives. The latter include the protection of minors and human dignity and the facilitation of the rights of disabled viewers/users. (*Preamble 12AVMSD*)

There is no doubt that **PATERNALISM**, in other words **actions** taken by public authorities, national or international, **intended to keep individuals from harm even against their wishes** (eg the prohibition of the sale of alcohol to minors or the obligation to wear seatbelts), is a necessity of modern life. Many of the goods (eg cigarettes or diet products) and services (eg tattoos or violent video games) readily available both in retail shops and on-line can seriously harm the health & safety as well as the social wellbeing of their users. It is not surprising therefore that the EU has taken extensive steps intended to ensure a certain level of ‘social responsibility’ of all AMSs available in Europe. These measures are meant to protect non-commercial interests of EU citizens such as their dignity, safety or access to key information. These actions are complemented by initiatives intended to protect its citizens in their capacity as viewers – where their ‘consumer interests’ might be endangered by the interests of those providing audiovisual commercial communications. In this context, **the Directive aims to**

- **ensure that all AMSs are ‘socially responsible’**
- **minors are not endangered**
- **consumer interests are not excessively restricted in relation to audiovisual commercial communications**
- **access to important content is not unduly precluded**

The consolidated version of the text of the Directive issued in January 2010 divides its provisions primarily according to the types of services it covers. Aside from its general provisions, it contains rules concerning all AMSs (with a special division for audiovisual commercial communications), provisions applicable to on-demand services only, rules on sponsoring and product placement and finally, provisions concerning the TV environment. The arguable advantage of such categorisation (making it easy to identify which rules apply to which types of services) is largely lost however because the rules of the Directive had to be transposed into national legislation. A classification following the specific goals to be achieved by the AVMSD could have proven easier to follow for individuals at least (private or commercial).

Chapter 2 will follow a ‘goal oriented’ categorisation in order to clearly identify the effects which the AVMSD is meant to achieve. Focusing on the key objectives of EU legislation not only reflects the fundamental characteristics

PART II

INTERNAL GROWTH – EXTERNAL STRENGTH

The creation of an internal market that respects key social values of the EU is without a doubt the primary purpose of its harmonisation initiatives in this field. However, merely creating an internal market does not necessarily make it effective in achieving the underlying socio-economic aims of positive integration. In other words, eliminating internal borders in audiovisual trade is unlikely to single-handedly increase consumer welfare to the expected level. The following discussion will be based on the assumption therefore that **economic integration** in the audiovisual field **can only then be effective if the resulting internal market is strong enough** overall to be externally independent and competitive (competitive ‘on the outside’) **and subject to internal competition** (competitive ‘on the inside’)

EU actions meant to facilitate and protect competition within the sector are covered in PART III of this book. Suffice to say at this point that the concept of ‘internal’ competitiveness of the EAS concerns the level and condition of competition found on particular audiovisual markets – it focuses on their internal workings and consumer benefits associated with the existence of effective competition therein. In this context, EU interventions:

- have an economic focus usually associated with state aid and competition law regimes (surrounding the notion of effective competition)
- have mainly a supervising and, if necessary, penalising character
- concern business and public bodies irrespective of their origin as long as they affect competition on EU markets – on the basis of objective criteria without recourse to preferential treatment
- tend to be tailor-made to their recipients – seeing however that they are usually directed to major companies (necessary trading partners to many other market players), they frequently have far reaching market consequences

PART II will be devoted to the far more intuitive relationship between **EU support of the internal growth and external strength of the EAS** or, in the words of the MEDIA I programme, **stimulating its competitive supply capacity**. The fact that such support exists is unarguable. The EU secures

substantial and secure demand for EU content. It continues to help fund its creation and distribution. It also works behind the scenes to advance Europe's technological development for the benefit of both businesses and individuals. But why are all these initiatives taken on the EU level? Are these socially driven actions in aid of its cultural diversity? Or is their primary purpose to be found in economic considerations? In other words, is the EU trying to sever its dependence on the imports of mass appeal foreign content for our 'social' or 'economic' good?

It is most likely that the **EU aims to achieve social and economic gains simultaneously** in the EAS and it is often impossible to separate them. Importantly, the two types of goals are not exclusive: the pursuit or achievement of one by no means precludes the other. Moreover, the same objective can be reached through different policy instruments while the same instrument can be used to achieve multiple goals. It is assumed in this context that citizens will benefit 'socially' from access to more European content → more demand for European content will in turn facilitate the economic growth of its production facilities → which will in turn benefit EU citizens 'economically' in terms of jobs and GDP. Similarly, EU led technological advancements will carry with them important benefits in the 'social' realm (such as growing inclusiveness) but carry with it significant 'economic' gains also.

This analysis will focus on those EU initiatives that directly and actively **facilitate the strengthening of the economic potential of the EAS as a whole, without negating the fact that they often also result in important social benefits.** In this context, EU interventions tend to:

- have a distinctly socio-economic focus which stresses the advantages of stronger EU production and distribution capacity for its social & cultural as well as economic growth and general welfare of the entire EU
- have a supporting and co-ordinating character in most cases
- benefit 'European' audiovisual businesses & professionals: preferential treatment is given to what is 'European' as opposed to 'national' or 'foreign'
- apply to the market on general terms: their positive effect on the sector as a whole is associated with a commutation of small but widespread support

As a result, Part II will cover EU efforts that strengthen the EAS both internally (internal growth) and externally (competitive potential). Chapter 3 will cover legally binding transmission quotas set out in the Directive which secure demand for European content and the extensive means of financial support available to the production and distribution of European content. Chapter 4 will be devoted to the variety of instruments used by the EU to facilitate the switch-over from analogue to digital transmission.

EU SUPPORT TO THE AUDIOVISUAL SECTOR

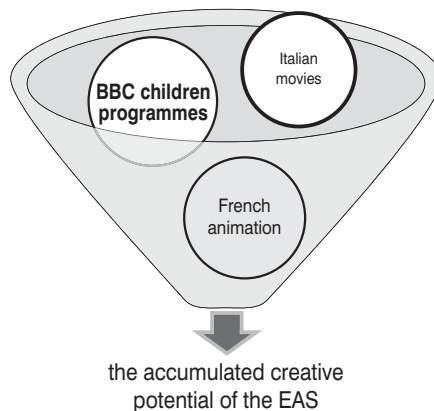
The origins of direct EU actions which have strengthened the EAS can be traced back to the end of the 1980s. Free movement has done little in terms of market integration and economic growth. The European audiovisual field continued to suffer from fragmentation in content production and distribution as well as from limited mobility of scarce resources. Technological growth was in most MS limited to increasing penetration of cable and satellite TV – their creative segments were lagging far behind. The EAS of the 1980s thus demanded more and more content to satisfy the growing ‘appetite’ of EU viewers but supplied little of its own.

Technological divisions, such as geographically motivated differences in the penetration of cable TV, are largely unavoidable in the audiovisual field. Other than that, it was Europe’s **CULTURAL DIVERSITY** that was **causing persistent market fragmentation** alongside national borders. Differences in language, heritage and tastes acted as a social road block to economic integration and thus, to an overall growth of the audiovisual field. All this changed with the onset of convergence and mass digitalisation of the 1990s. It was at this point in time that growing demand for mass-appeal content was complemented by an ever increasing demand for special interest (minority) programming. The EU swiftly recognised the huge economic potential of its cultural diversity in this respect seeing as it gave the EAS as a whole the ability to deliver an infinitely wide range of varied content. The EAS had thus the potential to contribute to fulfilling global demand for special interest programmes such as minority sports, culinary programmes, or high culture events.

From then on, the EU has found a new focus – rather than a hindrance to market integration, cultural diversity and creative fragmentation were **recognised as an economic advantage of the EAS as a whole**. This realisation was particularly important from the ‘external’ point of view. The EU long since realised the difficulties experienced by the EAS in the context of global competition. At the end of the 1980s, Europe’s deficit in audiovisual

trade was truly vast. It was not an exaggeration to say that the then limited capacity of European TV was flooded by non-EU programmes which were desirable because of their appeal and often low purchase price. Indeed, foreign content was often cheaper than that created or acquired locally and thus it was more economical for broadcasters to create their own programming or shop away-from-home. For instance, US productions enjoyed significant economies of scale in terms of content creation (as opposed to the fragmented and often very small domestic production capacities of particular MS) and intentional distribution. This fact stood in stark opposition to European-made programmes which have very little appeal outside the country or region of their source. Limited viewing figures, and thus low advertising or subscription revenues, generally discouraged European broadcasters from investing in local content.

To achieve market integration in general and to overcome the specific problems of the EAS in particular, the EU introduced the aforementioned instruments of positive integration meant to actively facilitate the creation of an internal market AMSs. However, they did not prove sufficient to overcome the economic weakness of the sector. However, rather than remain passive in accepting the unquestionable social right of its MS to preserve their national identities with its unavoidable separatist effect, the EU has decided to take steps to **support the EAS as a whole, embracing its cultural diversity as a reflection of its creative potential.**



By facilitating the creation and encouraging the consumption of European-made content internally, the EU has started to **PRO-ACTIVELY foster the internal growth of the EAS**. First, MS were required to force their broadcasters to make or acquire more European content. Second,

TECHNOLOGICAL ADVANCEMENT

While its key social importance cannot be denied, the audiovisual sector is only a single one out of the many segments of the EU economy. European works transmission quotas and the MEDIA programme are both instruments designed specifically for the needs of the EAS. In parallel, the EU is engaging however in many other far more widespread initiatives which are either directly or indirectly meant to support the internal growth of its economy. Current policy goals are expressed in the new **Europe 2020 Strategy to promote smart, sustainable and inclusive growth** introduced in 2010. In its framework, the Commission addresses the current economic crisis and some of the challenges expected further ahead. The Strategy focuses on creating new employment opportunities in the EU, on fostering a sustainable economy and supporting social **COHESION**. The latter concept, understood here as unified/balanced development, is closely related to the term **INCLUSIVENESS** which concerns efforts to ensure that no part of the EU society is excluded from the benefits associated with progress. Both concepts are closely linked with Europe's **REGIONAL POLICY** that has traditionally addressed its internal disparities by transferring very large EU funds to under-developed regions.

Europe 2020 has seven key initiatives including, most importantly here, the **Digital Agenda for Europe** (hereafter: DAE) which strongly **emphasises the key role of ICT** for Europe's economic and social development until 2020. The DAE aims to maximise the use of the Internet for the benefit of business as well as individuals. Indeed, the roles of the Internet cannot be underestimated seeing as it provides a unique possibility to develop new business models & employment opportunities, novel forms of entertainment & communications, better social & cultural services and enhanced information access. The Agenda is thus explicitly designed to 'spur innovation, economic growth and improvements in daily life for both citizens and businesses' by facilitating Europe's technological advancement.

Alongside the tailor-made aid given to audiovisual production and distribution companies, the internal growth of the EAS is greatly facilitated by EU support of the ICT field in general. ICT constitutes the technological backbone of the audiovisual sector, it is however equally important to Telecoms and Communications as well as all other converging industries. The importance of ICT goes however far beyond the relationship between technology and network-based economies. ICT can be an important contributing factor to solving some of the most challenging social problems of our age, such as: unemployment; education; health; environmental protection; the preservation of cultural heritage; and current limitations in the availability of public services. EU support of the ICT field is thus fuelled by a mixture of **social and economic reasons exemplified by: social inclusiveness** – ensuring that all EU citizens can benefit from the advancements associated with progressing digitalisation and convergence – and **maximising the unprecedented economic potential of ICT-based economy**. It is not surprising therefore that EU support to technological growth is by no means limited to the EAS but extends over its entire social and economic sphere from digitalisation of cultural material, though e-health to the interoperability of communications networks.

In practice, EU support of the ICT field is based on a **mixture of POLICY DOCUMENTS and financial instruments**. Its numerous ICT Communications & Strategies identify the social & economic challenges being addressed by the EU at any given time as well as the objectives being sought. These goals are then pursued with the help of an extensive array of **FINANCIAL INSTRUMENTS** which ‘inject’ considerable EU funds into the ICT field. EU funds are available to innovative European ICT projects, which have the potential to aid the technological advancement of the EU economy in comparison to its global competitors. They are also widely available to under-developed regions, which aid the technological advancement of areas that must catch up with the rest of the European economy. The former is thus meant to push the EU economy forward, the latter is meant to close existing technological development gaps between various EU regions.

European support to the ICT field is distributed in the framework of three separate initiatives:

- **the Competitiveness and Innovation Framework Programme** (the so-called **CIP**) which provides financial support to innovative market implementation and facilitation initiatives which includes the **Information and Communication Technologies Policy Support Programme** (the so-called **ICT PSP**)

PART III

INTERNAL COMPETITIVENESS

Competition is the essence of economic freedom – it reflects the free & fair rivalry of independent firms. Competition is also the basis of economic effectiveness and consumer welfare. **FREE COMPETITION** is associated with **markets void of unnecessary state intervention (Smith)** as well as **free from interference from other market players (Hoppmann)**. Free competition, however, is a largely unobtainable goal in modern economies. There are a growing number of social values considered basic by most consumers, such as access to key information for instance. The need to accommodate social goals frequently used to justify limits being placed by the State (eg the rightful owner of the copyright in a major sporting event might be precluded from selling the live transmission rights to a pay TV operator) and sometimes even by other undertakings (eg a downstream competitor ‘forcing’ access to infrastructure) on the individual freedom of economic activity.

Pro-competitive EU intervention is generally based on a somewhat different concept of **EFFECTIVE COMPETITION** deriving from the 1940 theory of workable competition (Clark). The level of competition within a market is seen as effective if it is **capable of ensuring the achievement of the primary goals of European Treaties (TFEU & TEU)**. The concept of effective competition is thus closely related to the so-called **‘practical logic’ of competition protection** whereby effective competition is protected by controlling market power and preventing its creation or increase. Practical logic is based on the assumption that market power will profitably deprive consumers of the benefits resulting from effective competition. The enforcement of European competition law is thus based on the assumption that **effective competition benefits consumers** in terms of

- lower prices
- higher quality of products / services
- great choice = a wide selection of goods / services
- more innovation & progress

As it was shown above, the EU takes many actions to enable its citizens to benefit from a safe, inclusive, creative and innovative internal market in AMSs. To ensure their long-term effectiveness, these initiatives are

accompanied by extensive **EU interventions meant to ensure that the EAS remains competitive within** (internal competitiveness). In other words, the EU takes direct actions to preserve, and at times even actively create, competition within particular European audiovisual markets. Those actions are **based on its STATE AID rules** primarily as they are applied to Public Service Broadcasting (the EU aims here to minimise competition distortions resulting from the selective financing of a given PSB by its MS); **and European COMPETITION LAW (ECL)** applicable to anticompetitive agreements, abuse of dominance & mergers (the EU aims here to protect internal competition from market forces).



The notion of 'free competition' is not completely alien to the EU seeing as Article 119 TFEU speaks of the economic policies of the EU and MS being 'conducted in accordance with the principle of an open market economy with free competition'.

- EU interventions meant to protect the 'internal' competitiveness of the EAS:
- concern the level (how much competition is present) and condition (how effective is existing competition) of competition on particular markets
 - remain focused on competition but also directly consider socio-political aims such as media plurality and thus;
 - explicitly acknowledge the exclusive competence of MS to organise and finance their PSBs in order to ensure inherently national socio-political objectives such as fostering national identity and an informed citizenship
 - tend to have a supervising and, when necessary, penalising character
 - concern all entities irrespective of their territorial origin or legal standing as long as their actions influence the internal competitiveness of the EAS
 - are based on objective criteria, they do not favour one type of undertaking over another merely on the basis of its territorial origin
 - tend to be tailor-made to their recipients – their widespread influence on the sector can be traced back to the market position of their recipients
- MS intervene into the internal workings of their domestic audiovisual markets on the basis of national Media Laws and Competition law regimes. By doing so, they protect 'national' social (eg media plurality) & economic interests. Market practices with competition effects limited to localised

PUBLIC SERVICE BROADCASTING, STATE AID & SERVICES OF GENERAL ECONOMIC INTEREST

Most of the European Audiovisual Policy instruments presented in PART I and II of this book foster the cultural diversity of the EAS and facilitate its internal growth & external strength. This realisation is true irrespective of whether diversity is seen as its ‘goal’ or ‘means’. Does the EU foster diversity to facilitate economic strength? Does it help the economy in order to aid culture? There can be no doubt that the EU pro-actively supports its diversity by securing internal demand for locally made programmes, preventing content foreclosure and funding support. Indeed, the EU is well aware of the socio-political inevitability as well as the economic potential of cultural diversity for the future of the EAS. However, **Europe’s cultural diversity is the sum of the national identities and heritage of all its MS.**

Fostering the identities and heritage of each and every European nation remains the prerogative of its MS. Domestic funding schemes are often used for that purpose as an equivalent of the MEDIA programme. Unlike the policy instruments available to the EU however, **MS use PUBLIC SERVICE BROADCASTING as a key means of reaching their media & cultural policy goals.** The EU acknowledges the role of Public Service Broadcasters (PSBs) for the socio-political well being of its nations. Thus, despite the often competition-distorting effects of their financing structures, the EU accepts the continuing existence of PSBs primarily because of their role in **fostering Europe’s cultural diversity**, albeit in a more indirect way than the pro-active instruments mentioned above.

MEDIA PLURALISM constitutes one of the many aspects of cultural diversity. It is a concept closely related to the freedom of expression which associates diversity with a ‘difference of opinion’, as opposed to cultural heritage for instance. In other words, media pluralism is the **basis for cultural diversity when the diversity of opinion derives from varying**



EU acceptance of public broadcasting is controversial seeing as their existence contradicts some of its foundations:

- the quintessentially 'national' character of PSBs **reinforces borders within the internal market**
- selective **state funding of PSBs can distort competition on an EU-scale**

cultural backgrounds. Media plurality is a derivative of one of the most basic social freedoms of our time – the freedom of expression which encompasses an active portrayal of diverging world views as well as their passive communication to the audience. While there can be no doubt that **private media outlets contribute to pluralism**, it is generally assumed that **an adequate level of media plurality can be ensured only by the continuing existence of PSBs.** The latter are meant to counterbalance the influence exercised on the offer of private MSPs by their profit-making character.

Truthfulness, objectively, quality, and comprehensiveness of media coverage are all requirements associated with the active side of the freedom of expression. They constitute the quintessential goals of national media/press laws and thus lie outside the scope of this book. What is relevant to this analysis is the passive side of the freedom of expression as it is reflected in media plurality – **ensuring that the audience can access all types of programming.** Private operators generally offer mass appeal content only, such as popular sports, movies, or drama series. It is traditionally the role of PSBs to fill the gaps, providing the audience with minority programming such as high culture events, documentaries, or less popular sports. It is to fulfil this very purpose that they receive most of their public funds.

Truthfully, it is easy to negate the programming difference between public and private broadcasters considering recent growth in special interest channels. It is equally true however that some parts of EU society, the elderly for instance, do not possess the means or indeed ability to effectively use pay-TV. Seeing as **some parts of the European audience continue to rely solely on PSBs as the most accessible form of TV broadcasting**, the programming gap remains relevant to this analysis. At the same time however, media pluralism is used by PSBs to justify their increasing presence in the on-demand environment. For this reason, the need to ensure pluralism has become a key social consideration not just for broadcasting but for an increasing number of audiovisual markets.

EUROPEAN COMPETITION LAW

The EAS is rapidly developing in both technological and creative terms. Its economic potential is among the greatest the economy has to offer, especially with respect to content creation and broadband development. Nevertheless, the EAS is likely to remain a somewhat divided economic field. Some partitioning can never be eliminated due to its inherent language differences for instance. Other divisions persist for socio-political reasons such as the particularly strict minors' protection rules applicable to video games in Germany which affect their circulation in its territory only. Despite its cultural diversification, **increasingly many factors encourage cross-border expansion in the EAS persuading private undertakings to exploit the possibilities created by the internal market.** They include:

- the right/ability to do so thanks to the abolition of legal, administrative, and regulatory rules in light of the impact exercised by the TWFD/AVMSD
- major cost savings associated with the use of the same infrastructure for the provision of complementary services
- widespread financial (and other) support offered by the EU
- the advantage or even necessity of technological and territorial expansion in light of increasing convergence
- lower economic risk thanks to a wider spread of business activities
- legal advantages, for instance, where copyright is concerned

Unchecked market expansion tends to result in high market concentration levels, in other words, it can easily create market power. This type of 'internal' growth can increase the supply capacity of the EAS and thus strengthen it externally but it can also endanger competition 'within' the internal market. High concentration levels tend to be detrimental to consumers because they usually fail to deliver the optimal price versus quality ratio, can hinder innovation, and increase market transparency which can in turn induce collusion (cartels). In other words, **if business**

practices taking place in the internal market were to go unchecked, the level and effectiveness of its ‘internal’ competitiveness would be likely to suffer. Despite potential benefits in external terms, the lack of competition ‘within’ the internal market **would become a major hindrance to the welfare of EU citizens** in the long term. Its negative effect would be felt both economically (market power tends to result in price rises) and socially (concentration tends to limit diversity).

6.1. General Considerations

In order to understand the influence that can be exercised on the internal market by way of ECL it is first necessary to address a number of general questions:

- What is ECL?
- What is the purpose of ECL?
- Who is subject to ECL?
- What practices are covered by ECL?
- What is ECL’s jurisdictional reach and what criteria are used to decide it?

6.1.1. Scope of ECL

ECL is part of the overall legal system of the EU. It **comprises Article 101 and 102 TFEU as well as Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings – the Merger Regulation (hereafter: MR)**. The legal rules that form the core of ECL have the status of primary EU law. ECL constitutes primary EU law. It is directly applicable in the entire EU. If a conflict arises, ECL takes precedence before equivalent national competition rules.

The primary rules of ECL are complemented by several important acts of **secondary legislation**. Key among them is *Council Regulation 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* and *Commission Regulation 802/2004 of 7th April 2004 implementing Council Regulation 139/2004 amended by Commission Regulation 1033/2008 of 20th October 2008* which set out the procedural conditions necessary for the enforcement of Article 101 & 102 TFEU and the MR respectively. The relatively sparse legal rules of ECL are greatly expanded on by the **jurisprudence of EU courts** as well as a number of **soft laws** issued over the years by the European Commission. Many key aspects of ECL derive from jurisdictional developments rather than

APPENDICES

LIST OF KEY INTERNET SOURCES

European Treaties: TFEU & TEU

<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>

Secondary Law

http://europa.eu/about-eu/basic-information/decision-making/legal-acts/index_en.htm

Court of Justice of the EU

http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm

Free Movement – Internal Market

http://ec.europa.eu/internal_market/top_layer/index_1_en.htm

Audiovisual Media Service Directive

http://ec.europa.eu/avpolicy/reg/avms/index_en.htm

Information Society and Media Directorate General

http://ec.europa.eu/dgs/information_society/index_en.htm

European Audiovisual Policy

http://ec.europa.eu/avpolicy/index_en.htm

Fundamental Rights Chapter

http://fra.europa.eu/fraWebsite/your_rights/eu-charter/eu-charter_en.htm

Minors & Video Games

http://ec.europa.eu/avpolicy/reg/minors/video/index_en.htm

European Games Developer Federation

<http://www.egdf.eu/>

Major Events in Particular Member States

http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events_list/index_en.htm

European Works

http://ec.europa.eu/avpolicy/reg/tvwf/implementation/promotion/index_en.htm

MEDIA 2007 programme

http://ec.europa.eu/culture/media/programme/overview/2007/index_en.htm

Europeana

www.europeana.eu

Culture

http://ec.europa.eu/culture/index_en.htm

7th Research Framework Programme

http://cordis.europa.eu/fp7/home_en.html

ICT

<http://cordis.europa.eu/fp7/ict/>

ICT PSP

http://ec.europa.eu/information_society/activities/ict_psp/index_en.htm

DigiCult

http://cordis.europa.eu/fp7/ict/telearn-digicult/home_en.html

GAMES@LARGE

<http://www.gamesatlarge.eu/>

I3DPOST: intelligent 3D content extraction and manipulation for film and games

<http://www.i3dpost.eu/>

Public Service Broadcasting

http://ec.europa.eu/avpolicy/reg/psb/index_en.htm

State Aid

http://ec.europa.eu/competition/state_aid/overview/index_en.html

Services of General Economic Interest

http://ec.europa.eu/competition/state_aid/legislation/sgei.html

2009 PSB Communication

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC1027\(01\):EN](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC1027(01):EN)

:NOT

State aid Cases in the EAS

http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf

ECL – Restrictive Practices : Article 101 & 102 TFEU

http://ec.europa.eu/competition/antitrust/overview_en.html

ECL – Regulation 1/2003

<http://ec.europa.eu/competition/antitrust/legislation/regulations.html>

ECL – Mergers

<http://ec.europa.eu/competition/mergers/legislation/legislation.html>

ECL in the EAS

http://ec.europa.eu/competition/sectors/media/overview_en.html

ECL Cases in the EAS

<http://ec.europa.eu/competition/sectors/media/cases.html>

Treaty on the Functioning of the European Union

TITLE VII COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

CHAPTER 1 RULES ON COMPETITION

SECTION 1 RULES APPLYING TO UNDERTAKINGS

Article 101 (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 103 (ex Article 83 TEC)

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.
2. The regulations or directives referred to in paragraph 1 shall be designed in particular:
 - (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;
 - (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
 - (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;
 - (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;
 - (e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

Article 104 (ex Article 84 TEC)

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Article 105 (ex Article 85 TEC)

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate

- cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.
2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.
 3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

Article 106 (ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

SECTION 2 AIDS GRANTED BY STATES

Article 107 (ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
2. The following shall be compatible with the internal market:
 - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
 - (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
3. The following may be considered to be compatible with the internal market:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 108 (ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.
2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

PROTOCOLS

PROTOCOL (No 26) ON SERVICES OF GENERAL INTEREST

THE HIGH CONTRACTING PARTIES,
WISHING to emphasise the importance of services of general interest,
HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

PROTOCOL (No 27) ON THE INTERNAL MARKET AND COMPETITION

THE HIGH CONTRACTING PARTIES,

CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,

HAVE AGREED that:

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

PROTOCOL (No 29) ON THE SYSTEM OF PUBLIC BROADCASTING IN THE MEMBER STATES

THE HIGH CONTRACTING PARTIES,

CONSIDERING that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism,

HAVE AGREED UPON the following interpretive provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.

AUDIOVISUAL MEDIA SERVICES DIRECTIVE

THE EUROPEAN PARLIAMENT THE COUNCIL
Brussels, 26 January 2010

DIRECTIVE 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) (codified version)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EU,
Having regard to the Treaty on the Functioning of the European Union, and in particular
Articles 53(1) and 62 thereof,
Having regard to the proposal from the European Commission,
Acting in accordance with the ordinary legislative procedure¹,
1 Position of the European Parliament of 20 October 2009 (not yet published in the
Official Journal) and Council Decision of

Whereas:

- (1) Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 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) has been substantially amended several times. In the interests of clarity and rationality the said Directive should be codified.
- (2) Audiovisual media services provided across frontiers by means of various technologies are one of the ways of pursuing the objectives of the Union. Certain measures are necessary to permit and ensure the transition from national markets to a common programme production and distribution market, and to guarantee conditions of fair competition without prejudice to the public interest role to be discharged by the audiovisual media services.
- (3) The Council of Europe has adopted the European Convention on Transfrontier Television.
- (4) In the light of new technologies in the transmission of audiovisual media services, a regulatory framework concerning the pursuit of broadcasting activities should 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 should 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.
- (5) 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.
 - (6) Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action under other provisions of that Treaty, in particular in order to respect and to promote the diversity of its cultures.
 - (7) In its resolutions of 1 December 2005¹ and 4 April 2006² on the Doha Round and on the WTO Ministerial Conferences, the European Parliament called for basic public services, such as audiovisual services, to be excluded from liberalisation under the General Agreement on Trade in Services (GATS) negotiations. In its resolution of 27 April 2006³, the European Parliament supported 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”. Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions⁴ approved the Unesco Convention on behalf of the Community. The Convention entered into force on 18 March 2007. This Directive respects the principles of that Convention.
 - (8) It is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole.
 - (9) This Directive is without prejudice to existing or future Union acts of harmonisation, in particular to satisfy mandatory requirements concerning the protection of consumers and the fairness of commercial transactions and competition.
 - (10) Traditional audiovisual media services — such as television — and emerging on-demand audiovisual media services offer significant employment opportunities in the 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 market for audiovisual media services, the basic principles of the internal market, such as free competition and equal treatment, should be respected in order to ensure transparency and predictability in markets for audiovisual media services and to achieve low barriers to entry.
 - (11) It is necessary, in order to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to

- all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services).
- (12) On 15 December 2003 the Commission adopted a Communication on the future of European regulatory audiovisual policy, in which it stressed that regulatory policy in that sector has to safeguard certain public interests, such as cultural diversity, the right to information, media pluralism, the protection of minors and consumer protection, and to enhance public awareness and media literacy, now and in the future.
 - (13) The Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting¹, reaffirmed that the fulfilment of the mission of public service broadcasting requires that it 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.
 - (14) The Commission has adopted the initiative “i2010: European Information Society” to foster growth and jobs in the information society and media industries. This 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 society services 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. The goal of the i2010 initiative 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.
 - (15) The European Parliament adopted on 4 September 2003¹, 22 April 2004² and 6 September 2005³ resolutions which in principle supported the general approach of basic rules for all audiovisual media services and additional rules for television broadcasting.
 - (16) 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 should 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.
 - (17) This Directive should not affect the obligations on Member States arising from the application of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services. Accordingly, draft national measures applicable to on-demand audiovisual media services of a stricter or more detailed nature than those which

are required to simply transpose Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 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 activities² should be subject to the procedural obligations established under Article 8 of Directive 98/34/EC.

- (18) 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) according to its Article 1(3) is without prejudice to measures taken at Union or national level to pursue general interest objectives, in particular relating to content regulation and audiovisual policy.
- (19) This Directive does not affect the responsibility of the Member States and their authorities with regard to the organisation — including the systems of licensing, administrative authorisation or taxation —, the financing and the content of programmes. The independence of cultural developments in the Member States and the preservation of cultural diversity in the Union therefore remain unaffected.
- (20) 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.
- (21) For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting 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. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should 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.
- (22) For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which 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, short advertising spots or information related to a product or non-audiovisual service. For these reasons, 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, should also be excluded from the scope of this Directive.

- (23) For the purposes of this Directive, the term “audiovisual” should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive, which should not affect the freedom of the Member States to regulate such services at national level in accordance with the Treaty on the Functioning of the European Union.
- (24) It is characteristic of on-demand audiovisual media 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. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of “programme” should be interpreted in a dynamic way taking into account developments in television broadcasting.
- (25) The concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the concept of “effective control”, when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in 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 (Directive on electronic commerce).
- (26) For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.
- (27) Television broadcasting currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example, is an on-demand audiovisual media service. In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast, i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.
- (28) The scope of this Directive should not cover electronic versions of newspapers and magazines.
- (29) All the characteristics of an audiovisual media service set out in its definition and explained in Recitals 20 to 27 should be present at the same time.
- (30) In the context of television broadcasting, the concept of simultaneous viewing should also cover 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.
- (31) A wide definition of audiovisual commercial communication should be laid down in this Directive, which should not however include public service announcements and charity appeals broadcast free of charge.
 - (32) For the purposes of this Directive, “European works” should be defined without prejudice to the possibility of Member States laying down a more detailed definition as regards media service providers under their jurisdiction, in compliance with Union law and account being taken of the objectives of this Directive.
 - (33) The country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market. This principle should 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.
 - (34) In order to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the Union, only one Member State should have jurisdiction over an audiovisual media service provider and pluralism of information should be a fundamental principle of the Union.
 - (35) The fixing of a series of practical criteria is designed to determine by an exhaustive procedure that only one Member State has jurisdiction over a media service provider in connection with the provision of the services which this Directive addresses. Nevertheless, taking into account the case-law of the Court of Justice of the European Union and so as to avoid cases where there is a vacuum of jurisdiction, it is appropriate to refer to the criterion of establishment within the meaning of Article 49 to 55 of the Treaty on the Functioning of the European Union as the final criterion determining the jurisdiction of a Member State.
 - (36) The requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Union law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States. However, the receiving Member State may, exceptionally and under specific conditions, provisionally suspend the retransmission of televised broadcasts.
 - (37) Restrictions on the free provision of on-demand audiovisual media services should only be possible in accordance with conditions and procedures replicating those already established by Articles 3(4), (5) and (6) of Directive 2000/31/EC.
 - (38) Technological developments, especially with regard to digital satellite programmes, mean that subsidiary criteria should be adapted in order to ensure suitable regulation and its effective implementation and to give players genuine power over the content of an audiovisual media service.
 - (39) As this Directive concerns services offered to the general public in the 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.
- (40) Articles 49 to 55 of the Treaty on the Functioning of the European Union lay down the fundamental right to freedom of establishment. Therefore, media service providers should in general be free to choose the Member States in which they establish themselves. The 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.
- (41) Member States should be able to apply more detailed or 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 Union law. In order 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 Court of Justice, combined with a more efficient procedure, would be an appropriate solution that takes account of Member State concerns without calling into question the proper application of the country of origin principle. The concept 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 EC Treaty (now Articles 49 and 56 of the Treaty on the Functioning of the European Union) and includes, inter alia, rules on the protection of consumers, the protection of minors and cultural policy. The Member State requesting cooperation should ensure that the specific national rules in question are objectively necessary, applied in a non-discriminatory manner and proportionate.
- (42) 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 television 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.
- (43) Under this Directive, notwithstanding the application of the country of origin principle, Member States may still take measures that restrict freedom of movement of television broadcasting, but only under the conditions and following the procedure laid down in this Directive. However, the Court of Justice has consistently held that any restriction on the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively¹.
- (44) In its Communication to the European Parliament and to the Council on Better Regulation for Growth and Jobs in the European Union, the Commission stressed that a careful analysis of the appropriate regulatory approach is necessary, in particular, in order to establish 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-regulation

and self-regulation instruments, implemented in accordance with the different legal traditions of the 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 are 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 role which effective self-regulation can play as a complement to the legislative 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 should not constitute a substitute for the obligations 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 allow for the possibility of State intervention in the event of its objectives not being met. Without prejudice to formal obligations of the Member States regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co-regulation and/or self-regulatory regimes nor disrupt or jeopardise current co-regulation or self-regulatory initiatives which are already in place within Member States and which are working effectively.

- (45) 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 media service provider. 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 Union law.
- (46) The right of persons with a disability and of the elderly to participate and be integrated in the social and cultural life of the Union is inextricably linked to the provision of accessible audiovisual media services. The means to achieve accessibility should include, but need not be limited to, sign language, subtitling, audio-description and easily understandable menu navigation.
- (47) “Media literacy” refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people are 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 are 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 its progress followed closely. The Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to

the competitiveness of the European audiovisual and on-line information services industry¹ already contains 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.

- (48) Television broadcasting 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 Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.
- (49) It is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society, such as the Olympic Games, the football World Cup and the European football championship. To this end, Member States retain the right to take measures compatible with Union law aimed at regulating the exercise by broadcasters under their jurisdiction of exclusive broadcasting rights to such events.
- (50) It is necessary to make arrangements within a Union framework, in order to avoid potential legal uncertainty and market distortions and to reconcile the free circulation of television services with the need to prevent the possibility of circumvention of national measures protecting a legitimate general interest.
- (51) In particular, it is appropriate to lay down provisions concerning the exercise by broadcasters of exclusive broadcasting rights that they may have purchased to events considered to be of major importance for society in a Member State other than that having jurisdiction over the broadcasters. In order to avoid speculative rights purchases with a view to circumvention of national measures, it is necessary to apply those provisions to contracts entered into after the publication of Directive 97/36/EC and concerning events which take place after the date of implementation. When contracts that predate the publication of that Directive are renewed, they are considered to be new contracts.
- (52) Events of major importance for society should, for the purposes of this Directive, meet certain criteria, that is to say be outstanding events which are of interest to the general public in the Union or in a given Member State or in an important component part of a given Member State and are organised in advance by an event organiser who is legally entitled to sell the rights pertaining to those events.
- (53) For the purposes of this Directive, “free television” means broadcasting on a channel, either public or commercial, of programmes which are accessible to the public without payment in addition to the modes of funding of broadcasting that are widely prevailing in each Member State (such as licence fee and/or the basic tier subscription fee to a cable network).
- (54) Member States are free to take whatever measures they deem appropriate with regard to audiovisual media services which come from third countries and which

do not satisfy the conditions laid down in Article 2, provided they comply with Union law and the international obligations of the Union.

- (55) In order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the Union are fully and properly protected, those exercising exclusive television broadcasting rights to 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 should be able to exercise this right through an intermediary acting specifically on its behalf on a case-by-case basis. Such short extracts may be used for EU-wide broadcasts by any channel including dedicated sports channels and should not exceed 90 seconds. The right of access to short extracts should apply on a trans-frontier basis only where it is necessary. Therefore a broadcaster should first seek access from a broadcaster established in the same Member State having exclusive rights to the event of high interest to the public.

The concept of general news programmes should not cover the compilation of short extracts into programmes serving entertainment purposes. The country of origin principle should apply to both the access to, and the transmission of, the short extracts. In a trans-frontier case, this means that the different laws should be applied sequentially. Firstly, for access to the short extracts the law of the Member State where the broadcaster supplying the initial signal (i.e. giving access) is established should apply. This is usually the Member State in which the event concerned takes place. Where a Member State has established an equivalent system of access to the event concerned, the law of that Member State should apply in any case. Secondly, for transmission of the short extracts, the law of the Member State where the broadcaster transmitting the short extracts is established should apply.

- (56) The requirements of this Directive regarding access to events of high interest to the public for the purpose of short news reports should be without prejudice to 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 society¹ and the relevant international conventions in the field of copyright and neighbouring rights. Member States should facilitate access to events of high interest to the public by granting access to the broadcaster's signal within the meaning of this Directive. However, they may choose other equivalent means within the meaning of this Directive. Such means include, inter alia, granting access to the venue of these events prior to granting access to the signal. Broadcasters should not be prevented from concluding more detailed contracts.
- (57) It should be ensured that the practice of media service providers of providing their live television broadcast news programmes in the on-demand mode after live transmission is possible without having to tailor the individual programme by omitting the short extracts. This possibility should be 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.
- (58) On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive.
- (59) The availability of harmful content in audiovisual media services is a concern for legislators, the media industry and parents. There will also be new challenges, especially in connection with new platforms and new products. Rules protecting the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including audiovisual commercial communications, are therefore necessary.
- (60) Measures taken to protect the physical, mental and moral development of minors and human dignity should 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 those measures, such as the use of personal identification numbers (PIN codes), filtering systems or labelling, should thus be to ensure an adequate level of protection of the physical, mental and moral development of minors and human dignity, especially with regard to on-demand audiovisual media services. The Recommendation on the protection of minors and human dignity and on the right of reply already recognised the importance of filtering systems and labelling and included a number of possible measures for the benefit of minors, such as systematically supplying users with an effective, updatable and easy-to-use filtering system when they subscribe to an access provider or equipping the access to services specifically intended for children with automatic filtering systems.
- (61) Media service providers under the jurisdiction of the Member States should in any case be subject to a ban on the dissemination of child pornography in accordance with the provisions of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography¹.
- (62) None of the provisions of this Directive that concern the protection of the physical, mental and moral development of minors and human dignity necessarily requires that the measures taken to protect those interests should be implemented through the prior verification of audiovisual media services by public bodies.
- (63) Coordination is needed to make it easier for persons and industries producing programmes having a cultural objective to take up and pursue their activities.
- (64) Minimum requirements in respect of all public or private Union television broadcasts for European audio-visual productions have been a means of promoting production, independent production and distribution in the abovementioned industries and are complementary to other instruments which are already or will be proposed to favour the same objective.
- (65) It is therefore necessary to promote markets of sufficient size for television productions in the Member States to recover necessary investments not only by

establishing common rules opening up national markets but also by envisaging for European productions, where practicable and by appropriate means, a majority proportion in television broadcasts of all Member States. In order to allow the monitoring of the application of those rules and the pursuit of the objectives, Member States should provide the Commission with a report on the application of the proportions reserved for European works and independent productions in this Directive. For the calculation of such proportions, account should be taken of the specific situation of Greece and Portugal. The Commission should inform the other Member States of these reports accompanied, where appropriate, by an opinion taking account of, in particular, progress achieved in relation to previous years, the share of first broadcasts in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audio-visual production capacity or restricted language area.

- (66) It is important to seek appropriate instruments and procedures in accordance with Union law in order to promote the implementation of the objectives of this Directive with a view to adopting suitable measures to encourage the activity and development of European audio-visual production and distribution, particularly in countries with a low production capacity or a restricted language area.
- (67) The proportions of European works must be achieved taking economic realities into account. Therefore, a progressive system for achieving this objective is required.
- (68) A commitment, where practicable, to a certain proportion of broadcasts for independent productions, created by producers who are independent of broadcasters, will stimulate new sources of television production, especially the creation of small and medium-sized enterprises. It will offer new opportunities and marketing outlets to creative talents, to cultural professions and to employees in the cultural field.
- (69) On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively 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 of and acquisition of rights in 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 is important to re-examine regularly the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports provided for under this Directive, Member States should also take into account, in particular, 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, and the actual consumption of European works offered by such services.
- (70) When implementing Article 16, Member States should encourage broadcasters to include an adequate share of co-produced European works or of European works of non-domestic origin.

- (71) When defining “producers who are independent of broadcasters” as referred to in Article 17, 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.
- (72) Channels broadcasting entirely in a language other than those of the Member States should not be covered by Articles 16 and 17 of this Directive. Nevertheless, where such a language or languages represent a substantial part but not all of the channel’s transmission time, Articles 16 and 17 should not apply to that part of transmission time.
- (73) National support schemes for the development of European production may be applied in so far as they comply with Union law.
- (74) The objective of supporting audiovisual production in Europe can be pursued within the Member States in the framework of the organisation of their audiovisual media services, inter alia through the definition of a public interest mission for certain media service providers, including the obligation to contribute substantially to investment in European production.
- (75) Media service providers, programme makers, producers, authors and other experts should be encouraged to develop more detailed concepts and strategies aimed at developing European audiovisual fiction films that are addressed to an international audience.
- (76) It is important to ensure that cinematographic works are transmitted within periods agreed between right holders and media service providers.
- (77) The question of specific time scales for each type of showing of cinematographic works is primarily a matter to be settled by means of agreements between the interested parties or professionals concerned.
- (78) In order to allow for an active policy in favour of a specific language, Member States remain free to lay down more detailed or stricter rules in particular on the basis of language criteria, as long as those rules are in conformity with Union law, and in particular are not applicable to the retransmission of broadcasts originating in other Member States.
- (79) The availability of on-demand audiovisual media services increases consumer choice. Detailed rules governing audiovisual commercial communication for on-demand audiovisual media 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.
- (80) 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, the development of new advertising techniques and marketing innovations has created new effective opportunities for audiovisual commercial communications in traditional broadcasting services, potentially enabling them to compete better on a level playing-field with on-demand innovations.
- (81) Commercial and technological developments give users increased choice and responsibility in their use of audiovisual media services. In order to remain

proportionate with the goals of general interest, regulation should allow a certain degree of flexibility with regard to television broadcasting. The principle of separation should be limited to television advertising and teleshopping, and product placement should be allowed under certain circumstances, unless a Member State decides otherwise. However, where product placement is surreptitious, it should be prohibited. The principle of separation should not prevent the use of new advertising techniques.

- (82) Apart from the practices that are covered by this Directive, 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 market¹ applies to unfair commercial practices, such as misleading and aggressive practices occurring in audiovisual media services. In addition, 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 products², which prohibits advertising and sponsorship for cigarettes and other tobacco products in printed media, information society services and radio broadcasting, should be without prejudice to this Directive, in view of the special characteristics of audiovisual media services. Article 88(1) of 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 use³, which prohibits advertising to the general public of certain medicinal products, applies, as provided in paragraph 5 of that Article and without prejudice to Article 21 of this Directive. Furthermore, this Directive should be 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.
- (83) In order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction.
- (84) Member States, with due regard to Union law and in relation to broadcasts intended solely for the national territory which may not be received, directly or indirectly, in one or more Member States, should be able to lay down different conditions for the insertion of advertising and different limits for the volume of advertising in order to facilitate these particular broadcasts.
- (85) Given the increased possibilities for viewers to avoid advertising through the 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 not justified. While the hourly amount of admissible advertising should not be increased, this Directive should give flexibility to broadcasters with regard to its insertion where this does not unduly impair the integrity of programmes.

- (86) This Directive is intended to safeguard the specific character of European television, where advertising is preferably inserted between programmes, and therefore limits possible interruptions to cinematographic works and films made for television as well as interruptions to some categories of programmes that need specific protection.
- (87) A limit of 20 % of television advertising spots and teleshopping spots per clock hour, also applying during “prime time”, should be laid down . The concept of a television advertising spot should be understood as television advertising in the sense of point (i) of Article 1(1) having a duration of not more than 12 minutes.
- (88) It is necessary to prohibit all audiovisual commercial communication promoting cigarettes and other tobacco products including indirect forms of audiovisual commercial communication which, whilst not directly mentioning the tobacco product, seek to circumvent the ban on audiovisual commercial communication for cigarettes and other tobacco products by using brand names, symbols or other distinctive features of tobacco products or of undertakings whose known or main activities include the production or sale of such products.
- (89) It is also necessary to prohibit all 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 and to lay down strict criteria relating to the television advertising of alcoholic products.
- (90) Surreptitious audiovisual commercial communication is a practice prohibited by this Directive because of its negative effect on consumers. The prohibition of surreptitious audiovisual commercial communication should 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.
- (91) Product placement is a reality in cinematographic works and in audiovisual works made for television. In order to ensure a level playing-field, and thus enhance the competitiveness of the European media industry, rules for product placement are necessary. The definition of product placement laid down in this Directive should cover 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 free of charge, 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 should be subject to the same qualitative rules and restrictions applying to audiovisual commercial communication. The decisive criterion distinguishing sponsorship from 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 point (m) of Article 1(1) contains the word “within”. In contrast, sponsor references may be shown during a programme but are not part of the plot.

- (92) Product placement should, in principle, be prohibited. However, derogations are appropriate for some kinds of programme, on the basis of a positive list. A Member State 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 in that Member State.
- (93) Furthermore, sponsorship and product placement should be 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.
- (94) In accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, 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.
- (95) Close cooperation between competent regulatory bodies of the Member States and the Commission is necessary to ensure the correct application of this Directive. Similarly close cooperation between Member States and between their regulatory bodies is particularly important with regard to the impact which broadcasters established in one Member State might have on another Member State. Where 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.
- (96) It is necessary to make clear that self-promotional activities are a particular form of advertising in which the broadcaster promotes its own products, services, programmes or channels. In particular, trailers consisting of extracts from programmes should be treated as programmes.
- (97) Daily transmission time allotted to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from these, or to public service announcements and charity appeals broadcast free of charge, should not be included in the maximum amounts of daily or hourly transmission time that may be allotted to advertising and teleshopping.
- (98) In order to avoid distortions of competition, this derogation should be limited to announcements concerning products that fulfil the dual condition of being both ancillary to and directly derived from the programmes concerned. The term “ancillary” refers to products intended specifically to allow the viewing public to benefit fully from, or to interact with, these programmes.
- (99) In view of the development of teleshopping, an economically important activity for operators as a whole and a genuine outlet for goods and services within the Union, it is essential to ensure a high level of consumer protection by putting in place appropriate standards regulating the form and content of such broadcasts.

- (100) It is important for the competent national authorities, in monitoring the implementation of the relevant provisions, to be able to distinguish, as regards channels not exclusively devoted to teleshopping, between transmission time devoted to teleshopping spots, advertising spots and other forms of advertising on the one hand and, on the other, transmission time devoted to teleshopping windows. It is therefore necessary and sufficient that each window be clearly identified by optical and acoustic means at least at the beginning and the end of the window.
- (101) This Directive should apply to channels exclusively devoted to teleshopping or self-promotion, without conventional programme elements such as news, sports, films, documentaries and drama, solely for the purposes of this Directive and without prejudice to the inclusion of such channels in the scope of other Union instruments.
- (102) Although television broadcasters are normally bound to ensure that programmes present facts and events fairly, it is nevertheless important that they should be subject to specific obligations with respect to the right of reply or equivalent remedies so that any person whose legitimate interests have been damaged by an assertion made in the course of a broadcast television programme may effectively exercise such right or remedy.
- (103) The right of reply is an appropriate legal remedy for television broadcasting and could also be applied in the on-line environment. The Recommendation on the protection of minors and human dignity and on the right of reply already includes appropriate guidelines for the implementation of measures in national law or practice so as to ensure sufficiently the right of reply or equivalent remedies in relation to on-line media.
- (104) Since the objectives of this Directive, namely the creation of an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives of general interest, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (105) This Directive is without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
Definitions

Article 1

1. For the purposes of this Directive, the following definitions shall apply:
 - (a) “audiovisual media service” means:
 - (i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union 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 point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;
 - (ii) audiovisual commercial communication;
 - (b) “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 the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama;
 - (c) “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 audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;
 - (d) “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;
 - (e) “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;
 - (f) “broadcaster” means a media service provider of television broadcasts;
 - (g) “on-demand audiovisual media 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 individual request on the basis of a catalogue of programmes selected by the media service provider;

- (h) “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;
 - (i) “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;
 - (j) “surreptitious audiovisual commercial communication” means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration;
 - (k) “sponsorship” means any contribution made by public or private undertakings or natural persons 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 their name, trade mark, image, activities or products;
 - (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 a programme, in return for payment or for similar consideration;
 - (n) “European works” means the following:
 - (i) works originating in Member States;
 - (ii) works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 3;
 - (iii) works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements.
2. The application of the provisions of points (n)(ii) and (iii) of paragraph 1 shall be conditional on works originating in Member States not being the subject of discriminatory measures in the third country concerned.

3. The works referred to in points (n)(i) and (ii) of paragraph 1 are works mainly made with authors and workers residing in one or more of the States referred to in those provisions provided that they comply with one of the following three conditions:
 - (i) they are made by one or more producers established in one or more of those States;
 - (ii) the production of the works is supervised and actually controlled by one or more producers established in one or more of those States;
 - (iii) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.
4. Works that are not European works within the meaning of point (n) of paragraph 1 but that are produced within the framework of bilateral co-production agreements concluded between Member States and third countries shall be deemed to be European works provided that the co-producers from the Union 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 any of the following:
 - (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 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 the 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 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 49 to 55 of the Treaty on the Functioning of the European Union.
 6. This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.

Article 3

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 27(1) or (2) and/or Article 6;
 - (b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in point (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 point (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 Union 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 audiovisual media 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 are:
 - (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 audiovisual media 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;
 - (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:
 - (i) asked the Member State under whose jurisdiction the media service provider falls to take measures and the latter did not take such measures, or they were inadequate;
 - (ii) notified the Commission and the Member State under whose jurisdiction the media service provider falls of its intention to take such measures.
5. Member States may, in urgent cases, derogate from the conditions laid down in point (b) of paragraph 4. 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 media 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 Union law in the shortest possible time. Where it comes to the conclusion that the measures are incompatible with Union 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 4

1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law.

2. 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 having 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 29 to examine the case.
3. The first Member State may adopt appropriate measures against the broadcaster concerned where it assesses that:
 - (a) the results achieved through the application of paragraph 2 are not satisfactory; and
 - (b) 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 in the first Member State. Such measures shall be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.
4. A Member State may take measures pursuant to paragraph 3 only if the following conditions are met:
 - (a) 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
 - (b) the Commission has decided that the measures are compatible with Union law, and in particular that assessments made by the Member State taking those measures under paragraphs 2 and 3 are correctly founded.
5. The Commission shall decide within three months following the notification provided for in point (a) of paragraph 4. If the Commission decides that the measures are incompatible with Union 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 co-regulation 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.
8. Directive 2000/31/EC shall apply unless 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 III

Provisions applicable to all audiovisual media services

Article 5

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

- (a) the name of the media service provider;
- (b) the geographical address at which the media service provider is established;
- (c) the details of the media service provider, including its electronic mail address or website, which allow it to be contacted rapidly in a direct and effective manner;
- (d) where applicable, the competent regulatory or supervisory bodies.

Article 6

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

Article 7

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 8

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

Article 9

1. Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:

- (a) audiovisual commercial communications shall be readily recognisable as such. Surreptitious audiovisual commercial communication shall be prohibited;
- (b) audiovisual commercial communications shall not use subliminal techniques;
- (c) audiovisual commercial communications shall not:
 - (i) prejudice respect for human dignity;
 - (ii) 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 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 shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;
 - (f) audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;
 - (g) audiovisual commercial communications shall not cause physical or moral 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 communications, accompanying or included in children's programmes, 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 10

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 shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
 - (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
 - (c) viewers shall be clearly informed of the existence of a sponsorship agreement. Sponsored programmes shall 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 at 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 shall 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 children's programmes, documentaries and religious programmes.

Article 11

1. Paragraphs 2, 3 and 4 shall apply only to programmes produced after 19 December 2009.
2. Product placement shall be prohibited.
3. By way of derogation from paragraph 2, product placement shall be admissible in the following cases unless a Member State decides otherwise:
 - (a) in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes;
 - (b) where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme. The derogation provided for in point (a) shall not apply to children's programmes.

Programmes that contain product placement shall meet at least all of the following requirements:

- (a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
- (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
- (c) they shall not give undue prominence to the product in question;
- (d) viewers shall be 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 when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

By way of exception, Member States may choose to waive the requirements set out in point (d) 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.

4. In any event programmes shall not contain product placement of:
 - (a) tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products;
 - (b) specific medicinal products or medical treatments available only on prescription in the Member State under whose jurisdiction the media service provider falls.

CHAPTER IV**Provisions applicable only to on-demand audiovisual media services****Article 12**

Member States shall take appropriate measures to ensure that on-demand audiovisual media 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 as to ensure that minors will not normally hear or see such on-demand audiovisual media services.

Article 13

1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the 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 offered by the on-demand audiovisual media service.
2. Member States shall report to the Commission no later than 19 December 2011 and every four years thereafter on the implementation of paragraph 1.
3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.

CHAPTER V**Provisions concerning exclusive rights and short news reports
in television broadcasting****Article 14**

1. Each Member State may take measures in accordance with Union 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 by 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 time. In so doing the Member State concerned shall also determine whether these events should be available by 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 Union law and communicate them to the other Member States. It shall seek the opinion of the contact committee established pursuant to Article 29. It shall forthwith publish the measures taken in the Official Journal of the European Union 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 after 18 December 2007 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 paragraphs 1 and 2 by 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 15

1. Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Union 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.
2. If another broadcaster established in the same Member State as the broadcaster seeking access has acquired exclusive rights to the event of high interest to the public, access shall be sought from that broadcaster.
3. 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.
4. As an alternative to paragraph 3, Member States may establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means.
5. Short extracts shall be used solely for general news programmes and may be used in on-demand audiovisual media services only if the same programme is offered on a deferred basis by the same media service provider.
6. Without prejudice to paragraphs 1 to 5, Member States shall ensure, in accordance with their legal systems and practices, that the modalities and conditions regarding the provision of such short extracts are defined, in particular, with respect to any compensation arrangements, the maximum length of short 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 VI**Promotion of distribution and production of television programmes****Article 16**

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 allotted 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 Greece and Portugal, the year 1988 shall be replaced by the year 1990.
3. Member States shall provide the Commission every two years, starting from 3 October 1991, with a report on the application of this Article and Article 17. That report shall in particular include a statistical statement on the achievement of the proportion referred to in this Article and Article 17 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 17 in accordance with the provisions of the Treaty on the Functioning of the European Union. 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.

Article 17

Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time allotted 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 the broadcaster's 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 18

This Chapter shall not apply to television broadcasts that are intended for local audiences and do not form part of a national network.

CHAPTER VII

Television advertising and teleshopping

Article 19

1. Television advertising and teleshopping shall be readily recognisable 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 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.

Article 20

1. Member States shall ensure, where television 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 concerned, and the rights of the right holders are not prejudiced.
2. The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. No television advertising or teleshopping shall be inserted during religious services.

Article 21

Teleshopping for medicinal products which are subject to a marketing authorisation within the meaning of Directive 2001/83/EC, as well as teleshopping for medical treatment, shall be prohibited.

Article 22

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 23

1. The proportion of television 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, sponsorship announcements and product placements.

Article 24

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 25

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. However, Chapter VI as well as Articles 20 and 23 shall not apply to these channels.

Article 26

Without prejudice to Article 4, Member States may, with due regard for Union law, lay down conditions other than those laid down in Article 20(2) and Article 23 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 VIII

Protection of minors in television broadcasting

Article 27

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

CHAPTER IX

Right of reply in television broadcasting

Article 28

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 X

Contact committee

Article 29

1. A contact committee is established 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 the contact 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 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 16(3) and on their methodology;
- (d) to discuss the outcome of regular consultations which the Commission holds with representatives of broadcasting organisations, producers, consumers, manufacturers, service providers and trade unions and the creative community;
- (e) to facilitate the exchange of information between the Member States and the Commission on the situation and the development of regulatory activities regarding audiovisual media services, taking account of the Union'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 XI

Cooperation between regulatory bodies of the Member States

Article 30

Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies.

CHAPTER XII

Final provisions

Article 31

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 32

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 33

Not later than 19 December 2011, and every three years thereafter, the Commission shall submit to the European Parliament, to the Council and to the European Economic and Social Committee a report on the application of this Directive 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.

That report shall also assess the issue of television 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 34

Directive 89/552/EEC, as amended by the Directives listed in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B. References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 35

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

Article 36

This Directive is addressed to the Member States.



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From the book reviews:

“This book’s key advantage lies in the comprehensive take on its subject matter not limited to solutions based on the audiovisual media services directive but covering also the impact exercised by direct intervention (support programmes) and competition protection. [...] The subject matter of the book is extremely current due to the implementation process of the modified European audiovisual policy [...]. The book will fill the gap in the Polish professional literature in the field of audiovisual media. Among the book’s addressees are audiovisual media companies, those engaged in market regulation [...] and a] wide range of those dealing with audiovisual and media policy.”

Prof. Dr. Stanisław Piątek
University of Warsaw
Faculty of Management

“Ms Sage’s book takes on the unenviable task of chartering uncharted waters [...] the author uniquely mixes areas of the EU’s core competences. The book [...] should prove itself of interest for a wide audience [...]. New readers and students are likely to particularly appreciate several elements that facilitate navigating through the EU maze. Ms Sage takes particular interest [...] in summarising key individual decisions and judgements – instruments which play an important role in developing the audiovisual sector and making it part of the internal market [...] the author timely flags important issues of principle, arising from [...] the Premier League case [...]”

Dr. Krzysztof Kuik
DG Competition
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