



**Observations by the Association of Portuguese Media Consumers ACMedia on the Addendum prepared by the General Secretariat of the EU Council of Ministers on the Amended proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative Action in Member States concerning the pursuit of television broadcasting activities (Television without frontiers) for Discussion on 24 May 2007**

1. In general, **ACMedia** welcomes the latest changes proposed by the Council to the Draft Consolidated text prepared by the Commission, notably those in the regulations proposed for the introduction of product placement, the requirement for the Commission to monitor developments in Member States in the field of media literacy, and in the increased co-ordination between Member States both within the Contact Committee, and between National Regulatory Authorities. **Nevertheless, we also consider it important to highlight a number of points where we consider that the General Secretariat's Addendum could be improved.**
2. **Recital 5** emphasises the need to improve legal certainty for companies delivering audiovisual media services and emerging on-demand services, while at the same time seeking to retain the country of origin principle and common minimum standards established in Directive 89/552/EEC. **ACMedia would like to see this Recital improved by including in it the need to harmonise the information**

**provided to viewers of television services and users of on-demand services within a single European information area.**

3. This will be especially important in regulating both the provision of information in regard to product placement and to the development of media literacy, since the extensive derogations which the current text proposes to allow individual Member States may well permit the introduction of substantial variations to the minimum standards established in Directive 89/552EEC. If common minimum standards are to be maintained, the derogations allowed to individual member States must either be abolished or kept to a minimum. **In ACMedia's view, this can be achieved without prejudice to the Community's wish to foster growth and jobs in the information society and media industries. Nor will it undermine the European Union's comprehensive strategy, which is designed to encourage the production of European content, the development of the digital economy and the uptake of ICT.**
4. **Recital 13a** suggests that as on-demand services are "television-like", the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive, and therefore in order to prevent disparities as regards free movement and competition, "the notion of programme should be interpreted in a dynamic way taking into account developments in television broadcasting." It is unclear what precisely is meant by "the notion of a programme". Moreover, it is unclear whether the freedom to interpret "the notion of a programme in a dynamic way taking into accounts developments in television broadcasting" is to be granted separately to each country of origin of the so-called programme, or whether this decision will ultimately be taken by the European Commission, the Council of Ministers or the European Court of Justice.

Furthermore, since the word “programme” is used extensively throughout the remainder of the Directive, both in the recitals and the articles, the inclusion of such a recital could easily lead to multiple interpretations of the Directive by individual Member States. **ACMedia therefore requests that Recital 13a should be removed.**

5. **Recital 25** provides a welcome definition of Media Literacy. **But ACPMedia also considers that the recital should be improved to make it clear that media-literate people should also be able to recognise the presence of all forms of audiovisual commercial communication, including product placement, to know and understand how co-regulation operates in all other Member States, and to be equipped to exercise a right of reply, or other equivalent remedy, to a trans - frontier broadcast authorised by another Member State.**
6. **ACMedia** generally welcomes the provisions in **Recitals 27, 27a and 27b** concerning the right of viewers to access short extracts of events of high public interest.
7. Regrettably, **ACMedia considers Recital 35a, which defines “producers who are independent of broadcasters” to be inadequate, since it does not provide a common EU definition.** This is necessary for two reasons. First, this approach is unacceptable since it both fails the requirement to provide a common minimum standard in the directive, and contradicts the principle established in recital 5 which sets down the need to improve legal certainty for companies delivering audiovisual media services and emerging on-demand services in the European information market. Moreover, a common definition will be especially important since article 3f(2) will allow a Member State to waive the requirement to inform viewers about product placement “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”. **ACMedia therefore proposes that Recital 35a should be amended to read, “Member States should therefore establish a common definition of an independent company. This definition shall exclude both the whole or part ownership of the production company by a television broadcaster or an audiovisual media service provider, and any pre-production financial relationship, including any contract regulating the ownership of secondary rights in a programme, between the independent production company and the audiovisual media service provider or any company affiliated to it.**

8. **ACMedia** supports the principle-underpinning **recital 38**. It therefore considers that in the second sentence the word “must”, which has a legal force, ought to replace the word “should” which only has a moral force. **ACMedia therefore submits that the second sentence of recital 38 should read: “Nevertheless, all audiovisual commercial communication must respect not only the identification rules but also a basic tier of qualitative rules in order to meet clear public policy objectives.”**
9. **Recital 38a** suggests that the right of reply, which is an appropriate legal remedy for television broadcasting, could also be applied in the on-line environment. **ACMedia** welcomes the proposal, but notes that there is no provision in article 23 for viewers to exercise a right of reply in relation to on-line services. **ACMedia therefore proposes that either the text of article 23 is amended accordingly, or if not, Recital 38a should be removed.**
10. **Recital 40** includes the welcome statement that where product placement is surreptitious it should be prohibited. **Recital 45** also states that surreptitious

audiovisual commercial communication is a practice, which is prohibited by this Directive because of its negative effect on consumers. However, **ACMedia** rejects the view that the mere presence of a neutral logo will adequately signal to a viewer that product placement has taken place. **ACMedia therefore proposes that the second half of the second sentence of recital 45 (i.e. after the semi-colon) should be amended to read “this shall be done by clearly announcing, both visually and aurally, that product placement has taken place”. Where appropriate, the announcement may be accompanied by the inclusion of a neutral logo. In addition, the announcement shall contain, either visually or aurally, the words ‘this placement has not affected the thematic responsibility or the editorial independence of the media service provider (or television broadcaster, as appropriate)’.**”

11. **Recital 46a** allows individual Member States to derogate from the general prohibitions on product placement on the basis of positive list. **ACMedia considers this proposal to be totally unacceptable for two reasons. First, it undermines the minimum standards allegedly guaranteed by the Directive. Secondly, it reduces the legal certainty for companies delivering audiovisual media services and emerging on-demand services, which recital 5 set out to establish. Furthermore, it will undermine the ability of viewers and consumers to be certain whether or not a given programme which has been produced in another Member State includes product placement. Finally, therefore, it will make the development of a syllabus in media literacy far more complicated than if there was a common set of European standards for product placement which allowed no derogations by individual Member States, even if each of them was based on a positive list.**

12. **ACMedia** welcomes **Recitals 47 and 47a**, which are both designed to ensure better co-ordination between Member States and their national regulatory authorities, and to ensure greater public awareness of the resultant regulatory frameworks arising from the implementation of the Directive.
13. Article 3(3) of the Directive requires that co-regulatory regimes shall be broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement. This requirement is welcome, provided that television viewers and consumers of on-demand services are accepted as stakeholders. However, there is no definition in the Directive of the term “stakeholders”. Moreover, different Member States may not share deploy the same definition of the term. **ACMedia therefore proposes that either article 1 of the Directive should include a definition of the term stakeholders, which makes it clear that the term includes viewers and consumers or their representatives, or alternatively that the Council should include a new recital (possibly a new recital 25a) which elaborates the general principle that viewers and consumers should be considered as one of the stakeholders when Member States establish co-regulatory and self-regulatory regimes.**
14. Article 3f(2) allows product placement in films and series made for audiovisual media services. **ACMedia considers that should be restricted to films and fictional series made for audiovisual media services.**
15. Article 3f(2c) permits an exception to the rule that viewers must be informed about the existence of product placement in a programme. **ACMedia believes that this exception undermines the principle of establishing in the Directive minimum standards of information for viewers of programmes containing product placement. In principle, ACPMedia therefore believes that this**

**exception should be removed. If this is not possible however, ACMedia would suggest that it is amended to read: “As an exception, Member States may choose to waive the requirements set out in (c) above provided that the programme in question has neither been produced nor commissioned, either in whole or in part, by the media service provider itself or a company affiliated to the media service provider.”**

- 16. ACMedia welcomes the recognition in article 23a (2d) that the contact committee will need to have wider responsibilities, including, *inter alia*, that of discussing the outcome of regular consultations which the Commission holds with representatives of consumers.**
- 17. ACMedia also welcomes the duty imposed on the Commission, not later than [...], and every three years thereafter, to submit to the European Parliament, the Council and the Economic and Social Committee a report on *inter alia*, of the levels of media literacy in all Member States.**

**Lisbon, 18<sup>th</sup> May 2007**