



EUROPEAN
COMMISSION

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
AMENDING DIRECTIVE 2010/13/EU 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)

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The audiovisual media landscape is changing at a rapid pace due to ever increasing convergence between television and services distributed via the Internet. Consumers increasingly access on-demand content via smart/connected TVs and portable devices. Consumers, in particular the young ones, watch videos, including user-generated content, on the Internet. Traditional broadcasting in the EU remains strong in terms of viewership, advertising revenues, and investment in content (around 30% of revenues). However, new business models are emerging. Broadcasters are extending their activities online and new players offering audiovisual content via the Internet (e.g. VoD providers and video-sharing platforms) are getting stronger and competing for the same audiences. However, TV broadcasting, VoD and user-generated content are subject to different rules and varying levels of consumer protection.

The Digital Single Market (DSM) strategy for Europe¹ calls for a modernisation of the Audiovisual Media Services Directive (AVMSD)² to reflect these market, consumption and technological changes. It requires the Commission to focus on the scope of the AVMSD and on the nature of the rules applicable to all market players³, in particular those for the promotion of European works⁴, protection of minors and advertising rules.

Pursuant to this commitment and in line with the "Better Regulation" requirements⁵, an ex-post evaluation (also called "REFIT") was carried out by the Commission. It assessed the effectiveness, efficiency, relevance, coherence and EU added-value of the AVMSD, and pinpointed the areas where there is potential for simplification, without undermining the objectives of the AVMSD.

• Consistency with existing policy provisions in the policy area

Council Directive 89/552/EEC as amended by Directives 97/36/EC and 2007/65/EC and codified in Directive 2010/13/EU (AVMSD) covers both rules for "television broadcasting" and for on-demand audiovisual media services. The present proposal takes into account the changes which have occurred in the audiovisual landscape since the last revision to ensure that the AVMSD will provide a modernised, flexible and forward looking legal framework.

¹ Communication from the Commission "A digital single market strategy for Europe", 6 May 2015, COM(2015) 192 final, http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf

² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 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)

³ More specifically, the DSM strategy mentions that "The Commission will examine whether the current system of rules applying to broadcast and to on-demand services should be adapted. It will also consider whether the current scope or the rules should be broadened to encompass new services and players that are currently not considered as audiovisual media services under the Directive and/or providers that fall outside its current geographical scope".

⁴ The DSM strategy also mentions that "The Commission will also work on measures to promote catalogues of European works on Video on Demand platforms".

⁵ The AVMSD REFIT evaluation is announced in the Commission Staff Working Document "REFIT: Initial results of the mapping of the acquis" (SWD(2013) 401 final) and is part of the Commission's 2015 Work Programme (Annex 3 (COM2014) 910 final of 16.12.2014).

- **Consistency with other Union policies**

This proposal is complementary to existing EU law, in particular the e-Commerce Directive 2000/31/EC and the Directive on advertising and sponsorship of tobacco products 2003/33/EC.

In December 2015, the Commission adopted a proposal for a European Accessibility Act⁶, which sets accessibility requirements for a wide range of products and services including audiovisual media services. As such, the revision of the AVMSD will not address the issue of accessibility.

e-Commerce Directive 2000/31/EC (ECD):

The current AVMSD does not apply to user-generated content offered on video-sharing platforms (e.g. YouTube) since these video-sharing platforms often do not control the selection and organisation of the content. These services are subject to the e-Commerce Directive which does not require intermediaries to monitor content hosted by them. Under the ECD, intermediaries are exempted from liability for the illegal content hosted when they do not have knowledge of it. However, when illegal content is identified, intermediaries should take expeditious action to disable access to or remove it to avoid liability.

The proposal would complement the ECD further by requiring Member States to ensure that video-sharing platforms put in place, by co-regulation, appropriate measures to protect minors from harmful content and all citizens from incitement to hatred.

Directive on advertising and sponsorship of tobacco products 2003/33/EC:

Directive 2003/33/EC prohibits advertising for cigarettes and other tobacco products in the press and other printed publications, in radio and in information society services. It also bans sponsorship, by tobacco companies, of radio programmes and of cross-border events. Moreover recital 14 of Directive 2003/33/EC makes it clear that all forms of direct and indirect audiovisual commercial communications for cigarettes and other tobacco products in broadcast services are prohibited by the TVWF Directive. The AVMSD already extended this prohibition to all audiovisual commercial communications, including sponsorship and product placement in audiovisual media services (Articles 9(1)(d), 10(2) and 11(4)(a) AVMSD). Directive 2014/40/EU concerning the manufacture, presentation and sale of tobacco provides that audiovisual commercial communications to which the AVMSD applies, are prohibited for electronic cigarettes and refill containers. This will be recalled in a recital of the AVMSD.

Unfair Commercial Practices Directive 2005/29/EC (UCPD):

The UCPD defines the commercial practices which are prohibited in the European Union (EU). It thus protects the economic interests of consumers before, during and after a commercial transaction has taken place.

Unfair commercial practices are those which:

- do not comply with the requirements of professional diligence ;
- are likely to materially distort the economic behaviour of the average consumer.

The UCPD applies to all misleading commercial practices including online.

⁶ COM(2015) 615 (<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2400&furtherNews=yes>)

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The AVMSD is based on the competence of the EU to coordinate Member States laws to bring about the freedom to provide services in the internal market (article 53(1) TFEU in conjunction with article 62 TFEU).

• Subsidiarity (for non-exclusive competence)

The EU-wide dimension of the audiovisual market is constantly increasing, in particular due to online growth and the fact that TV channels are becoming more international. As of the end of 2013, 5 141 TV channels (no local and windows) were established in the EU. Almost 1989 of them targeted foreign markets (either EU or extra EU). This share has increased from 28 % in 2009 - year of implementation - to 38 % in 2013. As far as VoD services are concerned, in 2015, on average in Member States, 31 % of the VoD services available are established in another EU country. This underpins the continued added value of the EU intervention.

The proposal complies with both the subsidiarity and proportionality principles by preserving, in general, a minimum harmonization approach and improving the derogation and circumvention mechanisms which will allow Member States to take their national specificities into account. De facto, Member States have adopted stricter rules in particular as regards the definition of on-demand audiovisual media service, the setting-up of the national regulatory authorities, the promotion of European works, the protection of minors and commercial communications.

Given that the AVMSD provides minimal harmonisation, any simplification of the existing rules can only be done via EU level intervention.

As regards the extension of the scope of the AVMSD to video-sharing platforms, EU level intervention prevents any potential future fragmentation resulting from national intervention. In this field, maximum-harmonisation is justified and flexibility is ensured via co-regulation.

• Proportionality

As stated above, by preserving the minimum harmonization approach and cooperation mechanisms, the proposal will comply with the proportionality principle.

• Choice of the instrument

The proposed Directive recommends the use of co-regulation and self-regulation in particular with regard to the protection of minors and commercial communications. Such regimes are deemed to be broadly accepted by the main stakeholders and provide for effective enforcement.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Ex-post evaluations/fitness checks of existing legislation

The overall conclusion is that the AVMSD objectives are still relevant. If the Directive were repealed the audiovisual internal market would collapse since providers would no longer benefit from the COO, but would be subject to 28 different regimes and jurisdictions. This would increase their costs and undermine their propensity to provide cross border services,

particularly into smaller Member States. Consumers would lose out because they would have less choice.

The REFIT evaluation concluded that there is scope for simplification, specifically of the procedures that support the application of the COO principle (i.e. the criteria determining jurisdiction over providers and the derogation and cooperation procedures limiting freedom of reception and retransmission in specific cases) and of some commercial communications rules. Some other rules are no longer fit to attain these objectives, primarily due to market developments and changes in viewing patterns. Simplification is also brought by aligning the rules of protection of minors for TV broadcasting and on-demand services.

• Stakeholder consultations

In 2013, the Commission published the Green Paper⁷ "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values" and invited stakeholders to share their views on the changing media landscape and borderless Internet in particular on market conditions, interoperability and infrastructure, and implications for EU rules. The outcomes of the Green Paper are reflected in the feedback document and executive summary of the replies published by the Commission in September 2014⁸.

In view of the current revision of the AVMSD, the Commission carried out a Public Consultation⁹ called "the AVMSD - a media framework for the 21st century" which took place from 06/07/2015 to 30/09/2015.

The main results when it comes to policy options for the future were:

- Convergence of views across stakeholders regarding the need for possible changes of the rules on the scope of application of the Directive, although there was no common pattern or clarity amongst stakeholders as regards the way forward.
- Convergence of views on the need to ensure the independence of national regulators.
- Support across stakeholders for maintaining the status quo as regards the country of origin principle; must-carry/findability; accessibility for persons with disabilities; major events for society, short news reports and right of reply.
- No clear consensus among stakeholders on commercial communications, protection of minors and promotion of European works.

The following trends emerged at the level of different groups of contributors:

- There was a call from a fair share of representatives of the broadcasting sector to ensure a level playing field either by regulating new services and/or warranting more flexibility of existing rules.
- Consumer organisations' called for strengthening the AVMSD rules aimed at protecting viewers, particularly vulnerable ones.
- The internet, telecom and ICT industries called for refraining from new regulation, in order to preserve innovation.

⁷ <http://ec.europa.eu/digital-agenda/en/news/consultation-green-paper-preparing-fully-converged-audiovisual-world-growth-creation-and-values>

⁸ <https://ec.europa.eu/digital-agenda/en/news/publication-summaries-green-paper-replies>

⁹ <http://ec.europa.eu/digital-agenda/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st>

- The content industry called for strengthening the rules aimed at promoting European works, across all audiovisual media services.

- **Collection and use of expertise**

The Commission has relied on the following external expertise:

- Policy recommendations from **other EU institutions**, namely the EP¹⁰, the Council¹¹, the European Economic and Social Committee¹² and the Committee of the Regions¹³.
- **Survey on AVMSD cost and benefits.** The survey was developed in the form of a questionnaire by a Task force of Member States' audiovisual regulators convened by the European Commission. The questionnaire was submitted to Member States' regulators within the European Regulators Group for Audiovisual Media Services (ERGA¹⁴), as well as to the industry in relevant sectors and to consumer organisations. The questionnaire was sent in May/June 2015. The questionnaire asked what have been the benefits and downsides of certain AVMSD rules possibly accompanied by quantitative evidence in terms of annual revenues/direct and indirect costs of compliance. It covered rules on:
 1. Commercial communications
 2. European works
 3. Protection of minors
 4. The country of origin principle

The reference period for the quantitative questions was 2010 to 2014, inclusive.

The survey gathered a total of 107 replies with 40 coming from commercial broadcasters (38 %), 20 public broadcasters (19 %), 18 VoD providers (17 %), 12 from national associations focusing on the protection of minors (12 %), 10 from national associations representing independent producers (10 %), 4 from consumer association (4 %). One association representing broadcasters and one representing sales houses also participated. The stakeholders who replied are established in 19 Member States.

- **Studies and opinions of the European Regulators Group for Audiovisual Media Services (ERGA).** In its 2015 Work Programme, ERGA committed to deliver analyses and reports on 4 main topics: the independence of audiovisual regulatory

¹⁰ Three Own-initiative reports adopted by the European Parliament. A) The January 2015 (still to be adopted) "Towards a Digital Single Market Act" (2015/2147(INI)); B) the July 2013 "Connected TV" report (Rapporteur MEP Petra Kammerevert (S&D, DE)) calling on the Commission to evaluate the extent to which it is necessary to revise the AVMSD, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0329&language=EN&ring=A7-2013-0212> B) The March 2014 report, "Preparing for a Fully Converged Audiovisual World" (Rapporteur MEP Sabine Verheyen (EPP, DE)) which calls for a review of the AVMSD, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0232&language=EN&ring=A7-2014-0057>.

¹¹ Most recently, the Council conclusions adopted under the Italian Presidency of the EU in 2014 inviting the Commission to "Urgently complete the exercise of the review of the AVMSD in the light of the rapid technological and market changes resulting from the digital shift, and on the basis of the outcome of this review submit an appropriate proposal for the revision of this Directive as soon as possible, in respect of the principle of subsidiarity." http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/145950.pdf

¹² Opinion adopted by the in September 2013 on the Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, <http://www.eesc.europa.eu/?i=portal.en.ten-opinions.28469>

¹³ At its Plenary Session of 12-14 October 2015, the Committee of the Regions adopted an own-initiative opinion on the "Review of the Audiovisual Media Services Directive" – link to be published

¹⁴ <http://ec.europa.eu/digital-agenda/en/news/commission-decision-establishing-european-regulators-group-audiovisual-media-services>

authorities; material jurisdiction in a convergent audiovisual world; protecting minors in a converged environment; tackling the issue of territorial jurisdiction in the EU context. Each topic was dealt with by sub-groups comprising ERGA members. The first three reports were adopted via written procedure (in line with Article 11 of the ERGA Rules of Procedure) in December 2015. The report on territorial jurisdiction will be adopted in the course of 2016.

- **Publicly-tendered studies¹⁵** on alcohol advertising exposure, independence of audiovisual regulators, self- and co-regulation and standardisation:
- **Study on Alcohol advertising exposure**, to assess whether rules on audiovisual commercial communication for alcoholic beverages have afforded minors the level of protection required¹⁶.
- **Study on the independence of audiovisual regulators**, updating a previous study on independence of regulatory authorities. It updates on recent changes and developments in Member States and candidate countries as regards the independence and efficient functioning of the audiovisual media services regulatory bodies. The draft final report was delivered to the Commission in October 2015 and published¹⁷ on 8 December 2015.
- **Study on Self-regulation** that reviews existing self-regulation approaches in a range of Member States and aims at providing information about relevant evidence of existing schemes and their effectiveness. The Final report is due in Q2 2016.
- **4 Studies on survey and data gathering to support the impact assessment** of a possible new legislative proposal concerning the AVMSD commissioned in the context of Framework Contract EAC-22-201¹⁸. These studies cover the following areas: commercial communication, protection of minors, cultural diversity and media freedom/public interest and access for persons with disabilities. The draft final reports of the study will be provided to the Commission in Q2 2016.
- **Two reports of the European Audiovisual Observatory (EAO)** ("Study on data and information on the costs and benefits of the Audiovisual Media Service Directive (AVMSD)"¹⁹ and "on-demand markets in the European Union – 2014 and 2015 developments"²⁰) provided in the context of Framework Contract PN/2011-27/A6. These two reports focus on
 - (1) Measurement of audiences
 - (2) Online advertising in the EU
 - (3) The EU Subscription video-on-demand market in 2014
 - (4) The visibility of films in on-demand services

¹⁵ <http://ted.europa.eu/udl?uri=TED:NOTICE:212396-2015:TEXT:EN:HTML&ticket=ST-1292379-SKcm8OGQ1rcJn11xAZqVGszP2ziXhYuZOoSisF&rBu0ZCOZKqO05NbMy9k6hQrTzImWU1TdcKGfvm49llwu7y5m-Ji71zYb8vr5J3R6cCTiGK-TqeqivAzhASPlqibmnf8X5hXPzlpWbU39btUwoJzMaU>

¹⁶ <https://ec.europa.eu/digital-single-market/en/news/study-exposure-minors-alcohol-advertising-tv-and-online-services>

¹⁷ <http://ec.europa.eu/digital-agenda/en/news/study-audiovisual-media-services>

¹⁸ <http://ted.europa.eu/udl?uri=TED:NOTICE:279501-2014:TEXT:EN:HTML>

¹⁹ <https://ec.europa.eu/digital-single-market/en/news/study-data-and-information-costs-and-benefits-audiovisual-media-service-directive-avmsd>

²⁰ <https://ec.europa.eu/digital-single-market/en/news/demand-audiovisual-markets-european-union-smart-20120028>

- (5) proportion of European fiction works on a sample of TV channels
- (6) on-demand audiovisual services including their revenues and investment in original programming
- (7) linear audiovisual services including their revenues and investment in original programming

• **Impact assessment**

The executive summary of the Impact assessment and the positive opinion of the Regulatory Scrutiny Board can be found on the website of the Commission: XXX

The following options have been examined (for each section, the preferred option is highlighted):

- (1) Options addressing the problem of insufficient minors and consumers protection in video-sharing platforms

Option A encourages self-regulation for protection of minors and consumers on video-sharing platforms

Options B imposes an obligation of means on video-sharing platforms for protection of minors and hate speech, implemented through co-regulation.

- (2) Options addressing the problem of the lack of a level playing field and internal market weaknesses

a) Promotion of European works

Option A gives more flexibility to both TV broadcasting and on-demand services in the way they implement the obligations to promote European works.

Option B maintains the status quo for TV broadcasting and reinforces the rules for on-demand service providers.

b) Protection of minors in on-demand services

Option A increases the level of protection of minors for on-demand audiovisual media services, simplifies the notion of harmful content and encourages EU co-regulation on content descriptors.

c) Country of origin principle

Option A simplifies and improves the jurisdiction rules and the cooperation procedures

d) Independence of Regulators

Option A requires Member States to have an independent regulatory authority and sets a number of requirements to support their independence and effectiveness. ERGA coordination and advisory role is reinforced and embedded in the AVMSD.

- (3) Option addressing the problem of the rules on commercial communications no longer fit for purpose

Option A makes some of the rules for audiovisual commercial communications more flexible.

The combination of the preferred options is deemed to strike the best balance between the need to introduce flexibility with respect to the current level of regulation and ensuring adequate consumer protection.

On the one hand, the industry will benefit from more flexible quantitative rules on commercial communications. The increased efficiency of the country of origin principle and the requirements for the independence of Regulators would improve the business environment in which audiovisual players operate.

On the other hand, consumers will be guaranteed a high level of protection through the limited extension of the AVMSD to video-sharing platforms and the reinforcement of the requirements applicable to on-demand services in terms of the protection of minors. Consumers will also benefit from a greater access to European works in on-demand services.

All options take into account, when appropriate, the need of flexibility for the industry by considering possible implementation via self and/or co-regulation (scope of application, information on harmful content).

Most of the options complement each other. For example, independence of regulators will be of the utmost importance if Member States decide to entrust them with the application of the new rules regarding video-sharing platforms. Also the potential increase in audiovisual media service providers' revenues deriving from the greater flexibility of quantitative rules on advertising will release a potential for an increased contribution to the production of European works.

The combination of options achieves a more level playing field between the different players in the audiovisual media market. This is for instance realized by levelling up certain requirements for on-demand services and video-sharing platforms in relation to the protection of consumer or promotion of European works while providing more flexibility to TV broadcasting services on certain rules on commercial communications.

• **Regulatory fitness and simplification**

The ex-post evaluation identified commercial communications as one area where more flexibility could be provided in particular as regards TV broadcasters.

New advertising techniques create opportunities for commercial communications in broadcasting services, enabling them to better compete with on-demand services. Product placement has the potential to generate substantial additional resources for providers. The regulatory framework has to be aligned to this new context, namely via more flexibility with respect to the rules for broadcasting services. Against this backdrop, the proposal allows (in certain circumstances) product placement and introduces more flexibility as regards the quantitative rules.

As regards possible savings for service providers, it would be limited. Advertising scheduling is a core component of broadcast programming and the quantitative rules imposed by the AVMSD are only a small part of a large number of parameters taken into account in TV scheduling strategies aiming at optimising audience and revenue. The costs associated with broadcast programming, including IT costs, are "business as usual", i.e. costs endured even in the absence of the AVMSD.

As regards national regulatory authorities, there would not be any incremental administrative cost for them. Currently, regulators' monitoring and enforcement activities with respect to the 20% limitation amount to up to EUR 1 million²¹. As regards product placement and

²¹ SQW/ Ramboll study, based on the current average value for the monitoring of 1 linear provider established in the EU (PPP adjusted) which is derived from a sample of the regulatory costs in 7 MS which can be considered as a representative sample of different approaches to fulfilling regulatory responsibilities with regard to the monitoring and enforcement of the quantitative rules. It is further assumed that regulators focus their regulatory activities on linear services which have more than 0,5 % of the audience share.

sponsorship rules, these costs amount respectively up to EUR 2.2 million and EUR 2.1 million per year at EU level²². As an important share of these costs derive from the application of subjective criteria, such as the undue prominence of product placement, regulators will certainly lower their current costs. It is however not possible to quantify precisely these cost savings.

As regards SMEs and micro enterprises, the proposal foresees possible exemptions for the provisions related to the promotion of European works. Indeed, Member States would be allowed to introduce exceptions for thematic or low audience audiovisual media services.

For the provisions addressing protection of consumer including minors, the proposal does not foresee any exemptions for SMEs and micro enterprises as it touches extremely important values.

- **Fundamental rights**

The proposal takes also full account of the fundamental rights and principles recognized by the Charter of Fundamental Rights of the European Union, in particular its Article 11. In this regard, this proposal does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the EU budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Monitoring of the implementation will continue to be assured by the European Commission on the basis of:

- Application reports by the Commission, on the Directive as a whole, two years after the adoption of the Directive and every three years thereafter;
- Reports on the application of the provisions related to the promotion of European works every 2 years (for TV broadcasting and on-demand services);
- Monitoring of the implementation of the provisions on video-sharing platforms on the basis of an independent study carried out after the transposition;
- Monitoring of the implementation of the provision on content descriptors for protection of minors.

- **Explanatory documents (for directives)**

N/A

- **Detailed explanation of the specific provisions of the proposal**

The country of origin principle (COO) is maintained and reinforced by simplifying the rules determining which country has jurisdiction and improving the derogation mechanisms in cases of exceptions.

The future Directive continues to be generally based on minimum harmonisation (except for platforms). However, a higher degree of harmonisation is sought by reinforcing the independence of audiovisual regulators. This is an important novelty, given the key role of Audiovisual regulators in shaping and preserving the internal market. Moreover, it is highly relevant for guaranteeing the pluralism of the media. The proposal reinforces the role of the European Regulators Group for Audiovisual Media Services (ERGA) by giving it more tasks when advising and assisting the Commission in the consistent implementation of the directive in all Member States. As a consequence, the Commission Decision of 3 February 2014 on establishing the European Regulators Group for Audiovisual Media Services will be repealed by the entering into force of the future Directive.

A further novelty of the Directive would be the limited extension of its scope to audiovisual platforms without editorial responsibility but which tag, organise and target advertisement on the content. Implementation would be required via co-regulation. The system would be compatible with the E-commerce Directive (ECD) and would tackle only consumer protection concerns.

The Directive would introduce an obligation on Member States to ensure that video-sharing platforms put in place, as part of co-regulation, measures to: i) protect minors from harmful content; access to which would have to be restricted; and ii) protect all citizens from incitement to hatred. In practice, these requirements would translate into an obligation for video-sharing platforms to ensure, without implying any form of editorial responsibility, their standard contract clauses have to be in conformity with some of the provisions of the AVMSD. Specifically, the concepts of harmful content, and hate speech would be based on the AVMSD.

Member States would not be allowed to impose on providers any general obligation to monitor content *ex ante* and, more generally, any measure contrary to the ECD. The Commission would facilitate, with ERGA's support, the coordination of codes of conduct at EU level.

This provision would be a full harmonisation provision (no stricter measures possible). Moreover, a complaint mechanism should be foreseen at national level and any sanctions by Member States should take into account the lack of proper editorial responsibility of the platforms.

The main changes on audiovisual commercial communications foresee the introduction of more flexibility for all audiovisual media services on product placement and sponsorship and increased flexibility for TV broadcasting. The hourly limit replaced by daily limit of 20% of advertising during the period between 07:00 and 23:00 (Article 23). Films made for television, cinematographic works and news could be interrupted more often (Article 20) and isolated spots would be admissible (Article 19). Moreover, the future Directive will reinforce the current provision seeking to protect minors from inappropriate audiovisual commercial communications of foods high in fat, salt/sodium and sugars and alcohol beverages by, where necessary, encouraging codes of conduct at EU level (Article 9(2) and (4)).

The revised Directive creates a more level playing field in the promotion of European works by obliging on-demand services to reserve at least 20% share for European works in their catalogues and to ensure adequate prominence of such works (Article 13). Article 13 will also allow Member States to impose financial contributions (direct investments or levies allocated to national film funds) to on-demand services in their jurisdictions as well as, under certain conditions, to those established in a different Member State but targeting their national audiences.

Regarding the protection of minors, the revised Directive foresees an alignment of the standards of protection for TV broadcasting and on-demand services. Article 12 of the revised Directive requires that programmes that may 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 them. This is regardless of whether such programmes are broadcast by TV broadcasters or provided by on-demand media service providers. In view of the alignment, Article 27 of the current Directive (applicable to TV broadcasting only) would be removed.

Finally, Article 7 of the current Directive would be deleted given that the proposed European Accessibility Act already sets stricter common accessibility requirements to media service providers.

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
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,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee²³, [where
necessary]

Having regard to the opinion of the Committee of the Regions²⁴, [where necessary]

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Directive 2007/65/EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (the Audiovisual Media Services) was adopted on 11 December 2007 and entered into force on 19 December 2007.
- (2) A codified version of the Audiovisual Media Service Directive (2010/13/EU) was adopted by the European Parliament and the Council on 10 March 2010 and published in the Official Journal.
- (3) In 2012 the first Commission report on the application of the Audiovisual Media Services Directive was presented to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions.
- (4) In 2013 the Commission launched a public consultation on the Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values". Following the public consultation, the European Economic and Social Committee adopted an Opinion²⁵ on the Green Paper in September 2013.

²³ OJ C , , p. .

²⁴ OJ C , , p. .

²⁵ COM(2013) 231 final

- (5) The European Parliament adopted two own-initiative reports in July 2013²⁶ and March 2014²⁷ respectively.
- (6) In Council conclusions adopted under the Italian Presidency in 2014, the Council invited the Commission to "urgently complete the exercise of the review of the Audiovisual Media Service Directive in the light of the rapid technological and market changes resulting from the digital shift, and on the basis of the outcome of this review submit an appropriate proposal for the revision of this Directive as soon as possible, in respect of the principle of subsidiarity"²⁸.
- (7) On 6 May 2015, the Commission adopted "A Digital Single Market Strategy for Europe"²⁹ in which it announced a review of the Audiovisual Media Service Directive "with a focus on its scope and on the nature of the rules applicable to all market players, in particular measures for the promotion of European works, and the rules on protection of minors and advertising rules". The Commission held a public consultation entitled "A media framework for the 21st century" from July to September 2015.
- (8) The European Regulators Group for Audiovisual Media Services (ERGA) was established by Commission decision³⁰ of 3 February 2014. It serves as a body advising and assisting the Commission in the implementation of the Audiovisual Media Service Directive.
- (9) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents³¹, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures by one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified
- (10) Since the entry into force of the Audiovisual Media Services Directive in 2007, the market has evolved significantly and rapidly. Technical developments allow for new types of services and user experiences. The viewing habits, particularly of younger generations, have changed significantly. While the main TV screen remains an important device to share audiovisual experiences, many viewers have moved to other, portable devices to watch audiovisual content. Traditional TV content accounts still for a major share of the average daily viewing time. However, new types of content such as short videos or user generated content gain increasing importance and new players, including video on demand services and video sharing platforms, that were emerging at the time of the last revision, are now well-established.
- (11) The Directive should remain applicable only to those services whose principal purpose is the provision of programmes in order to inform, entertain or educate. Where a service's main activity is not to provide programmes or user-generated videos, the principal purpose requirement is met if the service has audiovisual content and form

²⁶ "Connected TV" report of July 2013 (Rapporteur MEP Petra Kammerevert (S&D, DE))
²⁷ "Report on Preparing for a Fully Converged Audiovisual World" of March 2014 (Rapporteur MEP Sabine Verheyen (EPP, DE))
²⁸ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/145950.pdf
²⁹ COM(2015) 192 final
³⁰ C(2014) 462 final
³¹ OJ C 369, 17.12.2011, p. 14.

which is dissociable from the main activity. Online newspapers are in principle excluded from the scope of the Directive. However, this exclusion should not apply to standalone parts of online newspapers featuring audiovisual programmes or user-generated videos where those parts can be considered dissociable from their main activity, namely the presentation of news by non-audiovisual means. Social media services are not included, except if they provide a service that falls under the definition of a video-sharing platform. A service should be considered to be merely an indissociable complement to the main activity as a result of the links between the audiovisual offer and the main activity. As such, channels or any other audiovisual services under the editorial responsibility of a provider may constitute audiovisual media services in themselves, even if they are offered in the framework of a video-sharing platform which is characterised by the absence of editorial responsibility. In such cases, it will be up to the services with editorial responsibility to abide by the provisions of this Directive.

- (12) There are new challenges, notably in connection with video-sharing platforms, on which viewers - particularly minors - increasingly consume audiovisual content. In this context, harmful content and hate speech in video-sharing platforms have increasingly given rise to concern. It is necessary, in order to protect minors from harmful content and all citizens from content containing incitement to hatred, to apply rules on these matters to video-sharing platforms. As regards commercial communications in video-sharing platforms, they are already regulated by Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the "Unfair Commercial Practices Directive"). The Unfair Commercial Practices Directive prohibits certain unfair commercial practices, such as misleading and aggressive practices occurring in information society services. This Directive is therefore without prejudice to the Unfair Commercial Practices Directive. As regards commercial communications for tobacco products in video-sharing platforms, the existing prohibition in Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products ensures the required consumer protection.
- (13) An important share of the content presented in video-sharing platforms is not under the editorial responsibility of a media service provider. However, providers of video-sharing platforms typically determine the organisation of content, namely programmes or user-generated videos, including by automatic means or algorithms. Therefore they should be required to take appropriate measures to protect minors from content that may impair their physical, mental or moral development and protect all citizens from incitement to hatred.
- (14) To the extent that video-sharing platforms provide information society services covered by Article 14 of 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, no general obligation should be imposed on them to monitor the information which they transmit or store with respect to those services. Nor should they be subject to a general obligation actively to seek facts or circumstances indicating illegal or harmful activity. This is without prejudice to monitoring obligations in specific cases and, in particular, does not affect orders by national authorities in accordance with national legislation. Any removal of content

shall only be possible in accordance with the conditions established in Article 14 of Directive 2000/31/EC.

- (15) Member States must not impose any obligation of result on video-sharing platform providers. Member States shall only ensure that video-sharing platforms adopt measures, through codes of conduct, which are appropriate to achieve the objective of protecting minors from harmful content and all citizens from content containing incitement to hatred and that their terms and conditions comply with the concepts of content harmful to minors and incitement to hatred. These measures should not prevent video-sharing platform providers themselves, on a voluntary basis, from providing for stricter or more detailed measures. Member States shall only take enforcement measures related to failures by video-sharing platforms to adopt such measures.
- (16) Certain measures adopted by the industry exist at European and national level in order to allow citizens to flag or report content as harmful to minors or as hate speech. These measures represent effective mechanisms to protect minors and all citizens. They should therefore be made mandatory, by co-regulation, for video-sharing platforms. In addition, other measures such as effective age verification systems preventing minors from accessing harmful content, systems allowing the users to give feedback or to rate content, or parental control mechanisms can also contribute to reaching this objective.
- (17) Complaint and redress mechanisms are important to empower consumers and provide for means to settle disputes. Dedicated mechanisms should be available in particular as regards video-sharing platforms.
- (18) While mere hosting, caching, cloud computing, mere conduit, search engines and business services can give access to audiovisual content, they do not normally determine its organisation. This Directive should not include such services, which might be subject to Directive 2000/31/EC.
- (19) The criteria to determine which Member State has jurisdiction over an audiovisual media service include reference to the Member State where editorial decisions about an audiovisual media service are taken. Editorial decisions are decisions taken on a day-to-day basis, for instance by editors in chief or programme directors, within an approved schedule. Regarding non-linear services, those decisions include the determination of the actual catalogue of programmes offered.
- (20) Regarding video-sharing platforms, the criteria to determine the Member State having jurisdiction should be linked to the establishment of such services in a Member State, including establishment of a parent company, a subsidiary or an entity within the same group.
- (21) In order to ensure the effective application of the Directive, it is crucial for Member States to keep up-to-date records of the audiovisual media service providers and video-sharing platform providers under their jurisdiction and regularly share these records with their competent independent regulatory bodies and the Commission. These records includes information about the criteria, in line with the Directive, on which jurisdiction is based.
- (22) Establishing jurisdiction requires an assessment of factual situations against the criteria laid down in the Directive. The assessment of such factual situations might lead to conflicting results. In the application of the cooperation procedures foreseen in Articles 3 and 4 of the Directive, it is important that the Commission can base its findings on reliable facts. The European Regulators Group for Audiovisual Media

Services (ERGA) should therefore be empowered to provide opinions on jurisdiction upon the Commission's request.

- (23) The procedures and conditions for restricting freedom of movement should be the same for linear and non-linear services.
- (24) In its Communication to the European Parliament and to the Council on Better Regulation for Better Results – an EU Agenda³², the Commission stressed that when considering policy solutions, it will consider both regulatory and well-designed non-regulatory means, modelled on the Community of practice and the Principles for Better Self- and Co-regulation³³. A number of codes set up in the areas coordinated by the Directive have proved to be well designed, in line with the Principles for Better Self- and Co-regulation. The existence of a legislative backstop has been considered an important success factor in promoting compliance with a self- or co-regulatory code. It is equally important that the codes establish specific targets and objectives allowing for the regular, transparent and independent monitoring and evaluation of the objectives aimed by the codes. Graduated sanctions which maintain an element of proportionality are usually considered to be an effective approach in enforcing a scheme.
- (25) Measures taken to protect the physical, mental and moral development of minors and human dignity on video-sharing platforms 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 these measures should be to ensure an adequate level of protection of the physical, mental and moral development of minors and human dignity with regard to video-sharing platforms.
- (26) In order to empower viewers, including parents and minors, in making informed decisions about the content to be watched, it is necessary that audiovisual media service providers provide sufficient information about content that might seriously impair or is likely to impair minors' physical, mental or moral development. This could be done for instance through a system of content descriptors indicating the nature of the content. Content descriptors could be delivered through written, graphical and/or acoustic means.
- (27) On-demand audiovisual media services should promote the production and distribution of European works by ensuring that their catalogues contain a minimum share of European works and that these are given enough prominence.
- (28) In order to ensure adequate levels of investment on European works, Member States may impose financial obligations to on-demand service providers. They can take the form of direct contributions to the production of and acquisition of rights in European works. They may also impose levies payable to a fund, on the basis of the revenues made with on-demand services in their territory. Given the direct link between financial obligations and Member States' different cultural policies, it is appropriate to allow them to impose such financial obligations on providers of on-demand services established in another Member State which are directed towards its territory. In this case financial obligations may only be charged on the revenues generated through the audience in that Member State and provided that these revenues are not already subject to an equivalent contribution in the Member State of establishment.

³²

http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2015_215_en.pdf

³³

<http://ec.europa.eu/digital-agenda/en/communities/better-self-and-co-regulation>

- (29) When assessing on a case-by-case basis whether an on-demand audiovisual media service established in another Member State is targeting its territory, a Member State shall refer to indicators such as subscription revenues arising from national customers, advertisement or other promotions specifically targeted at customers in its territory, the main language of the service or the existence of content or commercial communications targeted specifically at the audience in the Member State of reception.
- (30) With a view to ensure an adequate promotion of European works while avoiding risks of double imposition for service providers, the assessment to determine the existence of an equivalent financial contribution in the Member State of establishment shall be based, among others, on the objective pursued, the nature and the amount of such contribution.
- (31) In order to ensure that obligations on promotion of European works do not undermine market development and to allow for the entry of new players in the market, small and micro as well as thematic on-demand audiovisual media services should not be subject to such requirements. Small on-demand services should mean services complying with the criteria laid down in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (SMEs). Thematic on-demand services should cover those catalogues exclusively devoted to specialised content. The Commission should encourage the Contact Committee to adopt Guidelines to guarantee a uniform implementation of these exceptions across the EU.
- (32) Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 concerning the manufacture, presentation and sale of tobacco³⁴ provides that audiovisual commercial communications to which this Directive applies, as well as commercial communications in information society services, are prohibited for electronic cigarettes and refill containers.
- (33) Certain widely recognised nutritional guidelines exist at national and international level, such as the WHO Regional Office for Europe's nutrient profile model, in order to differentiate foods on the basis of their nutritional composition in the context of foods television advertising to children. Member States are encouraged to ensure that self-and co-regulatory codes are used to effectively reduce the exposure of children and minors to audiovisual commercial communications regarding foods and beverages that are high in salt, sugars or fat or that otherwise do not fit these national or international nutritional guidelines.
- (34) Similarly, Member States are encouraged to ensure that self-and co-regulatory codes are used to effectively limit the exposure of children and minors to audiovisual commercial communications for alcoholic beverages. Certain co-regulatory or self-regulatory systems exist at European and national level in order to market responsibly alcoholic beverages, including in audiovisual commercial communications. These should be further encouraged. In particular, certain of these systems aim at ensuring that responsible drinking messages accompany audiovisual commercial communications for alcoholic beverages. Such measures and initiatives, as well as industry information campaigns about responsible drinking, are important to promote a moderate consumption and inform about the risks of alcohol misuse. Member States should further encourage their development.

³⁴ OJ L 127, 29.4.2014, p. 1

- (35) In order to remove barriers to the free circulation of cross-border services within the Union, it is necessary to ensure the effectiveness of self- and co-regulatory measures aiming, in particular, at protecting consumers or public health. Codes of conduct at Union level might be a good means of ensuring a more coherent and effective approach.
- (36) The public consultation entitled "A media framework for the 21st century" has confirmed that the market for TV broadcasting has evolved and that there is a need for more flexibility with regard to audiovisual commercial communications, in particular for quantitative rules for linear audiovisual media services, product placement and sponsorship. The emergence of new services, including without advertising, has led to a greater choice for viewers, who can easily switch to alternative offers.
- (37) Sponsorship represents an important means of financing audiovisual media services or programmes while promoting a legal or physical person's name, trade mark, image, activities or products. As such, for sponsorship to constitute a valuable form of advertising technique for advertisers and audiovisual media service providers, sponsorship announcements may contain promotional references to the goods or services of the sponsor, while not directly encouraging the purchase of the goods and services. Sponsorship announcements should also clearly inform the viewers of the existence of a sponsorship agreement. The content of sponsored programmes shall not be influenced in such a way as to affect the audiovisual media service provider's editorial independence.
- (38) The liberalisation of product placement in the previous review of the Directive has not brought about the expected take-up of this form of audiovisual commercial communication. In particular, the general prohibition of product placement with some exceptions has not created legal certainty for audiovisual media service providers. Product placement should thus be allowed in all audiovisual media services, subject to exceptions.
- (39) Product placement should not be admissible in news and current affairs programmes, consumer affairs programmes, religious programmes and programmes with a significant children's audience. Consumer affairs programmes are programmes offering advice to viewers, or including reviews on the purchase of products and services. Allowing product placement in such programmes would blur the distinction between advertising and editorial content for viewers who may expect a genuine and honest review of products or services in such programmes.
- (40) The rule that a product shall not be given undue prominence has proved difficult to apply in practice. It also restricts the take-up of product placement which, by definition, involves some level of prominent exposure to be able to generate value. The requirements for programmes containing product placement should thus focus on clearly informing the viewers of the existence of product placement and on ensuring that the audiovisual media service provider's editorial independence is not affected.
- (41) The requirement that isolated spots shall remain the exception has proved difficult to apply in practice and has led to overly restricting the use of such advertising spots. Isolated spots should be admissible and respect the principles of recognisability, distinguishability and separation (without prejudice to new advertising techniques).
- (42) As the increase in the number of new services has led to a greater choice for viewers, broadcasters are given greater flexibility with regard to the insertion of advertising and teleshopping spots where this does not unduly impair the integrity of programme. Yet,

in order to safeguard the specific character of the European television landscape, interruptions for cinematographic works and films made for television as well as for some categories of programmes that still need specific protection should remain limited.

- (43) While the Directive does not increase the overall amount of admissible advertising time during the period from 7:00 to 23:00, it is important for broadcasters to have more flexibility and to be able to decide when to place advertising in order to maximise advertisers' demand and viewers' flow. The hourly limit should thus be abolished while a daily limit of 20% of advertising within the period from 7:00 to 23:00 should be introduced.
- (44) Many broadcasters are part of larger media groups and make announcements not only in connection with their own programmes and ancillary products directly derived from those programmes but also in relation with programmes from other entities belonging to the same media group. Transmission time allotted to announcements made by the broadcaster in connection with programmes from other entities belonging to the same media group should not be included in the maximum amount of daily transmission time that may be allotted to advertising and teleshopping.
- (45) Regulatory bodies of the Member States can achieve the requisite degree of structural independence only if established as separate legal entities. Member States should therefore guarantee the independence of the national regulatory bodies from both the government and the industry with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States, including the possibility to set up converged regulators. National regulatory bodies should be in possession of the enforcement powers and resources necessary for the fulfilment of their tasks, in terms of staffing, expertise and financial means. The activities of national regulatory bodies established under this Directive should ensure respect for the objectives of media pluralism, cultural diversity, consumer protection, the internal market and the promotion of fair competition.
- (46) Any party subject of a decision of a national regulatory body should have the right to appeal to a body that is independent from the parties involved. Such body may be a court. The appeal procedure is without prejudice to the division of competences within national judicial systems and to the rights of legal or natural persons under national law.
- (47) With a view to ensuring the consistent application of the EU audiovisual regulatory framework across all Member States, the Commission established the European Regulators Group for Audiovisual Media Services (ERGA) by Commission decision of 3 February 2014 on establishing the European Regulators Group for Audiovisual Media Services. ERGA's role is to advise and assist the Commission in its work to ensure a consistent implementation of this Directive in all Member States, and to facilitate cooperation among the national regulatory authorities, and between the national regulatory authorities and the Commission.
- (48) ERGA has made a positive contribution towards consistent regulatory practice and has provided high level advice to the Commission on implementation matters. This calls for the formal recognition and reinforcement of its role in the Directive.
- (49) The Commission may consult ERGA on any matter relating to audiovisual media services and video-sharing platforms. ERGA should assist the Commission by

providing its expertise and advice and by facilitating exchange of best practices. In particular, the Commission should consult ERGA in the application of this Directive with a view to facilitating a convergent implementation of the Directive across the EU Digital Single Market. Upon the Commission's request, ERGA shall provide opinions, including on jurisdiction and Union codes in the area of protection of minors and hate speech as well as audiovisual commercial communications for foods high in fat, salt/sodium and sugars.

- (50) This Directive is without prejudice to the ability of Member States to impose obligations to ensure discoverability and accessibility of general interest content under defined general interest objectives such as media pluralism, freedom of speech and cultural diversity. Such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Union law. In this respect, Member States should in particular examine the need for regulatory intervention against the results of the outcome of market forces. Where Member States decide to impose discoverability rules, they should only impose proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2010/13/EU is hereby amended as follows:

- (1) Article 1 is amended as follows:

(a) In paragraph 1, the following new points *a bis* and *a ter* are added:

"(a *bis*) 'video-sharing platform service' means a service, as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, which meets all of the following requirements:

(i) the service consists of the storage of a large amount of programmes or user-generated videos, whereby the organisation of the content is determined by the provider of the service by automatic means or algorithms, notably hosting, displaying, tagging and sequencing, without that provider having editorial responsibility for that content;

(ii) the principal purpose of the service is the provision of programmes and user-generated videos to the general public, in order to inform, entertain or educate;

(iii) the service is made available by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC.

(a *ter*) 'principal purpose' within the meaning of point (1)(a)(i) and (a *bis*) means that the main activity of the service or a dissociable section of that service is devoted to providing programmes or user-generated videos."

(b) In paragraph 1, point (b), "and the form and content of which are comparable to the form and content of television broadcasting" is deleted and "videos of short duration" is added after "feature-length films".

(c) In paragraph 1, the following new point *b bis* is added:

"(b *bis*) 'user-generated video' means a set of moving images with or without sound constituting an individual item that is created and/or uploaded by end users;"

(d) In paragraph 1, the following new points *d bis* is added:

"(d *bis*) 'video-sharing platform provider' means the natural or legal person who provides a video-sharing platform service;"

(2) Chapter II is renamed "GENERAL PROVISIONS FOR AUDIOVISUAL MEDIA SERVICES".

(3) Article 2 is amended as follows:

(a) Paragraph 3 is replaced by the following:

"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 the majority of the workforce involved in the pursuit of the audiovisual media service activity operates;

(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."

(b) The following new paragraphs 5 *bis* and 5 *ter* are added:

"5 *bis*. Member States shall communicate to the Commission and regularly update a list of the audiovisual media service providers under their jurisdiction as well as on which of the criteria in paragraphs 2 to 5 their jurisdiction is based. The Commission shall ensure that the competent independent regulatory bodies have access to this information.

5 *ter*. If in applying Articles 3 and 4 of this Directive the Member States concerned do not agree on which Member State has jurisdiction, they shall bring the matter to the Commission's attention without undue delay. The Commission may request the European Regulators Group for Audiovisual Media Services (ERGA) to provide an opinion on the matter within 15 working days from the Commission's request. If the Commission requests an opinion from ERGA, the time-limits set out in Articles 3(5) and 4(5) of this Directive shall be suspended until ERGA has adopted an opinion."

(4) Article 3 is replaced by the following:

"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. Under the conditions set out in paragraphs 3 and 4, Member States may provisionally derogate from paragraph 1 if an audiovisual media service coming from another Member State

(a) manifestly, seriously and gravely infringes Article 12 and/or Article 6; or

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.

9. Member States and the Commission shall regularly exchange experiences and best practices regarding the procedure set out in paragraphs 2 to 8 in the framework of the Contact Committee and ERGA."

(5) Article 4 is amended as follows:

(a) In paragraph 1, "with regard to protection of minors and incitement to hatred (Articles 6, 6bis, 12), audiovisual commercial communications (Articles 9, 10, 11, 19 to 26), promotion of European works (Articles 13, 16 and 17) and independence of regulators (Articles 30 and 30 *bis*)" is inserted after "stricter rules".

(b) After paragraph 3(b), the following is inserted: "It is for the first Member State to substantiate the alleged circumvention, taking due account of the broadcaster's representations, if any, in line with point (b) of paragraph 4."

(c) Paragraphs 4 and 5 are replaced by the following:

"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;

(b) it has respected the rights of defence of the broadcaster concerned and, in particular, has given the broadcaster the opportunity to express its views on the alleged grievance and the measures the notifying Member States intends to take; and

(c) 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 3 months following the notification provided for in point (a) of paragraph 4. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within 3 months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. Where the Commission considers the notification is incomplete, it shall request all necessary additional information. Where a Member State responds to such a request, the Commission shall inform the Member State of the receipt of the response. Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or provides incomplete information, the Commission shall take a negative decision. If the Commission decides that the measures are incompatible with Union law, the Member State in question shall refrain from taking the proposed measures."

(d) Paragraph 7 is replaced by the following:

"7. Member States shall encourage co-regulation and/or self-regulation through codes adopted at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These codes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned. The codes shall clearly and unambiguously set out their objectives. They shall provide for regular,

(b) prejudices or presents a serious and grave risk of prejudice to public security, including the safeguarding of national security and defence.

3. In respect of the provisional derogation set out in paragraph 2, the following conditions need to be fulfilled:

(a) during the 12 months preceding the notification referred to in point (b) of this paragraph, the broadcaster has contravened paragraph 2 point (a) or (b) on at least two occasions;

(b) the Member State concerned has notified the broadcaster, the transmitting Member State and the Commission in writing of the alleged contraventions and of the measures it intends to take should any such contraventions occur again;

(c) consultations with the transmitting Member State and the Commission have not produced an amicable settlement within one month of the notification provided for in point (b);

(d) the broadcaster has contravened paragraph 2 point (a) or (b) on at least a further occasion;

(e) the notifying Member State has respected the rights of defence of the broadcaster concerned and, in particular, has given the broadcaster the opportunity to express its views on the alleged contraventions and the measures that Member State intends to take. It shall duly take into account these views as well as the views of the Member State of jurisdiction.

4. Points (a) and (d) of paragraph 3 only apply in respect of linear services.

5. The Commission shall, within 2 months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Union law. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within 2 months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. Where the Commission considers the notification is incomplete, it shall request all necessary additional information. Where a Member State responds to such a request, the Commission shall inform the Member State of the receipt of the response. Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or provides incomplete information, the Commission shall take a negative decision. If the Commission decides that the measures are incompatible with Union law, the Member State will be required to put an end to the measures in question as a matter of urgency.

6. Paragraphs 3 and 4 shall be without prejudice to the application of any procedure, remedy or sanction to the contraventions in question in the Member State which has jurisdiction over the media service provider concerned.

7. Member States may, in urgent cases, derogate from the conditions laid down in point (b) and (c) of paragraph 3. 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.

8. Without prejudice to the Member State's possibility of proceeding with the measures referred to in paragraph 7, the Commission shall examine the compatibility of the notified measures with Union law in the shortest possible time. Where it comes

transparent and independent monitoring and evaluation of the achievement of the objectives aimed at. They shall provide for effective enforcement, including when appropriate graduated and proportional sanctions in case of breaches of their rules."

- (5) Chapter III is renamed as follows: "PROVISIONS APPLICABLE TO AUDIOVISUAL MEDIA SERVICES".
- (6) Article 5 point (d) is replaced by the following:
"(d) the Member State having jurisdiction over the media service providers and the competent regulatory or supervisory bodies."
- (7) The following new Article 6 *bis* is inserted:

"Article 6 bis

1. Member States shall ensure that audiovisual media service providers provide sufficient information to viewers about content which may impair the physical, mental or moral development of minors. This could be done for instance through a system of descriptors indicating the nature of the content.
 2. For the implementation of this Article, Member States shall encourage co-regulation in line with Article 4 paragraph 7 of this Directive.
 3. The Commission and ERGA shall encourage media service providers to exchange best practices on co-regulatory systems across the EU. If considered appropriate, the Commission shall facilitate the development of Union codes.
 4. Draft Union codes and amendments or extensions to existing Union codes shall be submitted to the Commission. The Commission may ask ERGA to give an opinion on the drafts, amendments or extensions of these codes. The Commission may ensure appropriate publicity for these codes."
- (8) Article 7 is deleted.
 - (9) Article 9 is amended as follows:
 - (a) Paragraph 2 is replaced by the following:

"2. Member States and the Commission shall encourage the development of self- and co-regulatory codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in programmes with a significant children's audience, 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. Member States are encouraged to ensure that these codes are used to effectively reduce the exposure of minors to audiovisual commercial communications of foods and beverages that are high in salt, sugars or fat or that otherwise do not fit national or international nutritional guidelines. These codes shall be in line with Article 4 paragraph 7 of this Directive.

These codes shall provide that the audiovisual commercial communications should not emphasize the positive quality of the nutritional aspects of these products.

The Commission and ERGA shall encourage media service providers to exchange best practices on self- and co-regulatory systems across the EU. If considered appropriate, the Commission shall facilitate the development of Union codes."
 - (b) The following new paragraphs 3, 4 and 5 are inserted:

"3. Draft Union codes and amendments or extensions to existing Union codes shall be submitted to the Commission. The Commission may ask ERGA for an opinion on the drafts, amendments or extensions of these codes. The Commission may ensure appropriate publicity for these codes.

4. Member States and the Commission shall encourage the development of self- and co-regulatory codes of conduct regarding inappropriate audiovisual commercial communications for alcoholic beverages. Member States are encouraged to ensure that these codes are used to effectively limit the exposure of minors to audiovisual commercial communications for alcoholic beverages. These codes shall be in line with Article 4 paragraph 7 of this Directive.

The Commission and ERGA shall encourage the exchange of best practices on self- and co-regulatory systems across the EU. If considered appropriate, the Commission shall facilitate the development of Union codes.

5. Draft Union codes and amendments or extensions to existing Union codes shall be submitted to the Commission. The Commission may ask ERGA for an opinion on the drafts, amendments or extensions of these codes. The Commission may ensure appropriate publicity for these codes."

- (10) In Article 10, in point (c), the words "in particular by making special promotional references to those goods or services" are deleted.
- (11) Article 11 is replaced by the following:

"Article 11

1. Paragraphs 2, 3 and 4 shall apply only to programmes produced after 19 December 2009.

2. Product placement shall be admissible in all audiovisual media services, except in news and current affairs programmes, consumer affairs programmes, religious programmes and programmes with a significant children's audience.

3. 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;

(c) 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 (c) 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.

- (12) Article 12 is replaced by the following:

"Article 12

Member States shall take appropriate measures to ensure that programmes broadcast by broadcasters or provided by on-demand media service providers under their jurisdiction, which may 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 them. The measures may include selecting the time of the broadcast, age verification tools or other technical measures. They shall be proportionate to the potential harm of the programme.

The most harmful content, such as gratuitous violence and pornography, shall be subject to the strictest measures, such as encryption and PIN codes."

- (13) The heading "Chapter IV PROVISIONS APPLICABLE ONLY TO ON-DEMAND AUDIOVISUAL MEDIA SERVICES" is moved above Article 13.

- (14) Article 13 is replaced by the following:

"Article 13

1. Member States shall ensure that providers of on-demand audiovisual media services under their jurisdiction secure at least a 20% share of European works in their catalogue and ensure prominence of these works.

2. Member States may require providers of on-demand audiovisual media services under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contributions to national funds. Member States may require providers of on-demand audiovisual media services, targeting audiences in their territories, but being established in other Member States to make such financial contributions. In this case, the financial contribution shall be based only on the revenues made in the targeted Member States if these revenues are not already subject to an equivalent contribution in the Member State of establishment. Any financial contribution shall comply with Union law, in particular with State aid rules.

3. Member States shall report to the Commission no later than [date] and every 2 years thereafter on the implementation of paragraphs 1 and 2.

4. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraphs 1 and 2, taking into account the market and technological developments and the objective of cultural diversity.

5. Member States shall waive the requirements laid down in paragraphs 1 and 2 for low audience and thematic on-demand service providers and small and micro enterprises."

- (15) In Article 19, paragraph 2 is replaced by the following:

"2. Isolated advertising and teleshopping spots shall be admissible."

- (16) In paragraph 2 of Article 20, in the first sentence, the words "once for each scheduled period of at least 30 minutes" are replaced by "once for each scheduled period of at least 20 minutes".
- (17) Article 23 is replaced by the following:

"Article 23

1. The daily proportion of television advertising spots and teleshopping spots within the period between 7:00 and 23:00 shall not exceed 20 %.
 2. Paragraph 1 shall not apply to the following:
 - (a) announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes or with programmes from other entities belonging to the same media group;
 - (b) sponsorship announcements;
 - (c) and product placements."
- (18) Chapter VIII is deleted.
- (19) A new Chapter IX *bis* "PROVISION APPLICABLE ONLY TO VIDEO-SHARING PLATFORMS" is inserted.
- (20) The following new Articles 28 *bis* and 28 *ter* are inserted:

"Article 28 bis

1. Each Member State shall ensure that all video-sharing platforms transmitted by video-sharing platform providers under its jurisdiction comply with the rules of the system of law applicable to such services intended for the public in that Member State.
2. Member States shall ensure freedom of reception and shall not restrict services on their territory of video-sharing platform providers from other Member States for reasons which fall within the fields coordinated by Article 28 *ter*.
3. By way of derogation from Article 3(4) of Directive 2000/31/EC, a Member State may take measures to derogate from paragraph 2 in respect of video-sharing platform services if the following conditions are fulfilled:
 - (a) another Member State having jurisdiction over one or more video-sharing platform providers has not ensured that those platforms take appropriate measures in line with Article 28 *ter* (1);
 - (b) the Member State concerned has notified the Member State having jurisdiction and the Commission in writing of the alleged facts pursuant to point (a). The Member State concerned shall specify in its notification the measures it intends to take where the Member State having jurisdiction persists in failing to take appropriate measures;
 - (c) consultations with the Member State having jurisdiction and the Commission have not produced an amicable settlement within one month of the notification provided for in point (b).
4. The Commission shall, within 2 months following notification of the measures taken by the notifying Member State, take a decision on whether the measures are compatible with Union law. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within 2

months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. Where the Commission considers the notification is incomplete, it shall request all necessary additional information. Where a Member State responds to such a request, the Commission shall inform the Member State of the receipt of the response. Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or provides incomplete information, the Commission shall take a negative decision. If the Commission decides that the measures are incompatible with Union law, the Member State will be required to put an end to the measures in question as a matter of urgency.

5. Paragraphs 3 and 4 shall be without prejudice to the application of any procedure, remedy or sanction to the contraventions in question in the Member State which has jurisdiction over the media service provider concerned.

6. Member States shall not require video-sharing platform providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by Article 28 *ter*.

7. For the purposes of this Directive, a video-sharing platform provider shall be deemed to be under the jurisdiction of the Member State in which it is established within the meaning of Articles 49 to 55 of the Treaty on the Functioning of the European Union. In case a video-sharing platform provider is not established in a Member State, it shall be deemed to be under the jurisdiction of the Member State in which its parent company, one of its subsidiaries or an entity within the same group is established. In case more than one of these entities is established in a Member State, Member States shall ensure that video-sharing platform providers are required to designate one of the entities as a representative. In this case, the audiovisual Internet service provider shall be deemed to be under the jurisdiction of the Member State in which the representative is established. The representative acts on behalf of the video-sharing platform provider.

8. Member States shall communicate to the Commission and regularly update a list of the video-sharing platform providers under their jurisdiction as well as on which of the criteria in paragraph 4 their jurisdiction is based. The Commission shall ensure that the competent independent regulatory bodies have access to this information."

Article 28 ter

1. Member States shall ensure that video-sharing platform providers take appropriate measures to:

- protect minors from content that may impair their physical, mental or moral development;
- protect all citizens from content containing incitement to hatred.

2. For the purposes of paragraph 1, Member States shall ensure that these measures are implemented through codes of conduct, in line with Article 4 paragraph 7 of this Directive. Video-sharing platforms shall include the concepts of harmful content for minors (Article 12) and hate speech (Article 6) in their terms and conditions. The codes of conduct shall also include mechanisms for users to report or flag harmful content or hate speech. They shall include effective age verification systems preventing minors from accessing harmful content, systems allowing the users to give feedback or to rate content and parental control systems. Under the codes of conduct

the signatories shall act upon the feedback received and restrict access to harmful content. Signatories shall also be required to prevent or terminate the occurrence of illegal content following a national court or administrative authority decision.

3. Member States shall establish the mechanisms to assess the appropriateness of these measures. Member States shall entrust this task to the authorities established in conformity with Article 30 of this Directive.

4. Member States shall not impose a general obligation on video-sharing platform providers, providing the services covered by Article 14 of Directive 2000/31/EC, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

5. Any action taken by Member States to enforce paragraph 1 and 2 shall be proportionate.

6. Member States shall ensure that complaint and redress mechanisms for the settlement of consumer disputes are available.

7. The Commission and ERGA shall encourage video-sharing platform providers to exchange best practices on co-regulatory systems across the EU. If considered appropriate, the Commission shall facilitate the development of Union codes.

8. Draft Union codes and amendments or extensions to existing Union codes shall be submitted to the Commission. The Commission may ask ERGA to give an opinion on the drafts, amendments or extensions of these codes. The Commission may ensure appropriate publicity for these codes."

(21) Chapter XI is renamed "REGULATORY BODIES OF THE MEMBER STATES".

(22) Article 30 is replaced by the following:

"Article 30

1. Each Member State shall designate one or more independent national regulatory authorities. Member States shall ensure that they are legally distinct and functionally independent of any other public or private body.

2. Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently and in accordance with the AVMSD objectives of media pluralism, cultural diversity, consumer protection, internal market and the promotion of fair competition.

National regulatory authorities shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Community law. This shall not prevent supervision in accordance with national constitutional law.

3. The competences and powers of the independent regulatory authorities, as well as the ways of making them accountable should be clearly defined in law.

4. Member States shall ensure that national regulatory authorities have adequate enforcement powers to carry out their functions effectively.

5. The Head of a national regulatory body or the members of the collegiate body fulfilling that function within a national regulatory body, may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which

are laid down in advance in national law. A dismissal decision shall be made public and a statement of reasons shall be made available.

6. Member States shall ensure that independent national regulatory authorities have separate annual budgets. The budgets shall be made public. Member States shall also ensure that national regulatory authorities have adequate financial and human resources to enable them to carry out the task assigned to them and to actively participate in and contribute to ERGA.

7. Member States shall ensure that effective mechanisms exist at national level under which any user or audiovisual media services provider or video-sharing platforms who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body. The appeal body shall be independent of the parties involved in the appeal.

This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.

Pending the outcome of the appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law.

Where the appeal body referred to above is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such cases, its decision shall be subject to review by a court or tribunal within the meaning of Article 267 of the Treaty on the Functioning of the EU."

(23) The following new Article 30 *bis* is inserted:

"Article 30 bis

1. The European Regulators Group for Audiovisual Media Services (ERGA) is hereby established.

2. It shall be composed of national independent regulatory bodies in the field of audiovisual media services. They shall be represented by the heads or by nominated high level representatives of the national regulatory body with primary responsibility for overseeing audiovisual media services, or in cases where there is no national regulatory body, by other representatives as chosen through their procedures. A Commission representative shall also participate in the group meetings.

3. ERGA's tasks shall be:

(a) to advise and assist the Commission in its work to ensure a consistent implementation in all Member States of the regulatory framework for audiovisual media services;

(b) to assist and advise the Commission as to any matter related to audiovisual media services within the Commission's competence. If justified in order to advise the Commission on certain issues, the group may consult market participants, consumers and end-users in order to collect the necessary information;

(c) to provide for an exchange of experience and good practice as to the application of the regulatory framework for audiovisual media services;

(d) to cooperate and provide its members with the information necessary for the application of this Directive, in particular as regards Articles 3 and 4 thereof.

(e) to give opinions, when requested by the Commission, on the issues envisaged in Articles 2(7), 6 *bis*(4), 9(3), 9(5) and on any matter relating to audiovisual media services, in particular on the protection of minors and incitement to hatred."

(24) Article 32 is deleted.

(25) Article 33 is amended as follows:

"Article 33

The European Commission will monitor Member States' application of the Directive, including its application of co-regulation and/or self-regulation through codes adopted at national level.

Not later than four years after its adoption, 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.

No later than 10 years after adoption, the Commission shall submit to the European Parliament and the Council an ex post evaluation, accompanied where appropriate by proposals for its review, in order to measure the impact of the Directive and its added value."

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President