DIRECTIVE 97/36/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 30 June 1997

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 EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 57 (2) and 66 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 189b of the Treaty [3] in the light of the joint text approved by the Conciliation Committee on 16 April 1997,

(1) Whereas Council Directive 89/552/EEC [4] constitutes the legal framework for television broadcasting in the internal market;

(2) Whereas Article 26 of Directive 89/552/EEC states that the Commission shall, not later than the end of the fifth year after the date of adoption of the Directive, submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Directive and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting;

(3) Whereas the application of Directive 89/552/EEC and the report on its application have revealed the need to clarify certain definitions or obligations on Member States under this Directive;

(4) Whereas the Commission, in its communication of 19 July 1994 entitled 'Europe's way to the information society: an action plan', underlined the importance of a regulatory framework applying to the content of audiovisual services which would help to safeguard the free movement of such services in the Community and be responsive to the opportunities for growth in this sector opened up by new technologies, while at the same time taking into account the specific nature, in particular the cultural and sociological impact, of audiovisual programmes, whatever their mode of transmission;

(5) Whereas the Council welcomed this action plan at its meeting of 28 September 1994 and stressed the need to improve the competitiveness of the European audiovisual industry;

(6) Whereas the Commission has submitted a Green Paper on the Protection of Minors and Human Dignity in audiovisual and information services and has undertaken to submit a Green Paper focusing on developing the cultural aspects of these new services;

(7) Whereas any legislative framework concerning new audiovisual services must be compatible with the primary objective of this Directive which is to create the legal framework for the free movement of services;

(8) Whereas it is essential that the Member States should take action with regard to services comparable to television broadcasting in order to prevent any breach of the fundamental principles which must govern information and the emergence of wide disparities as regards free movement and competition;

(9) Whereas the Heads of State and Government meeting at the European Council in Essen on 9 and 10 December 1994 called on the Commission to present a proposal for a revision of Directive 89/552/EEC before their next meeting;

(10) Whereas the application of Directive 89/552/EEC has revealed the need to clarify the concept of jurisdiction as applied specifically to the audiovisual sector; whereas, in view of the case law of the Court of Justice of the European Communities, the establishment criterion should be made the principal criterion determining the jurisdiction of a particular Member State;

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[1] OJ No C 185, 19. 7. 1995, p. 4 and OJ No C 221, 30. 7. 1996, p. 10.
[2] OJ No C 301, 13. 11. 1995, p. 35.
[3] Opinion of the European Parliament of 14 February 1996 (OJ No C 65, 4. 3. 1996, p.113). Council Common Position of 18 July 1996 (OJ No C 264, 11. 9. 1996, p. 52) and Decision of the European Parliament of 12 November 1996 (OJ No C 362, 2. 12. 1996, p. 56). Decision of the European Parliament of 10 June 1997 and Decision of the Council of 19 June 1997.
[4] OJ No L 298, 17. 10. 1989, p. 23. Directive as amended by the 1994 Act of Accession.

(11) Whereas the concept of establishment, according to the criteria laid down by the Court of Justice in its judgment of 25 July 1991 in the *Factortame* case [1], involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period;

(12) Whereas the establishment of a television broadcasting organization may be determined by a series of practical criteria such as the location of the head office of the provider of services, the place where decisions on programming policy are usually taken, the place where the programme to be broadcast to the public is finally mixed and processed, and the place where a significant proportion of the workforce required for the pursuit of the television broadcasting activity is located;

(13) Whereas the fixing of a series of practical criteria is designed to determine by an exhaustive procedure that one Member State and one only has jurisdiction over a broadcaster in connection with the provision of the services which this Directive addresses; nevertheless, taking into account the case law of the Court of Justice and so as to avoid cases where there is a vacuum of jurisdiction it is appropriate to refer to the criterion of establishment within the meaning of Articles 52 and following of the Treaty establishing the European Community as the final criterion determining the jurisdiction of a Member State;

(14) Whereas the Court of Justice has constantly held [2] that a Member State retains the right to take measures against a television broadcasting organization that is established in another Member State but directs all or most of its activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the organization had it been established on the territory of the first Member State;

(15) Whereas Article F (2) of the Treaty on European Union stipulates that the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms as general principles of Community law; whereas any measure aimed at restricting the reception and/or suspending the retransmission of television broadcasts taken under Article 2a of Directive 89/552/EEC as amended by this Directive must be compatible with such principles;

(16) Whereas it is necessary to ensure the effective application of the provisions of Directive 89/552/EEC as amended by this Directive throughout the Community in order to preserve free and fair competition between firms in the same industry;

(17) Whereas directly affected third parties, including nationals of other Member States, must be able to assert their rights, according to national law, before competent judicial or other authorities of the Member State with jurisdiction over the television broadcasting organization that may be failing to comply with the national provisions arising out of the application of Directive 89/552/EEC as amended by this Directive;

(18) Whereas it is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society, such as the Olympic games, the football World Cup and European football championship; whereas to this end Member States retain the right to take measures compatible with Community law aimed at regulating the exercise by broadcasters under their jurisdiction of exclusive broadcasting rights to such events;

(19) Whereas it is necessary to make arrangements within a Community framework, in order to avoid potential legal uncertainty and market distortions and to reconcile free circulation of television services with the need to prevent the possibility of circumvention of national measures protecting a legitimate general interest;

(20) Whereas, in particular, it is appropriate to lay down in this Directive provisions concerning the exercise by broadcasters of exclusive broadcasting rights that they may have purchased to events considered to be of major importance for society in a Member State other than that having jurisdiction over the broadcasters, and whereas, in order to avoid speculative rights purchases with a view to circumvention of national measures, it is necessary to apply these provisions to contracts entered into after the publication of this Directive and concerning events which take place after the date of implementation, and whereas, when contracts that predate the publication of this Directive are renewed, they are considered to be new contracts;

[1] Case C-221/89, *Queen* v. *Secretary of State for Transport, ex parte Factortame Ltd. and Others,* (1991) ECR I-3905, paragraph 20.

[2] See, in particular, the judgments in Case 33/74, *Van Binsbergen* v. *Bestuur van de Bedrijfsvereniging,* (1974) ECR 1299 and in Case C-23/93, *TV 10 SA* v. *Commissariaat voor de Media,* (1994) ECR I-4795.

(21) Whereas events of major importance for society should, for the purposes of this Directive, meet certain criteria, that is to say be outstanding events which are of interest to the general public in the European Union or in a given Member State or in an important component part of a given Member State and are organized in advance by an event organizer who is legally entitled to sell the rights pertaining to that event;

(22) Whereas, for the purposes of this Directive, 'free television' means broadcasting on a channel, either public or commercial, of programmes which are accessible to the public without payment in addition to the modes of funding of broadcasting that are widely prevailing in each Member State (such as licence fee and/or the basic tier subscription fee to a cable network);

(23) Whereas Member States are free to take whatever measures they deem appropriate with regard to broadcasts which come from third countries and which do not satisfy the conditions laid down in Article 2 of Directive 89/552/EEC as amended by this Directive, provided they comply with Community law and the international obligations of the Community;

(24) Whereas in order to eliminate the obstacles arising from differences in national legislation on the promotion of European works, Directive 89/552/EEC as amended by this Directive contains provisions aimed at harmonizing such legislation; whereas those provisions which, in general, seek to liberalize trade must contain clauses harmonizing the conditions of competition;

(25) Whereas, moreover, Article 128 (4) of the Treaty establishing the European Community requires the Community to take cultural aspects into account in its action under other provisions of the Treaty;

(26) Whereas the Green Paper on 'Strategy options to strengthen the European programme industry in the context of the audiovisual policy of the European Union', adopted by the Commission on 7 April 1994, puts forward inter alia measures to promote European works in order to further the development of the sector; whereas the Media II programme, which seeks to promote training, development and distribution in the audiovisual sector, is also designed to enable the production of European works to be developed; whereas the Commission has proposed that production of European works should also be promoted by a Community mechanism such as a Guarantee Fund;

(27) Whereas broadcasting organizations, programme makers, producers, authors and other experts should be encouraged to develop more detailed concepts and strategies aimed at developing European audiovisual fiction films that are addressed to an international audience;

(28) Whereas, in addition to the considerations cited above, it is necessary to create conditions for improving the competitiveness of the programme industry; whereas the communications on the application of Articles 4 and 5 of Directive 89/552/EEC, adopted by the Commission on 3 March 1994 and 15 July 1996 pursuant to Article 4 (3) of that Directive, draw the conclusion that measures to promote European works can contribute to such an improvement but that they need to take account of developments in the field of television broadcasting;

(29) Whereas channels broadcasting entirely in a language other than those of the Member States should not be covered by the provisions of Articles 4 and 5; whereas, nevertheless, where such a language or languages represent a substantial part but not all of the channel's transmission time, the provisions of Articles 4 and 5 should not apply to that part of transmission time;

(30) Whereas the proportions of European works must be achieved taking economic realities into account; whereas, therefore, a progressive system for achieving this objective is required;

(31) Whereas, with a view to promoting the production of European works, it is essential that the Community, taking into account the audiovisual capacity of each Member State and the need to protect lesser used languages of the European Union, should promote independent producers; whereas Member States, in defining the notion of 'independent producer', should take appropriate account of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights;

(32) Whereas the question of specific time scales for each type of television showing of cinematographic works is primarily a matter to be settled by means of agreements between the interested parties or professionals concerned;

(33) Whereas advertising for medicinal products for human use is subject to the provisions of Directive 92/28/EEC [1];

[1] OJ No L 113, 30. 4. 1992, p. 13.

(34) Whereas daily transmission time allotted to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from these, or to public service announcements and charity appeals broadcast free of charge, is not to be included in the maximum amounts of daily or hourly transmission time that may be allotted to advertising and teleshopping;

(35) Whereas, in order to avoid distortions of competition, this derogation is limited to announcements concerning products that fulfil the dual condition of being both ancillary to and directly derived from the programmes concerned; whereas the term ancillary refers to products intended specifically to allow the viewing public to benefit fully from or to interact with these programmes;

(36) Whereas in view of the development of teleshopping, an economically important activity for operators as a whole and a genuine outlet for goods and services within the Community, it is essential to modify the rules on transmission time and to ensure a high level of consumer protection by putting in place appropriate standards regulating the form and content of such broadcasts;

(37) Whereas it is important for the competent national authorities, in monitoring the implementation of the relevant provisions, to be able to distinguish, as regards channels not exclusively devoted to teleshopping, between transmission time devoted to teleshopping spots, advertising spots and other forms of advertising on the one hand and, on the other, transmission time devoted to teleshopping windows; whereas it is therefore necessary and sufficient that each window be clearly identified by optical and acoustic means at least at the beginning and the end of the window;

(38) Whereas Directive 89/552/EEC as amended by this Directive applies to channels exclusively devoted to teleshopping or self-promotion, without conventional programme elements such as news, sports, films, documentaries and drama, solely for the purposes of these Directives and without prejudice to the inclusion of such channels in the scope of other Community instruments;

(39) Whereas it is necessary to make clear that self-promotional activities are a particular form of advertising in which the broadcaster promotes its own products, services, programmes or channels; whereas, in particular, trailers consisting of extracts from programmes should be treated as programmes; whereas self-promotion is a new and relatively unknown phenomenon and provisions concerning it may therefore be particularly subject to review in future examinations of this Directive;

(40) Whereas it is necessary to clarify the rules for the protection of the physical, mental and moral development of minors; whereas the establishment of a clear distinction between programmes that are subject to an absolute ban and those that may be authorized subject to the use of appropriate technical means should satisfy concern about the public interest expressed by Member States and the Community;

(41) Whereas none of the provisions of this Directive that concern the protection of minors and public order requires that the measures in question must necessarily be implemented through the prior control of television broadcasts;

(42) Whereas an investigation by the Commission, in liaison with the competent Member State authorities, of the possible advantages and drawbacks of further measures to facilitate the control exercised by parents or guardians over the programmes that minors may watch shall consider, *inter alia,* the desirability of:

— the requirement for new television sets to be equipped with a technical device enabling parents or guardians to filter out certain programmes,

— the setting up of appropriate rating systems,

— encouraging family viewing policies and other educational and awareness measures,

— taking into account experience gained in this field in Europe and elsewhere as well as the views of interested parties such as broadcasters, producers, educationalists, media specialists and relevant associations,

with a view to presenting, if necessary before the deadline laid down in Article 26, appropriate proposals for legislative or other measures;

(43) Whereas it is appropriate to amend Directive 89/552/EEC to allow natural or legal persons whose activities include the manufacture or the sale of medicinal products and medical treatment available only on prescription to sponsor television programmes, provided that such sponsorship does not circumvent the prohibition of television advertising for medicinal products and medical treatment available only on prescription;

(44) Whereas the approach in Directive 89/552/EEC and this Directive has been adopted to achieve the essential harmonization necessary and sufficient to ensure the free movement of television broadcasts in the Community; whereas Member States remain free to apply to broadcasters under their jurisdiction more detailed or stricter rules in the fields coordinated by this Directive, including, *inter alia,* rules concerning the achievement of language policy goals, protection of the public interest in terms of television's role as a provider of information, education, culture and entertainment, the need to safeguard pluralism in the information industry and the media, and the protection of competition with a view to avoiding the abuse of dominant positions and/or the establishment or strengthening of dominant positions by mergers, agreements, acquisitions or similar initiatives; whereas such rules must be compatible with Community law;

(45) Whereas the objective of supporting audiovisual production in Europe can be pursued within the Member States in the framework of the organization of their broadcasting services, *inter alia,* through the definition of a public interest mission for certain broadcasting organizations, including the obligation to contribute substantially to investment in European production;

(46) Whereas Article B of the Treaty on European Union states that one of the objectives the Union shall set itself is to maintain in full the 'acquis communautaire',

HAVE ADOPTED THIS DIRECTIVE:

Article 1

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

1. in Article 1:

(a) the following new point (b) shall be inserted:

'(b) "broadcaster" means the natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of (a) and who transmits them or has them transmitted by third parties;'

(b) the former point (b) shall become point (c) and shall read as follows:

'(c) "television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;'

(c) the former points (c) and (d) shall become points (d) and (e);

(d) the following point shall be added:

'(f) "teleshopping" means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment.';

2. Article 2 shall be replaced by the following:

'Article 2

1. Each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State.

2. For the purposes of this Directive the broadcasters under the jurisdiction of a Member State are:

— those established in that Member State in accordance with paragraph 3;

— those to whom paragraph 4 applies.

3. For the purposes of this Directive, a broadcaster shall be deemed to be established in a Member State in the following cases:

(a) the broadcaster has its head office in that Member State and the editorial decisions about programme schedules are taken in that Member State;

(b) if a broadcaster has its head office in one Member State but editorial decisions on programme schedules are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those