

## **EACA position on the proposed Audiovisual Media Services directive**

### **Position and suggested amendments**

10 July 2006.

The European Association of Communications Agencies (EACA) is the Brussels-based organisation that represents full-service advertising and media agencies as well as agency associations in Europe. Our members include 29 national associations (covering all EU members and candidate states) and all the major creative and media agency networks.

EACA welcomes the proposal for an Audiovisual Services Directive and the Commission intention to create a level playing field for audiovisual services, both on- and off-line, but would like to express its concern about specific parts of the directive that will have major consequences for the advertising industry.

### **I. Clarification of definitions**

For advertising professionals it is essential to know which forms of advertising are covered by a specific piece of legislation. The rules regarding classical or “linear” television advertising as laid down in the Television Without Frontiers directive<sup>1</sup> have been found effective and appropriate, both by consumers in the various Member States and the media and advertising industry. On the Internet, the situation is slightly different.

Until now, online audiovisual and other forms of commercial communications came under the E-commerce<sup>2</sup> directive that provides transparency and identification requirements, but no specific rules on the content of commercial communications.

The new Audiovisual Media Services directive on the other hand, lays down precise rules on the content of such online services. Some general rules which reflect basic values of our democratic society, such as a ban on incitement to hatred or a ban on discrimination, others more specific to advertising such as rules regarding advertisements aimed at minors, rules regarding the advertising of pharmaceuticals, alcoholic beverages or tobacco products and rules on certain advertising techniques such as sponsorship or product placement.

In order to be able to create legal, decent, honest and responsible advertising, it must therefore be clear which forms of advertising are covered by the E-commerce directive and which will be covered by the Audiovisual Media Services directive.

---

<sup>1</sup> Television Without Frontiers Directive 89/552/EEC, amended by Directive 97/36/EC.

<sup>2</sup> E-Commerce Directive 2000/31/EC

According to the Commission's explanations in the Preambles<sup>3</sup> of the directive, electronic versions of newspapers, magazines as well as audio transmissions and internet-based radio are excluded from the scope of the directive and come therefore under the E-Commerce directive. Similarly, audiovisual commercial communications on these media are also excluded from the scope of the directive.

As we believe that the current definition of audiovisual media service is slightly too broad to allow this simple distinction, we would like to propose the following amendment.

### I.A. Definition of audiovisual media service

#### Amendment to Article 1 (a)

"Audiovisual media service" means a service as defined by Articles 49 and 50 of the Treaty the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain and educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and Council. ***This excludes services where the audiovisual content is merely incidental to the service and is not its principal purpose, such as electronic versions of newspapers and magazines, audio transmission or radio.***

### I.B. Definition of product placement

EACA welcomes the Commission initiative to recognise product placement as a legitimate commercial communications practice, by taking it out of the "legal grey zone" bordering on the banned surreptitious advertising techniques group.

Although this practice is not yet widely used in Europe, there seems to be a certain potential which our British Member, the Institute of Advertising Practitioners (IPA) has estimated at a yearly £40 million in the UK. In 2004 in the States for example, product placement expenditure in television amounted to around \$1.9 billion, which represents 1.7% of the total audiovisual ad-spend<sup>4</sup>.

EACA strongly supports the possibility to use this practice, as long as its commercial intent is made clear for the viewer. This should not impinge however, on the editorial freedom of programme producers or broadcasters to use free products to create their shows, movies or series. In order to distinguish between product placement that has been paid for and free product placement which is part of an editorial decision, we would like to restrict the definition in the directive with the following amendment.

<sup>3</sup> Preambles 14, 15 and 16

<sup>4</sup> Carat-Koan, « Etude Comparative de l'Impact de la Règlementation sur les Marchés de la Publicité Télévisée – Rapport Final », July 2005, published February 2006

In order to limit the use of references to products and their brands provided for free to an acceptable use and avoid certain excesses which none of our EU advertising industry and media partners would support, please note the “*without undue prominence*” restriction limiting the visibility of products and their brands.

#### **Amendment to Article 1(k)**

“Product placement” means any form of audiovisual commercial communication consisting of the inclusion of- or reference to a product, a service or the trade mark thereof so that it is featured within audiovisual media services, ~~normally~~ in return for payment or **similar substantial** consideration. ***This does not include independent editorial decisions to use products, without undue prominence, which are integral to a programme and facilitate its production, such as prizes, incidental objects and props.***

## **II. Country of Origin principle**

EACA has consistently<sup>5</sup> given full support to the country of origin principle, enshrined in the Television Without Frontiers Directive<sup>6</sup>. This principle must continue to apply for audiovisual content services, particularly where they become non-linear and on the internet, as currently legislated by the E-commerce directive<sup>7</sup>, also based on the country of origin principle.

EACA is therefore concerned about the weakening of this principle by the new Articles 2(7), 2(8), 2(9) and 2(10) in the new proposal which allow Member States to block incoming audiovisual media services or advertisements resulting from “fraudulent conduct”.

We believe that disagreements between Member States on the content of essentially classical and linear broadcasts they receive should be solved in bilateral negotiations rather than by weakening a directive that aims to ensure the development of the European broadcast media and services as well as of the future audiovisual online content services.

#### **Amendment to Articles 2(7), (8), (9) and (10)**

**Delete**

<sup>5</sup> EACA Position Regarding Internal Market Principles, July 2004. EACA Position on the draft Directive on Services, November 2004. Letter to Commissioner Reding, 26 May 2005 by EACA, ACT and EPC. Letter to Commissioner Reding 5 April 2006.

<sup>6</sup> Television Without Frontiers Directive 89/552/EEC, amended by Directive 97/36/EC.

<sup>7</sup> E-Commerce Directive 2000/31/EC

### III. Co-Regulation and Self-Regulation

EACA welcomes the possibility expressed in Article 3 of using co-regulatory regimes (which we would call self-regulation with a legal backstop) to implement part of the directive. Where the 1999 Lex Fori study shows that certain sectors such as advertising have developed soft law mechanisms that have proved their worth, the February 2006 preliminary findings of the study by the Hans Bredow Institute state that co-regulation as defined in the study, is adapted to implement directives. The existing co-regulatory regimes analysed by the study are found to be largely satisfactory and effective as to the specific aims they pursue.

For that reason, we have a major issue with the Preamble 25 which refers to the 2003 “Inter-institutional Agreement” definition of co- and self-regulation, when interpreting “co-regulation” in the proposed directive. This definition not only dismisses most of the existing self- and co-regulatory advertising systems industry has built over the years and continues to support, develop and improve, but is also in full contradiction to the Hans Bredow Institute assessment of well-functioning co-regulatory regimes in the broadcast or advertising sector.

We would highly value and welcome a Parliament request to modify the definitions contained in this long-outdated “Inter-institutional Agreement”, to reflect the reality of advertising self-regulation and co-regulation as it exists and operates to the satisfaction of consumers in Europe.

We believe that, if a revision of this document is to be undertaken, the European Advertising Standards Alliance, EASA, and its members such as EACA, should be invited to provide explanations on the functioning and reality of the various systems of advertising self- and co-regulation that exist throughout Europe and to help drafting the relevant definitions.

Alternatively, the removal of all reference to this Agreement in Preamble 25 would be similarly effective and appreciated.

#### Amendment to Preamble 25

In its Communication to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Union the Commission stressed that a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, on whether alternatives such as co-regulation or self-regulation should be considered. ~~For co-regulation and self-regulation, the Interinstitutional Agreement on Better Law-making provides agreed definitions, criteria and procedures.~~ Experience showed that co- and self-regulation instruments implemented in accordance with different legal traditions of member States, can play an important role in delivering a high level of consumer protection.

## IV. Insertion rules for TV advertising & teleshopping

Article 11.2, by transforming the previous 30 minute period between two ad breaks in the current Television Without Frontiers directive into 35 minutes, creates a real problem in terms of programme creation and in terms of reducing advertising revenue.

The application of this article, when broadcasters show existing programmes lasting thirty minutes, would eliminate several advertising breaks, representing an estimated 5% to 10% of total revenues<sup>8</sup>, the equivalent of typical profit margins.

It would also reduce investment in new European audiovisual content as 66.5% of the revenues generated by children's TV advertising are reinvested in European content<sup>9</sup>.

The quantity of children's programmes itself could decrease as a result from the reduced advertising revenues. 94% of the revenue generated by children's TV advertising are reinvested in children's programmes<sup>10</sup>.

As this new rule does not have any public policy justification and would only make the European audiovisual business less competitive, EACA asks for the withdrawal of this rule, to be replaced with the 30 minute rule, currently in force.

### Amendment to Article 11(2)

The transmission of films made for television (excluding series, serials, light entertainment programmes and documentaries), cinematographic works, children's programmes and news programmes may be interrupted by advertising and/or teleshopping once for each period of ~~35~~ 30 minutes.

---

<sup>8</sup> Data provided by egta, the Association of Television and Radio Sales Houses, 2005 study

<sup>9</sup> Data provided by egta, 2002 study

<sup>10</sup> Data provided by egta, 2002 study