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EUROPEAN CONVENTION ON TRANSFRONTIER TELEVISION

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DRAFTING GROUP
ON THE REVISION OF THE EUROPEAN CONVENTION
ON TRANSFRONTIER TELEVISION

(T-TT-GDR)

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6th meeting
11 and 12 September 2008
Istanbul (Turkey)

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Draft Explanatory Report to the revised European Convention on Transfrontier Television updated following the consultation on 25-27 February 2009

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Draft Explanatory Report to the revised European Convention on Transfrontier Audiovisual media services [1]

I. Introduction

1. Meeting in Vienna on 9 and 10 December 1986, the ministers taking part in the 1st European Ministerial Conference on Mass Media Policy adopted a declaration in which they decided "to assign the highest priority (...) to the rapid preparation, within the Council of Europe framework, of binding legal instruments on certain crucial aspects of transfrontier broadcasting".

2. In the same declaration, they also urged the Committee of Ministers of the Council of Europe to "provide the appropriate means for preventing or solving possible conflicts caused by the transfrontier development of the mass media".

3. Subsequent to the adoption of the aforementioned declaration, the Committee of Ministers, at the 403rd meeting of the Ministers' Deputies, in January 1987, instructed the Steering Committee on the Mass Media (CDMM):

"to assign the highest priority to the elaboration of a binding legal instrument embodying the major principles which should govern transfrontier broadcasting, bearing in mind the existing Council of Europe recommendations concerning the media, and to submit the text of such a draft instrument without delay to the Committee of Ministers".

4. The Committee of Ministers also instructed the CDMM to propose, in the context of its work on a binding legal instrument, "the appropriate means for preventing or solving possible conflicts caused by the transfrontier development of the media".

5. In accordance with these instructions, the CDMM undertook the elaboration of the binding legal instrument requested at its 14th to 17th meetings (March to December 1987). It was assisted in this work by a drafting group (CDMM-GR) which held six meetings (April to December 1987). In addition, the Committee of Legal Experts in the Media Field (MM-JU), a subordinate body of the CDMM, held a special meeting in May 1987 to advise the CDMM on the inclusion of certain legal questions within the scope of the draft instrument.

6. During its work, the CDMM took into account, *inter alia*, that:

- the ministers participating in the European Ministerial Conference on Mass Media Policy had stressed the highest priority they attached to the rapid preparation of binding legal instruments in the field;

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[1] The numbers of new or revised paragraphs are indicated in bold. Numbers between brackets refer to the equivalent paragraphs in the existing Explanatory Report.

- in the final communiqué of the 80th Session of the Committee of Ministers (6-7 May 1987), the ministers "took cognizance with great interest of the texts adopted by the European Ministerial Conference on Mass Media Policy (Vienna, 9-10 December 1986). They noted with satisfaction that preparation of a draft for a binding legal instrument was in hand (...). They expressed the hope that preparation of the draft can be completed before the next ministerial conference which will be taking place in Stockholm in late 1988" (paragraph 13 of the final communiqué);

- it had, itself, been mandated to submit the text of a draft binding legal instrument without delay to the Committee of Ministers;

- the Parliamentary Assembly, in Recommendation 1067 (1987) adopted on 8 October 1987, recommended that the Committee of Ministers "finalise and open for signature early in 1988 a binding legal instrument on basic standards for transfrontier broadcasting by both public and private bodies, with a view to the possibility of its entering into force before the 2nd European Ministerial Conference on Mass Media Policy, in Stockholm, in November 1988, and set up an effective mechanism (including the representation of broadcasting bodies) to monitor the implementation of this instrument".

7. The CDMM also organised a hearing with representatives of the following bodies: World Federation of Advertisers (WFA), European Advertising Tripartite (EAT), European Association of Advertising Agencies (EAAA), European Office of Consumers Unions (BEUC), European Trade Union Confederation (ETUC), Union of Industries of the European Communities (UNICE), Joint Committee of the International Federation of Actors, International Federation of Musicians and International Federation of Audiovisual Workers' Unions (FFF), International Federation of Journalists (FIJ), International Federation of Film Producers' Associations (FIAPF), International Federation of Associations of Film Distributors (FIAD), Committee of the Cinematographic Industries of the European Community (CICCE), International Federation of Newspaper Publishers (FIEJ), International Federation of Periodical Press (FIPP), European Institute for the Media (EIM), International Institute of Communications (IIC), Fininvest, Bundesverband Kabel und Satellite BV, European Group of Television Advertising (EGTA), Super Channel.

8. At its 17th meeting (December 1987), the CDMM transmitted the text of a draft convention to the Committee of Ministers with a view to obtaining guidance on a number of outstanding issues before the text of the draft convention could be finalised. It was in this context that an informal meeting of European Ministers responsible for Mass Media Policy took place in Vienna on 12 and 13 April 1988, at the invitation of the Austrian Government. The purpose of the meeting was to seek solutions to the outstanding issues in the draft convention.

9. On the basis of the guidelines emerging from this informal meeting, the CDMM finalised the text of the draft European Convention on Transfrontier Television and draft Explanatory Report at a meeting held from 24 to 27 May and 6 to 10 June 1988 and transmitted these texts to the Committee of Ministers.

10. Following discussions on the draft Convention at the 419th, 420th and 421st meetings of the Ministers' Deputies (September, October and November 1988), the 2nd European Ministerial Conference on Mass Media Policy, held in Stockholm on 23 and 24 November 1988, examined a communication on the draft Convention and agreed to transmit to the Committee of Ministers a package of proposals on the final outstanding issues with a view to the rapid finalisation, adoption and opening for signature of the text.

11. The Committee of Ministers adopted the text of the Convention on 15 March 1989. It was opened for signature by member States of the Council of Europe and the other States Party to the European Cultural Convention, as well as the European Community, on 5 May 1989.

II. Background

12. Announcements made by several European countries and groups of countries in the early 1980s about their intention to introduce direct broadcasting by satellite (DBS) led to intergovernmental consultations in the Council of Europe and to the establishment of an action plan.

13. The Parliamentary Assembly expressed its interest in this question in Recommendation 926 (1981) on questions raised by cable television and direct satellite broadcasts. Following a proposal by the Government of the Federal Republic of Germany, the Committee of Ministers, at its 70th Session (April 1982), instructed its Deputies to prepare an opinion on the possibility of concluding a legal instrument in this field. In November 1982, following extensive legal discussions, a report of the CDMM was presented to the 71st Session of the Committee of Ministers. It concluded that a legal instrument was not only possible but also urgent, stressing that closer co-operation between the Council of Europe's member States would help to enhance the positive aspects of DBS and to prevent or attenuate possible negative effects.

14. Following this report, the Committee of Ministers instructed its Deputies to continue work in this field as a matter of urgency, with a view to drawing up recommendations to governments.

15. In February 1983, the CDMM adopted an action plan on satellite broadcasting, giving effect to the decision of the ministers. It noted that, in addition to direct broadcasting by satellite, use was already being made of communications satellites for the transmission of programmes from one country for distribution in another. This new application underlined the necessity for early action. For the implementation of this plan, the CDMM and its subordinate committees held regular exchanges of views on developments in member States in the media field, and, in particular, on the political, economic, cultural, technical and legal aspects of them. Likewise, exchanges of information on the technological aspects of the media, particularly as regards technical standards (transmission, distribution and reception) were held. Finally, the CDMM and its subordinate committees gathered, in the course of their work, the views of other interested

organisations by holding hearings with their representatives (organisations representing consumers, advertisers, the press, rights holders, social partners, etc.).

16. The work conducted under the action plan led, *inter alia*, to the adoption by the Committee of Ministers of the following recommendations to member States:

- Recommendation No. R (84) 3 of 23 February 1984 on principles on television advertising;

- Recommendation No. R (84) 22 of 7 December 1984 on the use of satellite capacity for television and sound radio;

- Recommendation No. R (86) 2 of 14 February 1986 on principles relating to copyright law questions in the field of television by satellite and cable;

- Recommendation No. R (86) 3 of 14 February 1986 on the promotion of audiovisual production in Europe.

17. Concurrently with this work, in January 1984, at the 366th meeting of the Ministers' Deputies, the Committee of Ministers decided to broaden the CDMM's remit, in particular to ensure that it could "act as a platform for exchanges of information and views for discussions between the member States on developments in the field of satellite broadcasting which could have an impact on the media situation in several European countries". This decision was motivated by the fact that, whilst the action plan was to be completed within a limited period of time, developments in the field were likely to have a profound effect on member States' broadcasting policies and arrangements for some time to come.

18. Furthermore, the European Ministers responsible for Cultural Affairs, taking part in their 4th Conference in Berlin in May 1984, in their Resolution No. 1 on culture and communications technology, appealed to the Committee of Ministers to consider convening a European conference "in order to define a comprehensive policy on the media".

19. Following consideration of the opinions of the CDMM and the Council for Cultural Co-operation (CDCC) on the advisability and scope of such a conference, the Committee of Ministers decided, at the 389th meeting of the Ministers' Deputies (October 1985), to entrust the preparation of the 1st European Ministerial Conference on Mass Media Policy to the CDMM, on the topic of "the future of television in Europe" and dealing respectively with the promotion of European audiovisual works and public and private broadcasting in Europe.

20. The conference took place in Vienna on 9 and 10 December 1986 at the invitation of the Austrian Government.

III. The original Convention

A. Reasons for its elaboration

21. Fundamental changes in the European broadcasting landscape were being brought about by large-scale technical developments in the field of information and communication.

22. The use of a variety of new transmission techniques, in particular for television programme services, was radically transforming the traditional concept of television in Europe. For many years characterised by relatively restricted technical capacity, television programme services available in individual European countries had been limited in number and could rarely be received by viewers in other countries. This was no longer the case with the widespread use of communications satellites (fixed satellite service - FSS) and wide-band cable systems, as well as similar devices, for the transmission of television programme services.

23. Two major consequences of these developments were, firstly, the increasingly transfrontier character of the services transmitted: it had become possible to receive the same service, with the appropriate transmission and reception equipment, in many European countries; secondly, due to the abundance of technical capacity, the number of transmission channels available was expected to become almost unlimited, thereby leading to the multiplication of programme services and competition between them.

24. Whilst it was realised that these developments might open up previously unexplored horizons to the public and offer it a considerable increase in choice, as well as provide new opportunities for cultural expression, international communication and contacts between nations, it was thought that they also carried with them a number of inherent challenges, *inter alia*, as regards national media structures and the fundamental functions of broadcasting, the maintenance and development of European cultural identities and the interest of the public to receive a full-range, high-quality service which contributes as a whole to the free formation of opinions and the development of culture.

25. Given the risk that increased international competition between the new services which were developing in Europe could induce a purely market approach to broadcasting and a general lowering of standards to the detriment of the effective choice of the public, the public service concept of broadcasting (whether publicly or privately organised) and Europe's cultural heritage were at the heart of concerns in those days about the development of transfrontier broadcasting in Europe.

26. The member States of the Council of Europe, attached as they are to the fundamental principles of freedom of expression and information contained in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950 - hereinafter referred to as the "European Convention on Human Rights"), and the free flow of information and ideas, as an indispensable basis for their media policies, welcomed the positive opportunities brought about by the developments which had already taken place in those days and future developments in television broadcasting in Europe. However, the magnitude and complexity of those developments were considered to be such that they required a common response from the member States of the Council of Europe.

27. All these points were, moreover, analysed in some depth in Resolution No. 2 and the Declaration adopted by the 1st European Ministerial Conference on Mass Media Policy and those texts constituted the framework within which the drafting of the Convention was undertaken.

B. Main features of the original Convention

28. The objective pursued by the member States in elaborating the Convention was to strengthen the free exchange of information and ideas by encouraging the transfrontier circulation of television programme services on the basis of a number of commonly agreed basic standards.

29. Those standards were designed to ensure that the unhindered transfrontier circulation of television programme services promotes certain fundamental values common to the member States, in particular the pluralism of ideas and opinions, and does not prejudice free circulation at national level, within individual member States.

30. Since the Convention seeks to elaborate a framework within which the transfrontier transmission of television programme services is to be encouraged, its purpose is not to regulate broadcasting activities *per se*, nor to impinge upon the domestic broadcasting policies and arrangements of the Parties. These remain for the Parties to determine, in the light of their individual political, legal, cultural, social and other traditions. Nor does the Convention seek to impinge upon the responsibility and independence of the broadcaster in programming matters. It follows, therefore, that certain aspects of broadcasting fall outside the purview of the Convention.

32. It follows from the above that Parties remain free to apply stricter or more detailed rules than those laid down in the Convention to programme services transmitted by entities or by technical means within their jurisdiction (see below, paragraphs 127, 365 and 366).

33. The areas in which the Convention establishes common basic standards are what the 1st European Ministerial Conference on Mass Media Policy qualified as "crucial aspects" of transfrontier television broadcasting:

- the protection of certain individual rights;
- the responsibility of the broadcaster in maintaining programme standards;
- advertising;
- sponsorship.

34. Recognising that transfrontier television broadcasting in Europe may be subject to rapid changes brought about by future technical developments, the Convention embodies provisions enabling its amendment in the light of the experience gained from its implementation and of technical developments in the field.

37. The Convention lays emphasis on the notion of co-operation for the implementation of its provisions: mutual assistance between the Parties on specific issues; friendly settlement of any difficulty in the application of the instrument at bi- or multilateral level between the Parties directly concerned and in a Standing Committee, composed of the Parties, and responsible for following the application of the Convention.

38. Provision was nonetheless made for arbitration, should it prove impossible to reach a friendly settlement through the channels referred to above.

IV. The first amending Protocol

A. Reasons for its elaboration

39. Since the entry into force of the Convention on 1 May 1993, the Standing Committee on Transfrontier Television - which was established in June 1993 under Article 20 of the Convention - has been monitoring the implementation of the Convention by the Parties, and discussed the economic, technological and political developments which have taken place since 1989. One of the major relevant political developments was the revision of the "Television without Frontiers" Directive[2] in the framework of the European Community, since the Convention, at the time of its preparation, had been negotiated in parallel with the drafting of this Directive. Therefore, the Standing Committee felt that it was necessary to examine whether the Convention should be amended so as to maintain a coherence with the revised Directive, in the interest of legal certainty of both States and transfrontier broadcasters.

40. As a result of this examination, the Standing Committee in general stressed the importance of preserving the coherence of legal rules for transfrontier television in order to facilitate the transfrontier circulation of television programmes. Therefore, it has been one of the main objectives of the amendment of the Convention to ensure its realignment with the revised Directive. Accepting several fundamental differences resulting from the different characters of both legal instruments (the Convention, for example, applies exclusively to transfrontier television while the Directive does not) the Standing Committee intended to safeguard coherence of at least those rules of both instruments which may apply to broadcasters under the jurisdiction of a Party to the Convention and of a Member State of the European Community at the same time. This intention is taken into account by the Standing Committee in cases of interpretation of the Convention.

B. Main features of the first amending Protocol

41. The main areas covered by the first amending Protocol were:

- the definition of advertising and the issue of self-promotion,
- tele-shopping,

[2] Directive 89/552/EEC on the co-ordination of certain provisions laid down by Law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and the Council of 19 June 1997.

- programme sponsorship,
- jurisdiction,
- abuse of rights granted by the Convention,
- public access to major events,
- the timeframe for the broadcasting of cinematographic works.

42. The first amending protocol, (ETS 171) was opened for signature to Parties to the Convention on 1 October 1998 and entered into force on 1 March 2002. Since its entry into force the amending protocol became an integrant part of the European Convention on Transfrontier Television.

V. Second amending Protocol

a. Background to the second amending Protocol

43. The possible need to update the Convention was discussed in the Standing Committee as from its 27th meeting in 2001, i.e. prior to the entry into force of the first amending protocol. It was recalled that given the changes taking place in the broadcasting sector, the Standing Committee was compelled to discuss the future of broadcasting regulation in the fields covered by the Convention. In effect, it was generally felt that as a result of the technological, market and legal developments taking place in the broadcasting sector, the Standing Committee would have to adopt a forward-looking approach and discuss how the changes in the broadcasting environment would/could affect the Convention. At the same occasion, the Observer Delegate of the European Commission reported on the steps taken in view of the re-examination of the "Television without Frontiers" Directive in 2002.

44. In the light of the above, the Standing Committee decided to organise an expert seminar to have a focused discussion on how to bring the Convention into line with the reality of broadcasting. This expert seminar on "Economic, Technical and other Developments in the Television Sector and their impact on the European Convention on Transfrontier Television" took place on 6 December 2001 and gathered over 100 persons from broadcasting organisations, governments, regulatory bodies and the advertising industry. The ideas presented by the rapporteurs/participants during the seminar have been taken forward by the Standing Committee in its further discussion on the review of the Convention[3]

45. The Standing Committee decided to commission a new paper on the review of the Convention to Dr Andreas Grünwald, as a follow-up to his presentation at the December 2001 seminar. This "Report on possible options for the review of the European Convention on Transfrontier Television" was presented to the Committee in 2003[4]. During its 34th meeting in July 2003 the Standing Committee agreed on a work plan for the review of the Convention, and underlined that the Standing Committee should

[3] The full reports of the key-note speakers to this seminar can be found on the web site of the Standing Committee www.coe.int/media

[4] Dr Grünwald's report is available on the website of the Standing Committee

continue to take account of the work carried out within the European Union concerning the review of the "Television without frontiers" Directive.

46. In the basis of this workplan and until its 41st meeting in October 2006 the Standing Committee considered the provisions of the Convention on the basis of discussion papers prepared by its delegates on the following questions:

- the scope of the Convention, jurisdiction, freedom of reception and retransmission, the duties of the Parties of the Convention, advertising directed at a single Party and the abuse of rights granted by the Convention;

- advertising, sponsorship and teleshopping;

- the right to information and cultural objectives: access to major events, short reports, cultural objectives, media pluralism, right of reply ;

- the protection of minors and respect for human dignity;

- the role of the Standing Committee, the settlement of disputes and mutual assistance.

47. The discussion papers led to preliminary proposals for amending the Convention elaborated by 4 delegates of the Standing Committee which were discussed during its 41st meeting.

48. In addressing these questions the Standing Committee followed closely the developments at European Union level. The Standing Committee also considered the creation of new provisions to address Council of Europe's areas of concern regarding the protection of human rights, democracy and pluralism. It considered European Commission proposals on broadening the scope of the Convention to cover three subjects – the role of public service broadcasting in a democratic society, media pluralism as well as "TV" and the role of independent regulatory bodies. A proposal by the Permanent Conference of the Mediterranean Audiovisual Operators (COPEAM), to amend the existing provision on cultural objectives and the promotion of European works to the effect that reference be made to "Euro-Mediterranean audiovisual works" was equally discussed.

49. In view of the importance of progressing as efficiently as possible with the revision of the Convention, the Standing Committee decided to set up a drafting group made up of delegates from Austria, France, Germany, Poland, Switzerland, Turkey and the United Kingdom. Close cooperation between the European Union and the Council of Europe in revising the Television without Frontiers (TVWF) Directive and the European Convention on Transfrontier Television was ensured by the participation of an observer delegate of the European Commission in the drafting Group and the participation of the Secretary to the Standing Committee to the meetings of the TVWF Contact Committee discussing the

contents and transposition of the Audiovisual media services (AVMS) Directive which was finally adopted on 17 December 2007.

50. The drafting group met twice, on 29 and 30 March 2007 and on 21 and 22 June 2007 before it submitted its first draft amendments to the Convention to the Standing Committee which were considered during its 42nd meeting, in October 2007. The Standing Committee provided further guidance to the drafting Group and invited delegates, including observer delegates, to send additional comments, including proposals on outstanding issues which could be covered by the Convention for consideration by the drafting Group. The drafting Group held four more meetings, one in 2007 (26 and 27 November 2007) and three in 2008 (on 27 and 28 March, on 19 and 20 June and on 11 and 12 September) before it submitted its revised draft amendments to the European Convention on transfrontier television, as well as a revised explanatory report to the Standing Committee at its 43rd meeting on 12 to 14 November 2008. During this meeting, the Standing Committee reached a provisional agreement on the draft revised Convention and invited observer States, delegations of the Steering Committee on the Media and New Communication Services (CDMC) and stakeholders to send further reactions on the provisional agreement reached. On 27 January 2009, the Parliamentary Assembly adopted its Recommendation 1855 (2009) and report on "the regulation of audiovisual media services" which was discussed with the representative of the Assembly, Mr Andrew McIntosh (UK), during the 7th meeting of the drafting Group held on 27 and 28 January 2009 as well as during a consultation meeting with the Parties to the Convention on 25 to 27 February 2009. Interested stakeholders were invited for a hearing at this consultation. The Standing Committee finalised the draft second amending protocol to the Convention as well as the revision of the present explanatory report during its 44th meeting on 11 and 12 June 2009.

b. Main new features of the European Convention on transfrontier audiovisual media services

51. Following adoption of the second amending Protocol to the European Convention on transfrontier television, the Convention will have a new title "European Convention on transfrontier audiovisual media services" to reflect the widening of its scope to transfrontier aspects of on-demand audiovisual media services.

52. Terms employed have been aligned, to the extent possible, with the definitions of the AVMS Directive to ensure greater compatibility between both instruments.

53. The role of co-and self-regulation in the fields covered by the Convention has been recognised and is encouraged (Article 4 paragraph 2)

54. Jurisdiction criteria have been aligned with the AVMS Directive to avoid as much as possible cases of double jurisdiction (Article 4 paragraph 5

55. Transparency and information requirements to parties and audiovisual media service providers have been aligned with the AVMS Directive to ensure harmonisation of legal requirements in this field (Article 5)

56. Responsibilities of audiovisual media service providers for the content and presentation of audiovisual media services continue to be based on the dignity of the human being and the fundamental rights of others. This is reflected in the prohibition of these services to contain any incitement to hatred based on race, sex, religion or nationality as well as to give undue prominence to violence. The reference to indecency has been abolished because of its lack of clarity.

57. Instead, more emphasis has been put on the responsibility of audiovisual media service providers to ensure the adequate protection of minors against programmes which might seriously impair their physical, mental or moral development, in particular those that involve pornography or gratuitous violence. A distinction has hereby been made between television broadcasts, who should not contain any such programmes and on-demand services where these programmes should only be available in a way that minors will not normally see or hear them. (Article 6)

58. Access of persons with a visual or hearing disability to audiovisual media services is promoted by the introduction of a new provision to the Convention Article 7.

59. The Right of reply contained in Article 8 remains limited to television broadcast. For on-demand services reference can be made to Recommendation Rec(2004)16 of the Committee of ministers on the right of reply in the new media environment.

60. Access of the public to information Article 9 has been reinforced by the introduction of a duty for Parties to ensure a right for broadcasters to have access to short extracts on events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.

61. Article 10 concerning access of the public to events of major importance has been amended to improve the previous provisions on the mechanism for mutual recognition of lists of events of major importance and corresponding measures foreseen in Article 9a, paragraphs 2 and 3, of the Convention. The Standing Committee concluded at its 42nd meeting that the previous wording lacked clarity and legal certainty in respect of the decision making procedure and possible effects of these decisions on the procedural rights of rightholders.

62. The possible accession of non-European states to the Convention has been taken into account by reserving Article 11 concerning the promotion of European audiovisual works to European Parties.

63. Further to the adoption by the Committee of Ministers of Recommendation Rec (2007)2 to member states on media pluralism and diversity of media content as well as the Declaration of the Committee of Ministers on protecting the role of the media in

democracy in the context of media concentration, Article 12 on media pluralism and diversity of content has been further elaborated to include provisions by which Parties commit themselves to promote and encourage media pluralism, including by promoting full transparency of ownership and by encouraging broadcasters with a public service mission to play an active role in the social cohesion of all members and communities of the society.

64. Rules on audiovisual commercial communication have been largely aligned with the AVMS Directive so as to ensure greater compatibility between both instruments. Features introduced by the amendments include:

- greater flexibility for the quantity and insertion rules of television advertising and teleshopping, in particular by the deletion of a maximum daily transmission time and number of tele-shopping windows (Articles 15 and 17)

- an encouragement for audiovisual media service providers to develop codes of conduct regarding audiovisual commercial communication in children's programmes of foods and beverages containing substances such as fat, salt sugar etc of which an excessive intake would not be commendable (Article 18 paragraph 6)

- specific regulation of product placement – allowing product placement in certain types of programmes and circumstances - have been introduced in Article 19 in alignment with the corresponding AVMS Directive provision

- the obligation for audiovisual commercial communication not to encourage behaviour grossly prejudicial to the protection of the environment (General standards Article 13 paragraph 3 sub iii.)

65. A consultation procedure to prevent circumvention of stricter national laws has been introduced in the Chapter dealing with mutual assistance, Article 23 paragraph 3 sub d. The procedure to follow in case of alleged circumvention by broadcast targeted to another party has been aligned with the AVMS Directive. It is contained in Article 33 paragraphs 2, 3 and 4, in replacement of the previous article 24a on alleged abuses of rights conferred by the Convention. Article 20 (previously 16), which remains unchanged, contains a prohibition of circumvention in the field of television advertising and tele-shopping. Chapter VII on "Restrictions to the principle of freedom of expression and retransmission" has changed its heading (previous heading "alleged violations of this Convention") to introduce the procedures and measures applicable on on-demand services (Article 29). The latter have been aligned with the corresponding AVMS Directive and allow Parties to take measures against non linear services not only in case of violation of the convention but also of stricter national law.

66. The measures referred to in Article 29 and in Article 33, paragraph 3 have to be notified to the Standing Committee in view of an opinion on the compatibility of the measure with the Convention. Article 25 concerning the functions of the Standing Committee contains a new provision (paragraph 3) to confirm this role.

67. Chapter V dealing with the Standing Committee has furthermore been slightly adapted to

- take account of the need to have among its members persons with expertise in the regulation of audiovisual media services (Article 24 paragraph 2)

- allow for electronic voting on decisions where oral consultation is not essential (Article 24 paragraph 8)

- take into account the amendments made to Article 10 (Article 25 paragraph 2)

68. In considering the functions of the Standing Committee particular attention was paid to the fact that its opinions, recommendations or decisions should only address State parties to the convention and should not affect the right of rightholders to have an effective remedy before a national authority against any alleged violation of his fundamental rights or freedoms as enshrined in the European Convention on Human Rights.

c. Nature of the amendments to the European Convention on transfrontier television

Widening of the scope of the Convention

69. The main, and most visible, amendment proposed by the second amending protocol is the change of the title and scope of the Convention on Transfrontier Television. As a result of the widening of the scope, the Convention has been renamed to refer to transfrontier audiovisual media services. The Convention is no longer limited to transfrontier aspects of television (linear) broadcasting but includes regulation on transfrontier aspects of "on-demand" (non-linear) services.

70. Taking into account the growing importance of on-demand services in the society their regulation by the Convention was felt necessary by the fact that they are television-like, addressing the same audience as television broadcast and offering similar types of programmes by similar means of access.

71. While most provisions now refer to all audiovisual media services, some provisions are limited to television broadcast. Others distinguish requirements to television broadcast from those applicable to on-demand services. Overall, regulation of transfrontier aspects of on-demand services is less strict, offering more flexibility to the Parties with regard to the duties of service providers and protection of the viewer.

72. The reason for this distinction is the fact that the viewer has more control over programmes on-demand since the viewer chooses what to see and at which moment. On-demand television is also less invasive, it does not operate at a schedule decided by the media provider and lacks the immediacy and suggestive power of (live) broadcasts. On a

number of issues however, such as the duration and insertion of advertising, a distinction exists simply because the requirements to broadcasters are irrelevant for on-demand services.

73. For the reasons mentioned above, distinct regulation for television broadcast and on-demand services is foreseen in the following areas:

a. Article 6 concerning the responsibilities of audiovisual media providers on programming matters limits the requirement in paragraph 2 that news fairly present facts and encourage the free formation of opinions to television broadcast. Paragraph 3 concerning the level of protection of minors contains two sets of requirements including requirements to television broadcasts and less strict requirements for on-demand services.

b. Article 8 concerning the right of reply is limited to television broadcasters. Article 9 concerning the access of the public to information (short extracts) and Article 10 concerning the access of the public to events of major importance are equally reserved to television broadcast.

c. Article 11 on cultural objectives maintains requirements for television broadcasters to promote European audiovisual works and adds a requirement, of a different nature, for on-demand services.

d. Article 12 on media pluralism and diversity of content refers in its new paragraph 3 to the role of television broadcasters with a public service mission to play an active role in promoting social cohesion in a large number of aspects.

e. In the field of audiovisual commercial communication Article 15 on duration of advertising spots and tele-shopping windows as well as Article 17 on insertion of advertising and tele-shopping - only concern television broadcast. Article 18 concerning audiovisual commercial communication for particular products such as tobacco, alcohol and medicines, contains additional requirements for broadcasters with regard to medicines and medical treatment as well as for alcoholic beverages. The provisions of Article 20 concerning advertising and tele-shopping directed specifically at a single Party are limited to television broadcast. The same applies to Article 22 which concerns television broadcasting devoted exclusively to advertising, tele-shopping and/or self-promotion.

f. Chapter VII concerning restrictions to the principle of freedom of expression and retransmission of audiovisual media services contains in Articles 28 and 29 two different procedures governing the measures Parties may take against television broadcasts and on demand services. Article 29 which concerns possible measures in respect of on-demand services, leaves Parties a larger range of discretionary powers.

g. Similarly to Article 20, Article 33 paragraphs 2 and 3 which concern the possibility of action of a Party against broadcasters established in another Party in order to circumvent the stricter national law of the first Party, only applies to television broadcast.

Alignment with the AVMS Directive

74. For EU member States and for transfrontier providers compatibility of the Convention with the Audiovisual Media Services Directive is of paramount importance. In order to ensure the necessary coherence and to avoid incompatibility between these instruments, the terms employed (art. 2) and provisions on issues of common concern have been aligned with the AVMS Directive. Alignment has been realised to the extent possible taking into account the difference in nature between both instruments as well as the common interest of all the Parties, EU and non EU member States, to the Convention.

75. Provisions created or amended in alignment with the AVMS Directive include:

- Article 4 paragraph 2; a new provision concerning the role of co-and self-regulatory regimes in enforcing the duties of Parties,

- Article 4 paragraph 5 amending the ancillary jurisdiction criteria,

- Article 5 paragraph 2 amending the requirements on transparency and information,

- Article 6 paragraphs .1 and .3 amending the responsibilities of audiovisual media providers, so as to ensure the same level of protection for minors, in particular where this concerns programmes containing pornography or gratuitous violence,

- Article 7; a new provision concerning access of disabled persons to audiovisual media services,

- Article 9 amending the provision concerning access of the public to information (short extracts),

- Article 11 paragraph 2; a new provision concerning the support by broadcasters to independent producers of European audiovisual works,

- Article 11 paragraph 5, a new provision on the promotion by on-demand services of the production of and access to European audiovisual works,

- Article 29 a new provision concerning restrictions to the principle of freedom of expression and retransmission with regard to on-demand services and, finally,

- Article 33 paragraphs 2 to 4; new provisions dealing with alleged circumvention by broadcasts targeted to another party.

76. Similarly, many amendments to Chapter III of the Convention concerning audiovisual commercial communications have been motivated by the intention of alignment with the AVMS Directive. These include:

- Article 13 paragraphs 3 and 4 amending the general standards of audiovisual commercial communication,

- Article 15 amending the requirements on the duration of television advertising,

- Article 16 paragraph 1 amending the requirements on the form and presentation of audiovisual commercial communication,

- Article 17 amending the requirements on the insertion of television advertising and tele-shopping,

- Article 18 amending the requirements on audiovisual commercial communication for particular products,

- Article 19; a new provision on product-placement and

- Article 21 amending the requirements on sponsorship.

Variations from the AVMS Directive to meet specific policy concerns of the Council of Europe

77. Although alignment with the AVMS Directive has been sought on questions where the Directive pursues policy goals which are similar to those of the Council of Europe, the following - remaining or newly created - differences deserve to be highlighted.

78. The most important differences reside in the very nature of the Convention. Unlike the Directive, the Convention limits its scope to audiovisual media services which are *transfrontier in character.* The nature of this Council of Europe Convention also implies that the implementation of the Convention is based on co-operation between the Parties. Unlike the European Commission, who enforces the implementation of community law, including the AVMS Directive, the body in charge of following the implementation of the Convention, the Standing Committee, has no powers to take sanctions or impose its views on the Parties.

79. Other differences are linked to specific Council of Europe policy objectives justifying the existence in the Convention of obligations which are not in the Directive.

80. Article 6 paragraph 2 which requires broadcasters to ensure that news fairly present facts and encourage the free formation of opinions has been maintained and is specific to the Convention.

81. Article 11 on cultural objectives, as well as the definition of European audiovisual works will continue to differ from their equivalents in the AVMS Directive, in spite of efforts of alignment on the promotion of independent producers and on-demand services. In the context of the Convention, audiovisual works are considered as “European” when they originate from a member state of the Council of Europe or a Party to the Cultural

Convention. The definition of European works in the AVMS Directive is more restrictive since it does not cover European works originating from non Parties to the Convention. A second difference concerns the quota requirements which due to the intergovernmental nature of the Convention and its Standing Committee are more lenient. Thirdly, in anticipation to the accession to the Convention by non-European States, whose participation in the promotion of European works is not to be imposed, Article 11 is the only provision of the Convention addressed at "European" Parties.

82. Article 12 on media pluralism and diversity of content has been further developed to take account of Recommendation Rec (2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content as well as of the Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration and has no equivalent in the Directive.

83. The Convention's provisions on commercial communication have been largely aligned with the AVMS Directive although some differences remain. One of these differences is the fact that in the Convention the definitions of audiovisual commercial communication (Article 2j) and television advertising (Article 2k) also cover "images designed to advance a cause or idea, or to bring about some other effect". The Convention, unlike the AVMS Directive, also contains provisions concerning "announcements in the public interest and charity appeals free of charge" (Article 14).

84. A more important divergence from the AVMS Directive and community law's country of origin principle, is the existence in the Convention of Article 20 on television advertising and tele-shopping directed at a single Party, designed to protect Parties against circumvention of their national rules. This provision which prohibits circumvention of advertising rules is specific to the Convention. Specific to the Convention, although mentioned in Recital 66 of the Directive 2007/65/EC, is also a new provision, Article 23, paragraph 3 sub d which aims to prevent circumvention by consultation between Parties prior to issuing an authorisation with a broadcaster whose programme service is to be wholly or principally directed at the territory of that other Party. (cf page 17).

VI. Comments on the provisions of the Convention

Preamble

85. (75) The preamble sets out the reasons which led the member States of the Council of Europe to elaborate the Convention (see above, Sections II and III).

86. (76) It reaffirms the commitment of the signatory States to human rights and fundamental freedoms and, in particular, to freedom of expression and information as embodied in Article 10 of the European Convention on Human Rights. It furthermore recalls that their audiovisual media policy is based on their commitment to the freedom and free flow of information, editorial independence, diversity of opinions, media pluralism, the protection of minors and the promotion of media literacy of the users. It recognises the

need to consolidate and update the common broad framework of regulation to encourage the free circulation of audiovisual media services. The common framework refers in particular to Community law.

87. The preamble recalls that the Convention is inspired by the texts adopted by the European Ministerial Conferences on Mass media Policy and highlights the main guidelines of the Council of Europe's audiovisual policy, of which the Convention forms a part. Reference is made in particular to the concerns which inspired the adoption, by the Committee of Ministers, of Recommendation Rec(91)5 on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a transfrontier context; Recommendation No R (97) 19 on the portrayal of violence in the electronic media; Recommendation No R (97) 20 on "hate speech"; Recommendation No R (97) 21 on the media and the promotion of a culture of tolerance; Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting, and in particular its citizen-oriented approach and stipulations regarding the transition to digital broadcasting; Declaration on the allocation and management of the digital dividend and the public interest, adopted on 20 February 2008, Recommendation Rec(2004)16 of the Committee of Ministers to member states on the right of reply in the new media environment Recommendation Rec(2007)2 on media pluralism and diversity of media content; Declaration of 31 January 2007 on protecting the role of the media in democracy in the context of media concentration; Recommendation Rec(2007)3 on the remit of public service media in the information society; Declaration of 26 March 2008 on the independence and functions of regulatory authorities for the broadcasting sector, Recommendation Rec(2000)23 of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector Recommendation Rec(2006)3 of the Committee of Ministers to member states on the UNESCO Convention on the protection and promotion of the diversity of cultural expressions.

Chapter I: General provisions

Article 1: Object, purpose and field of application

88. This Article is essential to the Convention as a whole in that it determines its object, purpose and field of application.

89. The opening paragraph of this Article defines the object and purpose of the Convention: facilitating the provision, transmission or retransmission of audiovisual media services in a transfrontier context.

90. (113) The purpose of the Convention is not to regulate the provision and activities of audiovisual media services as a whole, nor is it designed to harmonise the Parties' rules on this issue; it aims to lay down basic standards by which audiovisual media services may enjoy unhindered transfrontier circulation. It follows, therefore, that the programme services in respect of which the Convention's rules are enforceable are those which are transfrontier in character.

91. (114) The criterion retained for determining the transfrontier character of an audiovisual media service is a purely factual one: any audiovisual media service whose provider is within the jurisdiction of a Party and which can be received directly (using standard equipment) or indirectly (via a cable network, or ADSL for example) by the general public in one or more other Parties is considered to be transfrontier in character.

92. (115) This implies that all forms of overspill, whether unavoidable or intentional and whatever the technical means of transmission involved (terrestrial transmitter, satellite, cable, ADSL etc.), are taken into account for the purpose of determining the applicability of the Convention.

93. (116) Consideration was given, in this context, to the question of whether local and regional television programme services as well as specialised services (such as specialised sports or film services) should be excluded from the field of application of the Convention because of their specific focus and audience. The possibility of introducing a criterion of intention was evoked in this regard. It was, however, concluded that there was no objective reason for not including such services where they can be received in one or more other Parties, and that, furthermore, any determination of intention is a particularly hazardous operation.

94. (117) It follows from the preceding paragraphs that the term "provided" covers both transmissions and retransmissions of television broadcast (linear audiovisual media services) and the provision of on-demand programmes (or non linear audiovisual media services) which can be received, directly or indirectly, in one or more other Parties (that is, which are transfrontier in character).

95. Paragraphs 1 and 2 refer to the field of application, or scope, of the Convention that is to say the audiovisual media services which are subject to the basic standards contained therein. This scope includes audiovisual media services, as defined in Article 2 delivered by media service providers which fall within the jurisdiction of a Party to the Convention and which can be received, directly or indirectly, in one or more other Parties. The term 'under the jurisdiction of a Party" is to be read in conjunction with Article 5, paragraphs 2 to 5 of the Convention containing the rules needed to determine the Party whose jurisdiction is responsible for a media service provider. This jurisdiction criterion is central to the scope of the Convention since the Convention limits jurisdiction of its Parties to services provided by media service providers as defined in Article 2. For example, programmes made available to Parties by a media service provider who is not under the jurisdiction of a Party or via technical entities without any editorial responsibility (e.g. programmes accessible by Internet service providers) would fall outside the scope of the Convention.

96. Excluded from the scope of the Convention are those audiovisual media services which are exclusively addressed to States other then Parties to the Convention and which can not be received with standard consumer equipment. This exclusion is based on the intention that the Convention should only apply to audiovisual media services addressed to the general public of the Parties concerned. The definition of "standard consumer

equipment" is left to each State Party and is expected to evolve with technological developments and consumer behaviour.

Article 2: Terms employed

97. (80)This Article establishes, for the purposes of the Convention, the scope and meaning of the principal terms employed therein. Although due consideration has been given to achieve a maximum possible alignment of the definitions of the terms employed to those given in the Audiovisual Media Services Directive, the terms may not necessarily be identical to similar terms employed in the Directive, in other international instruments or in the domestic legislation or regulations of the Parties, and they are without prejudice to those terms.

a) "Audiovisual media service"

98. The Standing Committee on Transfrontier Television decided to align the definition of the term "audiovisual media service" to the one used in the Audiovisual Media Service Directive as expanded in Recitals 16, 18 and 23 of the Directive 2007/65/EC. In order to avoid differences in interpretation much of the following text has been based on these recitals.

99. The definition of an audiovisual media service covers only audiovisual media services (television broadcasting or television-like on-demand services) which are mass media, that is, which have a clear impact on, a significant portion of the general public. It covers mass media in their function to inform, entertain and educate the general public. The definition includes audiovisual commercial communication and excludes private correspondence (such as e-mails). Closed user-group systems, such as encrypted audiovisual media services designed specifically and exclusively for members of a given profession (for example the medical profession) are not within the scope of the notion of audiovisual media services in so far as they are not intended for reception by the general public.

100. Also excluded are services whose principal purpose is not the provision of programmes and where audiovisual content is merely incidental to the service. Examples include websites with audiovisual elements only in an ancillary manner, such as graphical elements, short advertising spots or information related to a product or service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of of gambling services, as well as on-line games and search engines are excluded from the scope, but not broadcasts devoted to gambling or games of chance.

101. The term "services" is to be understood in the same way as in the EU context (the AVMSD refers to services as defined in the EU Treaty). It will therefore cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or

distribution of audiovisual content generated by private users for the purpose of sharing and exchange with communities of interest.

102. The notion of editorial responsibility, defined below, is essential for the definition of the role of the media service provider and therefore for the definition of audiovisual media services. This also applies to the terms "programme" and "audiovisual" as defined below.

103. (95 + Recital 20 AVMSD) Television broadcasting currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example is an on-demand audiovisual media service. Where a given media service provider offers two or more audiovisual media services, including in the form of packages of services, each individual service must be considered for the purposes of the Convention In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same audiovisual media service provider, the requirements of this Convention should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast i.e. linear transmission. However where different kinds of services are offered in parallel, but are clearly separate services, the Convention should apply to each of the services concerned.

104. (93 + Recital 22 AVMSD) The notion of audiovisual media service does not include services offered by the broadcaster or on-demand audiovisual media service as a subsidiary of its principal activity, i.e. the provision of programmes (for example production and sale of DVD's, stand-alone text based services, publications, etc.). It does however cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides.

105. (Recital 21 AVMSD) Also excluded from the definition of audiovisual media services are electronic versions of newspapers and magazines.

106. (94) Furthermore, account should be taken of the specific case of television broadcasting exclusively devoted to advertising, tele-shopping and/or self-promotion. Such services are covered by Chapter IV of the Convention (see paragraphs 393 to 396 below).

107. The definition finally refers to the technique used to ensure reception of the service by the general public which should be "by means of an electronic communications network". It is recalled in this context that, according to Article 1, paragraph 2 this reception can be direct or indirect and in one or more Parties.

108. In relation to the term "electronic communications network", reference is made to the definition contained in Framework Directive 2002/21/EC[5] of the European Parliament and the Council "on a common regulatory framework for electronic communications networks and services". The Standing Committee refers to this Directive so as to ensure that the Convention and the AVMSD cover the same notion. According to this definition the term means "transmission systems and, where applicable, switching or routing

[5] This Directive is under revision at the moment of drafting this report.

equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed".

b) "Transmission"

109. (81)The authors of the Convention decided to opt for the concept of "transmission" in order to avoid any possible contradiction and confusion with the concept of "broadcasting" to be found in other international instruments and, in particular, the notion of "broadcasting service" which is defined in Appendix II (reference 2012) to the International Telecommunication Convention (Nairobi, 1982) as a "radio communication service in which the transmissions are intended for direct reception by the public".

110. (82) Indeed, the chief criterion retained for the purposes of this Convention is whether, independently of the technical means employed (terrestrial transmitter, cable system, satellite, *ADSL* etc.), *the audiovisual media service* in question is designed for direct or indirect reception by the general public. By opting for the term "transmission", the authors thus wished to embrace the whole range of technical means employed to bring *audiovisual media services* to the public. It followed that, as far as transmission via satellite is concerned, the distinction prevailing in the Radio Regulations of the International Telecommunications Union (ITU) between a broadcasting satellite service (DBS) and a fixed satellite service (FSS)[6] should not be retained. The reason was that, already, the technical difference between the two types of service was becoming increasingly blurred, making individual reception from FSS a fairly common phenomenon, and the fact that further technical developments, particularly the emergence of new intermediate satellites, were likely to blur this distinction even further.

111. (84) The term "transmission" also applies to on-demand audiovisual media services and to subscription television services (that is, a service intended for reception by the general public where the users pay a specific fee in return for the service offered), or teletext services

112. (86) The term "initial *provision*" used in the definition of "transmission" refers to *the audiovisual media service* as a whole, at the initial stage of transmission, and not to a given programme within the service which is transmitted for the first time.

c) "Retransmission"

113 (87) The three essential criteria for a retransmission are that it should be simultaneous with the transmission, complete and unchanged, that is that it should not cut out individual

[6] The basic difference, resulting from the definitions in the Radio Regulations (Nos. 22 and 37), is that transmissions via DBS are intended for direct reception by the general public whereas transmissions via FSS will, as a general rule, reach the public via an earth station.

programme items, or that sounds or images or both should not be superimposed on the original transmission. For television broadcast all three criteria must be fulfilled, failing that, a new transmission is involved. For on-demand services only the last two criteria are relevant. This point has, as will be seen in paragraphs 155 to 178 below, implication as regards the duties of the transmitting Parties.

114. (88) In the context of television broadcast, a retransmission is also considered to be simultaneous where it is quasi-simultaneous, because of the variations in the short time lag which occurs between the transmission and the reception of the broadcast due to the technical reasons inherent in the transmission process.

115. (89) The notion of "complete" within the meaning of this sub-paragraph covers the complete retransmission of an entire television programme service as well as the retransmission of important parts of such a service, provided the coherence and integrity of the programme is not prejudiced and the media service provider concerned has authorised such a practice. It does not, however, cover the retransmission of isolated items of an audiovisual media–service, nor situations in which a new programme is composed from isolated items of several audiovisual media services, nor the simultaneous retransmission of several programmes of parts of audiovisual media services on the same screen.

d) "Programme"

116. For the purpose of this Convention the notion of "programme" includes the requirement of being "audiovisual" and refers to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama. The notion of "programme" is to be interpreted in a dynamic way taking into account developments in television broadcasting. Programmes will be either scheduled by a broadcaster for transmission to the general public or proposed in a catalogue by on-demand audiovisual media providers to the individual viewers. In order to be covered by the notion of "programme", the form and content of the items arranged in a catalogue established by on-demand audiovisual media providers should be "television-like".

e) "Editorial responsibility"

117. Central in the notion of "editorial responsibility" is the exercise of effective control, which lies by definition in the hands of the media service provider. The control required should be effective and concerns the selection of programmes, including all of their content, their form and presentation as well as the timing of their broadcast. The last element does not apply to on-demand services, where programmes are arranged in a catalogue.

118. Although editorial responsibility does not necessarily imply legal liability under national law for the content or the services provided (legal liability could be vested with a legal or natural person who has no effective control), this notion is paramount in

establishing the identity of the media service provider. Editorial responsibility exists irrespective of whether the service provider transmits the service for reception by the general public or calls on a third party to do so.

119. In this respect reference is made to Article 4 of this Convention, where the editorial responsibility is the ruling criterion to determine the establishment of a media service provider for the purpose of the jurisdiction rules of parties, and the duties of transmitting parties to comply with the terms of the Convention. Reference is furthermore made to Article 6 of the Convention which stipulates the requirements of this Convention to the editorial responsibility of media service providers.

f) "Media service provider"

120. It follows from the comments in paragraphs 102 and 119 that the principal criterion characterising the media service provider is the editorial responsibility for the audiovisual media service. The media service provider can be a natural or a legal person, a "broadcaster" or an "on-demand audiovisual media service" provider. The definition excludes natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.

g) "Television broadcasting" or "television broadcast"

121. This notion is synonymous to a linear audiovisual media service as opposed to on-demand or non-linear services. The distinctive criterion lies in the fact that television broadcasting provides for transmission of a programme at a specific moment, determined by a programme schedule decided by the broadcaster for the purpose of simultaneous viewing. The notion of simultaneous viewing is explained in paragraph 114 above.

h) "Broadcaster"

122. A broadcaster is a media service provider of television broadcasts. Reference is made to paragraphs 120 and 121 concerning these notions.

i) "On-demand audiovisual media service"

123. This notion is synonymous to a non-linear audiovisual media service. It is characteristic of on-demand audiovisual media services that the programmes provided are "television-like" and compete for the same audience as television broadcast. The distinctive criterion, as compared to linear services (i.e. television broadcast), is that the user selects the programme from a catalogue arranged by the service provider and views the selected programme at a moment of his/her choice.

j) "Audiovisual commercial communication"

124. With the extension of the Convention to on-demand services and the determination of several basic requirements it is necessary to introduce a wider definition of audiovisual

commercial communication in addition to television advertising and tele-shopping. The term therefore also includes the other forms of images with an indirect promotional character such as sponsorship messages and product placement.

125. Despite the reference to "commercial" communication (i.e. inter alia to promote the sale of goods or services of entities pursuing an **economic** activity) the term does also include announcements in return for payment designed to advance a cause or idea[7] .This definition, which is wider than its equivalent in the corresponding EU Directive, is consistent with the initial version of the Convention which included in the definition of "advertising": "public announcement [...] in return for payment [...] which is intended to promote the sale, purchase or rental of a product or service, to advance a cause or idea or to bring about some other effect desired by the advertiser or broadcaster itself". The second amending Protocol to the Convention shortened this original formulation for technical reasons. From the viewpoint of the authors of the Convention there is no reason why its regulations (apart from Article 15) should not also apply to these forms of announcements, as the underlying goals (e.g consumer protection) should also be valid for all forms of communication in return for payment.

126. As an example for bringing about "some other effects" mention can be made of campaigns of insurance companies encouraging viewers to fast their seatbelt or to lock their homes properly when going on holidays. In this case the effect is desired by the "advertiser". The definition does on the other hand not include public service announcements and charity appeals broadcast free of charge (see Article 14 below).

127. In this context it is important to stress that "thematic placement" is prohibited according to the regulations in Art. 19 paragraph 2 sub i and 21 paragraph 1 sub a as it influences the content of a programme in such a way as to affect the responsibility and the editorial independence of the media service provider.

128. It has to be pointed out that not only moving images are covered by this definition but also static pictures. An indispensable constituent for the notion of audiovisual commercial communication is the requirement "in return for payment or similar consideration or for self promotional purposes".

k) "Television advertising"

129. (98) Two elements make up the concept of this definition[8]: firstly, that the announcement in question pursues a specific objective, that is to promote the sale, purchase or rental of a product or service available against remuneration (1) or to advance a cause or idea or bring about some other effect desired (2); secondly, that the

[7] See for instance the advertisement about animal welfare in the ECHR Judgement of 28 June 2001, Application no. 24699/94, VGT Verein gegen Tierfabriken v Switzerland, see also Judgement 10 July 2003, Application no 44179/98 Murphy v. Ireland

[8] See also European Court of Justice, 18 October 2007, C-195/06, KommAustria v. ORF: an announcement could also be regarded as television advertising if the goods and services offered […] were the subject of representations or promotions "intended to encourage viewers to buy those goods and services".

transmission time has either been allotted in return for remuneration or similar consideration by an advertiser to the broadcaster or used by broadcasters themselves for self-promotional purposes.

130. (99) As stated before in relation to sub-paragraph j) the term also includes announcements designed to advance a cause or idea or to bring about some other effect without encouraging the purchase or rental of a particular product or service (for example cases where the announcement aims to enhance the name, the responsibilities or the general activities of a company), so that all of the Articles of this Convention (except Article 15) also apply to these forms of announcements.

131. (100) It follows from this concept that advertising at sports and similar events (for example, advertising panels in stadiums, logos on equipment, etc.) which are transmitted or retransmitted do not fall under the regulation of advertising. However, a distinction must be made with regard to such events between situations where advertising is displayed in the background, which the broadcaster cannot avoid, and situations where, due to the particular use of the camera or other transmission techniques (including data processing and the use of virtual techniques), the broadcaster presents permanently, repeatedly or prominently one or more specific advertisements on the television screen. In the latter case, the rules of the Convention will be applicable. In general, an economic assessment may support the distinction: direct payment to the broadcaster by the advertiser may be an argument in favour of the application of the rules of the Convention, payment to the organiser of the event only without any economic advantage for the broadcaster could be an argument against the application, still leaving open whether this might be sponsoring or product placement.

132. (101) In its Opinion No 6 (1995) on the legal framework for "infomercials", the Standing Committee concluded that "infomercials" should be subject to the advertising rules of the Convention. An infomercial is a programme-long advertisement which aims to "promote the sale, purchase or rental of a product or service", even if its form gives it a strong informational character. Therefore, infomercials are covered by the definition of advertising contained in Article 2 (k) of the Convention.

133. (102) Thus, infomercials must respect the provisions on the form and presentation of advertising (Article 16). For the distinction between spots and longer forms of advertising see also Article 15 below.

134. (103) With respect to self-promotion 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.. Through the explicit reference to self-promotion in Article 2 (k) of the Convention, such publicity can therefore generally be considered as advertising for the purposes of the Convention. An exception should, however, be made for announcements of programme services merely for information purposes. Also trailers consisting of extracts from programmes should be treated as programmes (this also includes trailers for another channel of the same

broadcaster). Such forms cannot be regarded as advertising in the sense of Article 15 (see below).

135. (104) Non-profit announcements in the public interest, for example those for road safety, civic duties or health campaigns and charity appeals broadcast free of charge, are not considered as "commercial communication" in the sense of Article 2(j) (see Article 14 below).

136. (105) It is also recognised that the presentation of cultural products or events within an information programme or a critique (for example, a literary programme or a programme on the cinema) is not to be assimilated to advertising as long as there is no payment or similar consideration for this reference .

l) "Surreptitious audiovisual commercial communication"

137. Surreptitious audiovisual commercial communication is a practice prohibited by this Convention because of its negative effect on consumers. The decisive criterion is the potential of the presentation to mislead the consumer. Surreptitious audiovisual commercial communication can therefore be assumed if a publicity ploy is "camouflaged" in a way that the average viewer does not perceive it as such. Is the purpose of the presentation obvious to the average attentive viewer the announcement or presentation cannot be considered as surreptitious, it might then constitute (legal) audiovisual commercial communication or television advertising.

138. The prohibition of surreptitious audiovisual commercial communication should not cover legitimate product placement within the framework of this Convention, where the viewer is adequately informed of the existence of product placement. This can be done by signalling the fact that product placement is taking place in a given programme, for example by means of a neutral logo.

m) "Sponsorship"

139. (107) Two elements make up this notion: the participation of a natural or legal person in the direct or indirect financing of a programme and the fact that such participation pursues a specific objective, namely to promote the sponsor by a reference to his/her name, trademark, image, activities or products (see below Article 21).

140. (108 & 109) As to the first element, participation in the direct or indirect financing of a programme is intended to refer to both direct participation in the financing of the programme as such and the various forms of indirect participation, such as the provision of material, knowledge and goods for the production. Usually the revenue from sponsorship is integrated into the specific budget of a sponsored programme but this is not a condition for the fulfilment of the definition, it is also possible that the revenue is allocated to the general budget of the service. The decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to a product or service (which is perceived by the average viewer as one of a certain brand) is built into the

action of a programme which is why the definition contains the word "within". In contrast, sponsor references (possibly with a reference to or a picture of such a product) may be shown (by an insert) during a programme but are not part of the plot. A person providing products for the making of a programme (that are not to be perceived as being of a special brand) would on the other hand have to be judged as a sponsor. Such participation will be established by an agreement or contract between the sponsor and the media service provider concerned. As concern prizes for game shows or quizzes these - if of significant value - will have to be considered as product-placement. The same is valid for production props. See for this the prerequisites under paragraph 342.

141. (110) As in the case of advertising, the sponsorship of events which are transmitted or retransmitted in programme services basically falls outside the scope of "sponsoring" within the meaning of this Convention. However, a clear distinction is to be made between sponsored programmes and sponsored events. It was considered that, unlike a sponsored programme, in the case of a sponsored event, the broadcaster gains no material benefit from the sponsor for the transmission or retransmission. It was, however, recognised that situations may occur in which the same person sponsors both the event and the transmission or retransmission, either by directly financing the latter or by indirectly financing it (for example by payment of royalties). In such cases, the rules of the Convention on sponsorship are applicable.

142. (111) The reference to "who is not engaged in broadcasting activities or in the production of audiovisual works" is intended to exclude co-productions or the co-financing of audiovisual works between broadcasters or between broadcasters and independent producers, from being treated as a form of sponsorship. On the other hand, it is clear that the sponsorship of a programme does not confer on the sponsor the status of co-producer, nor the corresponding rights and obligations.

143. For the requirements of the definition it is not necessary that the contribution of the sponsor consists in money. It is also possible that the sponsor provides other benefits such as e.g. material for the production or to contribute special knowledge etc. This must not be confounded with provision of goods and services in the context of product-placement (see paragraph 339 below).

n) "Tele-shopping[9]"

144. (106) "Tele-shopping" means direct offers in television programmes broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations in return for payment. The notion of tele-shopping includes:

[9] See also European Court of Justice 18 October 2007, C-195/06, KommAustria v. ORF according to which a broadcast during which a television broadcaster offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, is covered by the definition of tele-shopping if that broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked

- tele-shopping spots;

- tele-shopping programmes (broadcast within programme services not exclusively devoted to tele-shopping, especially in the form of isolated programmes or tele-shopping windows); and

- programme services exclusively devoted to tele-shopping.

o) "Product placement"

145. Product placement is a reality in cinematographic works and in audiovisual works made for television, but regulatory regimes are manifold. In order to ensure a level playing field and to create legal clarity it is necessary to adopt rules for product placement.

146. The definition of product placement should cover any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured **within** a programme, in return for payment or for similar consideration. (For the decisive criterion distinguishing sponsorship from product-placement see paragraph 140 above).

147. The provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value. Product placement is subject to the same qualitative rules and restrictions applying to audiovisual commercial communication but in addition also has the meet special conditions of Article 19. Parties to the convention are therefore not obliged to treat production props and prizes of negligible value as product-placement, but these then would have to be considered as a sub-form of audiovisual commercial communication.

p) "European works"

148. (96) A creative work is considered to be European within the framework of this Convention if its production or co-production is controlled by European natural or legal persons. In general terms, this is in line with the general philosophy of Resolution (85) 6 of the Committee of Ministers on European cultural identity.

149. (97) It is to be noted in this context that the notion “European” is to be understood in the broad sense, i.e referring to the geographical territory of Europe, without discriminating between countries that are Parties to the Convention and the other European countries, member States of the Council of Europe as well as other States Party to the European Cultural Convention. The European Convention on Cinematographic Co-Production contains a detailed definition of the term "European cinematographic work" in its Appendix II, which may also be helpful for the identification of the European character of an audiovisual work. As a result, not all “European works” in the sense of

this Convention will be considered as such in the sense of the Audiovisual Media Service Directive. Reference is made to paragraphs 254 and 255 concerning Article 11.

Article 3: Freedom of reception and retransmission

150. (119) This Article establishes a major principle: the Parties shall ensure freedom of expression and information in accordance with Article 10 of the European Convention on Human Rights; consequently, they shall ensure freedom of reception and, as far as this is technically possible, retransmission on their territories of *audiovisual media* services which comply with the terms of the Convention.

151. (120) Such guarantees shall be subject to the sole derogations provided for under Articles 28*,* 29 and 33 according to the conditions and procedures foreseen thereby and subject to respect for the principles derived from Article 10 of the European Convention on Human Rights.

152. (121) The implications of this Article are that a Party will not be entitled to rely on the specific provisions of its domestic legislation or regulations in areas covered by the Convention (advertising and tele-shopping, sponsorship, responsibility of the media service provider in maintaining programme standards, etc.) to restrict reception or to restrict or prevent the retransmission on its territory, of an audiovisual media service from another Party which complies with the provisions of the Convention. This Article is, however, without prejudice to the current situation with regard to areas which are not governed by the Convention (for example, civil and criminal law responsibility of the media service provider).

153. (122) The principle embodied in this Article does not concern the question of technical capacity, for example, the capacity of cable networks or the number of available frequencies. Situations may clearly arise in which, due to limited technical capacity, a Party is unable to ensure the retransmission on its territory, notwithstanding the conformity of the *audiovisual media* service with the Convention. Should such situations arise, it was considered that the provisions concerning co-operation and mutual assistance between the Parties (Article 23) would be the appropriate means for solving any difficulties.

154. (123). On a more general level, the principle that *the* freedom of reception and retransmission *of services* shall be guaranteed is not intended to inhibit Parties in the exercise of their general spectrum allocation policies in ways authorised under other international agreements.

Article 4: Duties and jurisdiction of the transmitting Parties

155. (124) This Article establishes, in paragraphs 1 and 2*,* the duties of the Parties with regard to audiovisual media services provided within their jurisdiction and which can be received in one or more other Parties. Paragraphs 3 to 6 determine the criteria for

jurisdiction of Parties over these services. The specific objective of this provision arises from the need to ensure that such services comply with the terms of the Convention.

156. (125) It is to be noted, therefore, that this Article does not deal with the question of which domestic law is applicable in areas which are not covered by the Convention; as indicated in paragraph 30 above, certain aspects of broadcasting remain outside the scope of the Convention.

157. (126) Furthermore, as this Article concerns exclusively the duties of the transmitting Parties under the Convention, it does not nullify the responsibilities of the media service provider or entity ensuring the transmission or retransmission in matters such as the obtaining of the necessary authorisations from the authors and other rights holders and their remuneration, respect of technical regulations, criminal and civil law liability, respect of rules on unfair competition (see, in this context, paragraphs 183 and 278 below).

158. (127) It is clear from Article 33 that the provisions of this Article do not prevent a Party from applying stricter or more detailed rules than those embodied in the Convention to audiovisual media services whose providers are within its jurisdiction (see paragraph 455 below). However, except in the circumstances covered by Articles 20, 29 and 33 paragraphs 2 to 4, that Party is not entitled to rely on such stricter or more detailed rules in order to restrict the retransmission on its territory of audiovisual media services which are within the jurisdiction of another Party and which comply with the terms of the Convention

Paragraph 1

159. (128) Paragraph 1 establishes the responsibility of each transmitting Party, as identified in paragraph 2, to ensure compliance with the terms of the Convention of audiovisual media services provided within its jurisdiction, within the meaning of Article 1, paragraph 2.

160. (129) It is to be noted that the responsibility under paragraph 1 in no way implies establishing an interference with the responsibility and independence of the media service provider as regards programming content; nor does it imply in any way the introduction of a system of a priori control. Both are contrary to the philosophy of the member States of the Council of Europe in such matters.

161. (130) The Convention leaves the detailed fulfilment of their duties under this paragraph to the discretion of the Parties, who will take into account their constitutional, legislative or regulatory provisions (including, *inter alia,* the domestic courts of a Party) for the purpose of determining the appropriate means and the competent organs by which compliance with the Convention is ensured.

Paragraph 2

162. This provision invites Parties to promote, for the purposes of the effective implementation of this Convention, the introduction, at national level, of co- and/or self-

regulation instruments where this is compatible with their legislation and appropriate for the sector concerned. Appropriateness in the context of this provision is determined by the sector or problem concerned, the level of acceptance by the main stakeholders and by the effectiveness of the enforcement, including, where needed, by the possibility of imposing sanctions.

163. This paragraph tries to achieve the same objective as the corresponding provision, Article 3, paragraph 7, in the Audiovisual Media Service Directive (2007/65/EC) which the Standing Committee decided to include in the Convention. Reference is furthermore made to Recital 36 of this Directive.

164. Self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves. Self-regulation can play an important role as a complement to the legislative and judicial and/or administrative mechanisms in place but should not constitute a substitute for the obligations of the national legislator of the Parties concerned.

165. Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of each Party. The generic term "co-regulation" covers regulatory instruments which are based on cooperation between State bodies and self regulatory bodies and vary widely in terms of their designation and structure at national level The actual form which such instruments take reflects the specific tradition of media regulation in the individual States. Co-regulation allows for the possibility of State intervention in the event of its objectives not being met.

166. The provision does not oblige Parties to introduce co- and /or self regulatory regimes, but Parties should carefully consider the advantages they may offer for the purpose of achieving measures, required by this Convention. The main advantage of co-and self-regulation as compared to legislation is that measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves.

Paragraph 3

167. (131) This paragraph sets out the criteria for establishing the competence of a Party vis-à-vis a media service provider for the purposes of the Convention.

168. (133) Paragraph 3, first indent, lays down the general principle whereby the transmitting Party is the Party in which a media service provider is established, on the basis of and in accordance with the criteria set out in paragraph 4 to determine such establishment. The pre-eminence given to the criteria of establishment is aimed at ensuring that the competent Party with regard to a media service provider is the Party in which the operation of such a provider is actually carried out.

169. (134) In the event that the competence of a Party cannot be defined on the basis of the principle of establishment in accordance with the criteria of paragraph 4, the second indent of paragraph 3 sets out an ancillary rule for determining the competence of the Parties by indicating that they assume the role of transmitting Party *vis-à-vis* those services to which paragraph 5 applies.

Paragraph 4

170. (135) This paragraph determines a chain of criteria to determine whether a media service provider is established, within the meaning of paragraph 3, in a given Party. As indicated above, the objective of these cascading criteria is to ensure that the competent Party is the Party in which the activities of a media service provider are carried out, given the fact that such providers may split up their activities between several States.

171. (136) Paragraph 4(a) covers the situation, in principle the most common, in which a media service provider has its head office in a Party and where the editorial decisions on programmes and, in the case of broadcasters on their schedules, are taken in that Party. In such a case, the provider concerned clearly falls within the competence of that Party, in so far as the decisions concerning the most important activities related to management and programming matters are taken on the territory of that Party.

172. (137) However, it may arise in certain cases that a media service provider has its head office in one Party, while editorial decisions on programmes, schedules or catalogues are taken in another Party. In such a situation, paragraph 4(b) provides that this provider is deemed to be established in the Party where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates, given that this provides considerable material evidence of the place where the activity is effectively carried out.

173. (138) There may be, however, cases where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of the Parties, or in neither of those Parties. This situation may make it more difficult to determine the place of establishment. In the first case, paragraph 4(b) again uses the criterion of the head office to determine the competent Party. In the second case, the media service provider is deemed to be established in the Party where it first began its activity in accordance with the law of that Party, provided that it maintains a stable and effective link with the economy of that Party.

174. (139) A last situation concerns the hypothesis in which a media service provider has its head office in a Party, but editorial decisions on programmes, schedules or catalogues are taken in a State which is not Party to the Convention, or vice-versa. In such a case, paragraph 4(c) provides that such a provider will be deemed to be established in the Party concerned if a significant part of the workforce involved in the pursuit of the activity operates in that Party.

175. (140) It should be noted that the alignment of the criteria for establishing jurisdiction in the Convention with those in the revised Directive does not exclude that marginal

problems of conflict of jurisdiction may arise in the context of the implementation of the two instruments because some member States of the European Community are not Parties to the Convention, while many States which are Party to it are not members of the European Community. As a result of the simultaneous application of the criteria of Article 4, paragraph 4 of the Convention and of Article 2, paragraph 3 of the Audiovisual Media Service Directive (2007/65/EC), two States could assume jurisdiction at the same time and in respect of the same audiovisual media service provider. In order to avoid this, paragraph 4 (d) provides that if a media service provider is deemed to be established in a member State of the European Community, when applying the criteria of paragraph 3 of Article 2 of this Directive, that media service provider shall also be deemed to be established in that State for the purposes of the Convention. In the case where conflicts of jurisdiction cannot be resolved, despite of the application of paragraph 4 (d) of Article 4, a solution should be sought by the bodies responsible for supervising the implementation of the amended Convention and the Audiovisual Media Service Directive.

Paragraph 5

176. (141) It may be the case that the application of the cascading criteria set out in paragraph 4 does not make it possible to determine that a television broadcasting organisation is established in a Party within the meaning of paragraph 3. In such a case, the ancillary rule laid down in paragraph 5 has to be examined to settle the question of the competence of the Parties. As for the rule concerning establishment, paragraph 5 provides for the criteria based on the means used for the transmission of the programme service or services of the television broadcasting organisation. These criteria are the use of a satellite uplink situated in that Party or, failing this, the use of a satellite capacity appertaining to a Party.

177. It is to be noted that this ancillary rule has been adapted to the amended, corresponding rule in Article 2, paragraph 4 of the Audiovisual Media Services Directive. The Television without Frontiers Directive refers to the following cascade of ancillary jurisdiction criteria: firstly the frequency granted, secondly the use of a satellite capacity and lastly the use of a satellite up-link. The amendment introduced by the Audiovisual Media services Directive consisted of a deletion of the reference to frequencies and an inversion of the remaining criteria: firstly the use of satellite up-link and secondly to the use of satellite capacity. EU member states are applying the amended ancillary criteria of the Audiovisual media services Directive as from the end of the transposition period, i.e. 19 December 2009.

178. The amendment in the Directive was justified by technological developments rendering inadequate the reference to frequencies in the EU context. In addition, the use of satellite capacity- as a jurisdiction criterion caused a degree of difficulty because it is legally and technically difficult to require a satellite operator to remove a particular channel/service from a multiplexed bundle in cases where the channel is in breach of European norms.

Paragraph 6

179. (142) Should the ancillary rule provided for under paragraph 5 not make it possible to determine the transmitting Party, paragraph 6 provides that the Standing Committee shall consider the issue according to Article 25 of the Convention in order to determine this Party. On this issue, Article 4 of the Convention departs from the solution retained in Article 2, paragraph 5, of the Audiovisual Media Service Directive which provides, as an ultimate criterion for determining competence, that "the competent Member State shall be that in which the media service provider is established within the meaning of Articles 43 to 48 of the Treaty ". This criterion shall, under Article 32, paragraph 1 of the Convention, apply to those Member States of the European Community which are Parties to the Convention. It cannot be used in the direct relationship between Member States and non-Member States of the European Community, as well as in the relationship existing only between these non-Member States.

Article 5: Transparency and information requirements

180. (144) The current evolution of audiovisual media services, makes it particularly necessary that information about the media service provider is available to everyone. Because of the multiplication and diversification of audiovisual media services, on the one hand, and the transfrontier character of transmissions, on the other, it is important, both for States and viewers, to know who is responsible for what.

181. The wording of paragraph 2 of this Article is aligned with the text of Article 3a of the Audiovisual Media Services Directive (2007/65/EC). Reference is furthermore made to Recital 43 of this Directive. The requirements for the provision of information are minimum requirements.

Paragraph 1

182. (145) This paragraph deals with the question of transparency as regards the responsibilities of the broadcaster. Where a media service provider is required to have an authorisation, or contract, to carry out its activities, Parties to the Convention should ensure that the responsibilities of the service provider are clearly and adequately set out in the authorisation, contract or any other legal text or measure.

183. (146) The term "responsibilities" refers to the obligations, for example, under the contract or franchise by which the broadcaster is bound; but it also concerns the broadcaster's civil and criminal law liability.

184. (147) The terms "authorisation", "contract" and "any other legal measure" cover all forms of arrangements by which broadcasters are entitled to transmit programme services. This may, as appropriate, be through legislation or a regulation of the Party concerned.

185. The provision takes account of the fact that an increasing number of media service providers, and in particular on-demand audiovisual media services, are not or no longer

subject to a licensing or authorisation regime. It is clear that the provision does not oblige Parties to submit all media service providers to a licensing or authorisation regime.

186. (148) This provision does not mean that the Party responsible for ensuring respect for the principle of transparency must automatically publish the information in question. However, it should at least satisfy itself that such information is available and is furnished on request to any interested natural or legal person: individual, organisation, media service provider, State, etc. Where appropriate, such information will be requested through the competent authority in the receiving Party; Article 23 of the Convention provides for the designation of one or more authorities whose task is, *inter alia*, to provide the information referred to in this paragraph.

Paragraph 2

187. (149) The transparency required under this provision corresponds to the need for users to have easy and direct access at any time to information about the media service provider. The latter is required to provide, in addition to his geographic address, the details, including his electronic mail address or website where the provider can be reached in a direct and effective manner. This could be achieved by various techniques e.g. station indents, listings, teletext, electronic programme guides, websites, magazines etc. Where applicable, audiovisual media services should also provide information about the competent regulatory or supervisory bodies.

188. (150) The provision of information provided for by this paragraph shall take place within the framework of the general rules on provision of information and shall duly respect, in particular, the rules on data protection, professional secrecy and commercial secrets.

189. Although the Convention no longer requires media service providers to provide information about the status of the broadcaster, the name of the legal representative, the composition of the capital, and the nature, purpose and mode of financing of the programme service, the provision of information of a general nature on financial sources (public and/or private, licence fee and/or commercial resources) and breakdown of the capital should still be encouraged. In this respect, reference is made to Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content[10] which recommends, in its Chapter III that member States should ensure access of the public to the following types of information on existing media outlets:

- information concerning the persons or bodies participating in the structure of the media and on the nature and the extent of the respective participation of these persons or bodies in the structure concerned and, where possible, the ultimate beneficiaries of this participation;

[10] Updating Recommendation No. R (94) 13 on measures to promote media transparency.

- information on the nature and the extent of the interests held by the above persons and bodies in other media or in media enterprises, even in other economic sectors;

- information on other persons or bodies likely to exercise a significant influence on the programming policy or editorial policy;

- information regarding the support measures granted to the media;

- information on the procedure applied in respect of the right of reply and complaint.

Chapter II: Programming matters

Article 6: Responsibilities of audiovisual media services providers

190. (153) The philosophy underlying the title of this Article is that, whilst the Parties are responsible for ensuring the application of the Convention and for taking any necessary legal measures in their domestic legal frameworks for this purpose, the media service providers will, in the first instance, be responsible for observing the provisions of this Article. It is in this sense that the terms "responsibilities of the audiovisual media services providers are to be understood in the title of this Article, compared with the notion of "responsibilities" contained in Article56, paragraph 1, of the Convention (see above, paragraph 183).

191. (154) It is emphasised, as in paragraph 160 above, that this Article in no way implies establishing an interference with the responsibility and independence of the media service provider as regards programming content, nor indeed the introduction of a system of a priori control. Article 4, paragraph 2 underlines the potential value in this area of developing self- and co-regulation as a complement to legislation, in the form of codes of conduct by media service providers.

192. (155) It is to be noted that the standards embodied in paragraphs 1 and 2 of this Article, in so far as they concern all items of audiovisual media services, apply equally to all programmes, including advertising, programmes trailers, public announcements and any other element of the service transmitted (see above, paragraphs 99, 100 and 116).

Paragraph 1

193. (156) The standards contained in this paragraph, which is inspired notably by the European Convention on Human Rights and should be interpreted in the light of the case-law of its organs, represent the affirmation of the desire to respect basic values common to all member States of the Council of Europe. Among the provisions of that Convention, mention should be made of Article 10 which guarantees freedom of expression and information. The exercise of this freedom, however, carries certain responsibilities and may therefore be subject to certain conditions or limitations provided for in paragraph 2 of Article 10 of that Convention.

194. (157) This paragraph is also a reflection of elements contained in the preamble to the Universal Declaration of Human Rights (1948) concerning the inherent dignity and equality of all human beings, including equality between women and men.

195. (160) Respect for the equal dignity of all human beings is at the very basis of a democratic and pluralist society and the Council of Europe has always attached the greatest importance to safeguarding and realising these ideals and principles. Paragraph 1 a) concerns the responsibility for linear and non-linear audiovisual media service providers not to include programmes containing incitement to hatred based on race, sex, religion or nationality and is aligned with Article 3b of the Audiovisual Media Services Directive. Recommendation No R (97) 20 on "hate speech", and Recommendation No. R (97) 21 of the Committee of Ministers to member states on the media and the promotion of a culture of tolerance are both relevant in this context. The notion of "incitement" is to be read in the light of the case law of the European Court of Human Rights, notably in the judgement Leroy vs France (n° 36109/03) and Norwood vs UK (n°23131/03).

196. Paragraph 1 b) concerning "undue prominence to violence" applies to both television broadcast and on-demand audiovisual media services. Unlike the Audiovisual Media Services Directive and paragraph 3 of this Article, the requirement not to give undue prominence to violence goes beyond the context of the protection of minors. It does not imply that such violence as exist in society cannot be portrayed in television programme services or in programmes offered by on-demand services, but it is designed to ensure that violence as such is not given a prominent place in programmes offered. In this context, reference must be made to Recommendation No. R (97) 19 on the portrayal of violence in the electronic media which contains, in its appendix, parameters to be taken into account for determining whether the portrayal of violence in a programme is justified or unjustified (for example, the type of programme, the viewing time, the possibility of free access or conditional access, and so on)

Paragraph 2

197. (165) This paragraph embodies an important principle, which is moreover reflected in codes of conduct of professional organisations of journalists, and aims to guarantee the plurality of information sources and the independence of news programmes. Those responsible for news programme*s* and journalists in charge of news services have a moral responsibility towards the public not only for the reporting of news but also for their comments on events and their developments.

198. This responsibility is particularly important in the context of television broadcasting. In the interest of the viewers, news programmes should be reliable and made in good faith. The journalistic standards on fairness and accuracy are notably directed against the distortion of political, historical or cultural facts. This can also been done through omission. Broadcasters should ensure that information provided in news programmes is precise, truthful and factual. In order to ensure the free formation of the viewer's opinion,

news programmes should make a clear distinction in their presentation of facts (susceptible of proof) and opinions (value judgements).

199. Since on-demand services are different with regard to the control the viewer can exercise and can be expected to provide the public with a wider offer of information sources, the Standing Committee decided to limit this requirement to television broadcast. It is recalled that the general principles of responsible journalism developed in the case-law of the European Court of Human Rights (including the requirement to clearly distinguish facts from value judgments) also apply to on-demand television.

200. Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content notes that "pluralism of information [...] will not be automatically guaranteed by the multiplication of the means of communication offered to the public. Therefore, member states should define and implement an active policy in this field, including monitoring procedures, and adopt any necessary measures in order to ensure that a sufficient variety of information, opinions and programmes is disseminated by the media and is available to the public." (Chapter II, General principle 1)

201. (166) The free formation of opinions is particularly important in respect of Parties' rules regarding electoral or political campaigns. Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaign provides guidance on this issue.

Paragraph 3

202. This provision concerns the protection of minors against harmful content in programmes and contains separate rules for linear and non-linear services,

203. The first indent of this provision concerns television programmes. It makes a distinction between television programmes which "might seriously impair" the physical, mental or moral development of minors, and those who are "likely to impair their development". Programmes containing pornography or gratuitous violence are mentioned as - non-exhaustive - examples of programmes where the potential damage to the development of minors can be serious and then must not be broadcast. Parties to the Convention must therefore not allow television programmes containing pornographic material to be broadcast [either] free on air [or encrypted broadcasts] regardless of the time of broadcast. Programmes presenting a less serious level of risk, those that are likely to impair the development of minors broadcasts must, if shown, be organised in a way that minors are not likely to see them. This can either be achieved by technical means, including the use of personal identification numbers (pin codes), filtering systems or labelling, or by scheduling.

204. (163) The scheduling of programmes or other items of programme services which are unsuitable for minors must take into account the time difference between the Parties, and consequently the official time in both the transmitting and receiving Parties.

205. The second indent concerns harmful content in on-demand services. Since the user, and in the context of the protection of minors, their parents or legal representatives, have a greater control on the programmes viewed, the requirements on the programme services are less restricted. They only concern content which might seriously impair the physical, mental or moral developments of minors. On demand service providers should ensure that such programmes are not made available in a way that the minor could normally hear or see them. Reference is made to the use of technical means as described in paragraph 203 above.

206. (164) The Convention supplements the protection provided for in this Article by dealing with the specific problem of advertising and tele-shopping addressed to, or using minors in Article 13, paragraph 4 (see below, paragraph 280)..

Article 7: Access for disabled persons

207. The right of persons with a disability and of the elderly to participate and be integrated in the social and cultural life of the Community is inextricably linked to the provision of accessible audiovisual media services. The means to achieve accessibility should include, but need not to be limited to, sign language, subtitling, audio-description and easily understandable menu navigation. Media service providers might wish to consult organisations representing disabled people in their own country.

208. Recommendation Rec(2006)5 of the Committee of Ministers to member states to promote the rights and full participation of people with disabilities in society highlights the importance for persons with disabilities to fully participate in the cultural life of a society and to have adequate access to information and education. The Action Plan "improving the quality of life of people with disabilities in Europe 2006-2015" in the Appendix to the Recommendation contains various lines of action to achieve these goals

Article 8: Right of reply

209. (167) The principle embodied in this Article follows on from Resolution (74) 26 on the right of reply and the provisions of Recommendation No. R (84) 22 on the use of satellite capacity for television and sound radio. Reference is furthermore made to Recommendation Rec(2004)16 of the Committee of Ministers to member states on the right of reply in the new media environment. The scope of the latter Recommendation, which covers all media, exceeds the one of the present Convention which is limited to the right of reply in the context of television broadcasting. This limitation was preserved to ensure alignment with the scope of the Audiovisual Media Services Directive, Article 23 and Recital 53. The authors of this Convention recall, however, that the Committee of Ministers recommends that the member States of the Council of Europe apply the right of reply or an equivalent remedy in all media so also in the context of on-demand television[11].

[11] Rec (2004)16 Principle 1. Scope of the right of reply "Any natural or legal person, irrespective of nationality or residence, should be given a right of reply or an equivalent remedy offering a possibility to

210. (168) A right of reply within the meaning of the Convention is a right exercised by a natural or legal person in order to correct inaccurate facts or information, in cases where such facts or information concern him/her or constitute an attack on his/her legitimate rights (especially in regards to his/her dignity, honour or reputation). As indicated in paragraph 211 below, the modalities of exercise of this right are determined by the transmitting Party.

211. (169) The exercise of a right of reply or the access to other comparable legal or administrative remedies may be ensured by any legal or other procedure, the modalities of which are determined by the transmitting Party: right of reply, right of correction, right of rectification, right of recourse to special bodies or procedures.

212. (170) According to this provision, a right of reply or other comparable legal or administrative remedies are transfrontier in character. Therefore, they may be exercised equally by nationals and non-nationals, residents and non-residents of Parties to the Convention.

213. (171) It follows from this provision that the transmitting Parties are under an obligation to ensure that a right of reply or other comparable legal or administrative remedies may be exercised in relation to television programmes which are transmitted or retransmitted within their jurisdiction, within the meaning of Article 1, paragraph 2. Therefore, where no right of reply or other comparable legal or administrative remedies are provided in a Party, it is bound to introduce such a right or remedies with regard to programmes provided within its jurisdiction, within the meaning of Article 1, paragraph 2. However, this need not necessarily be in the form of legislation; it could be established in the broadcaster's contract or franchise.

214. (172) According to this provision, the transmitting Parties are obliged to furnish the necessary modalities for the effective exercise of such a right or access to other comparable legal or administrative remedies by any person referred to in the paragraph. This includes the timing and other arrangements, which should be such that the exercise of this right or access to other comparable legal or administrative remedies can be effective. Thus, for example, the context in which a right of reply is exercised should be comparable to that in which the incriminated statement was made.

215. It should be noted that the Convention’s provision on the right of reply differs in its wording from the one used in Article 23 of the AVMS Directive (previously in Article 23 of the TVWF Directive). Although the requirements of the Convention are less detailed than those in the Directive, it is underlined that these differences are not incompatible and should not lead to difficulties in their implementation.

Article 9: Access of the public to information

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react to any information in the media presenting inaccurate facts about him or her and which affect his/her personal rights.”

216. The continuing growth in the number of national and transfrontier broadcasters in Europe increases the possibilities for freedom of expression, for pluralistic supply of information and for exchanges between different opinions and cultures. At the same time, it gives rise to increased competition among broadcasters in order to attract audiences.

217. This competition between broadcasters is illustrated in particular by the generally accepted practice whereby a broadcaster acquires exclusive rights for the television showing of events of high interest to the public, notably sports events. In particular, broadcasters operating in a transfrontier context often acquire these rights for countries other than their country of origin.

218. Because television is an important source of information for the public, the exercise of exclusive rights for the television broadcasting of an event of high interest to the public may prove to be a problem to the right of access of the public to information in one or more of the countries which are covered by the exclusive rights which a broadcaster has purchased.

219. The right of the public to information derives from Article 10 of the European Convention on Human Rights and it has been given specific recognition in this article. . Nonetheless it is important to stress the need that a balance should be struck between this right and the rights of:

- the broadcaster who holds exclusive rights;
- the owner of the premises where the event takes place ;
- the organiser of the event ;
- authors and other right holders of works used in the framework of an event.

220. In particular, it is necessary to avoid an excessive interference with the property right of the broadcaster having the exclusive rights. However, it should be stressed that the public's right of access to information requires that other broadcasters should be able to communicate information on an event which is the subject of exclusive rights.

221. (179) This provision is not concerned with the acquisition of exclusive rights but with the modalities of the exercise of such rights in a transfrontier context. It by no means implies in any way that, when exclusive rights to an event have been acquired by a broadcaster, other broadcasters have the right to retransmit the event in its entirety. Instead, Article 9 of the Convention gives them the right to use short extracts from the event in news reports as part of general news programmes.

222. In terms of jurisdiction the country of origin principle as elaborated in Article 4 should apply to both the access to and the transmission of the short extracts. In a transfrontier case, this means that the different laws should be applied sequentially. Firstly, for access to the short extracts the law of the Party where the broadcaster supplying the initial signal (i.e. giving access) is established should apply. This is often (but not always) the Party in which the event concerned takes place.

223. Where a Party has established an equivalent system of access to the event concerned (see below paragraph 4), the law of that Party should apply in any case. Secondly, for transmission of the short extracts, the law of the Party where the broadcaster transmitting the short extracts is established should apply. Broadcasters should not be prevented from concluding more detailed contracts (except in questions of compensation arrangements).

224. Parties to the Convention have the obligation to put in place a system that works effectively but they are, within the limits allowed by the European Convention on Human Rights, free to choose the appropriate means. This is particularly true with regard to issues not touched by this Convention, like how exactly the source has to be identified, or how exactly the right can be exercised (signal quality, time elapsed between event and broadcast, etc.)

Paragraph 1

225. In order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers are fully and properly protected, those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts on fair, reasonable and non-discriminatory terms taking due account of exclusive rights. Such terms should be communicated in a timely manner before the event of high interest to the public takes place to give others sufficient time to exercise such a right. A broadcaster should be able to exercise this right through an intermediary acting specifically on its behalf on a case-by-case basis.

226. It is important to stress that this article only relates to broadcasters within the meaning of Article 2 of this Convention. The Convention places no obligations or entitlements on the suppliers of on-demand audiovisual media services, so long as they are not also broadcasters.

227. "Short news report" means such brief sound and picture sequences about an event f.i (but not exclusively – see paragraph 3 below) to enable the public of another broadcaster to have a sufficient overview of the essential aspects of such an event, as part of a general news programme. Broadcasters who wish to compile such programmes have the right to determine which scenes form the essential aspects – the choice therefore is for the broadcaster who will use the extracts, not the broadcaster who supplies them.

228. "Event of high interest to the public" means any event (sports, cultural, social, political event etc.) in which a broadcaster holds the exclusive rights for its television broadcast and which is considered by one or more broadcasters from other countries as being of particular interest for its (their) public. The public may be the public as a whole, or relevant sectors thereof, who have particular areas of interest, according to their professional or extra-professional activities, age, etc. In practice, however, the identification of an event as being of high interest will be determined by the broadcaster, whose public risks being deprived of the right of access to information. This broadcaster is, in the end, in the best position to assess the specific expectations of its public with regard to a given event.

229. **(**177) The term "event of high interest" indicates that at least some aspects of the event justify short footage in a television programme providing information to the public. Such events need not (and in many cases will not) meet the criteria fixed in paragraph 246 below. They do not have to be of major importance for society nor do they have to be included in lists as foreseen in Article 9a. The latter would not be appropriate nor possible in all cases. Sometimes events being of high public interest will be identified only shortly before they take place. In general, broadcasters asking for a right to short reporting and not the Parties will have to gauge the interest of the public to receive information about the event in question.

230. (178) Whilst events of high interest to the public do not have to meet the criteria for the "events of major importance for society" which are protected by Article 10, those events of major importance will usually meet the criteria for national measures foreseen in Article 9. In such situations both measures may be relevant. National measures provided for in Article 10 may be necessary to ensure that a substantial proportion of the public is not deprived of the possibility of following the event on free television by live or deferred exclusive coverage. However, for informational purposes, it may be necessary to allow other broadcasters the right to short reporting in their news programmes.

231. In cases where the access of the public to the venue of the event is forbidden or restricted (for example, for certain major cultural or social events), its television broadcast may be all the more important. In such cases, the exercise of exclusive rights may have important consequences for the right of the public to have access to information.

232. "Transmitted on exclusive basis" concerns the rights acquired contractually by a broadcaster from the f.i. the organiser of an event of high interest and/or from the owner of the premises where the event is taking place, as well as from the authors and other rights holders, with a view to the exclusive television broadcast of the event by that broadcaster for a given geographical zone. The Convention provides for a right of access to events “which are transmitted” but does not deal with the mere acquisition of exclusive rights.

233. Thus, any broadcaster from a country other than the primary broadcaster - whether or not its signal covers or reaches the country covered by the exclusive rights - would be entitled to a short report (that is if a broadcaster from country A acquires the exclusivity for countries A, B and C, broadcasters from countries B and C, but also from other countries, would be entitled to a short report, even though no exclusivity has been acquired by broadcaster A for such other countries). According to the definition, any broadcaster from a country other than the exclusive rights holding broadcaster would be entitled to a short report irrespective of whether or not the broadcaster's exclusivity covers that country.

Paragraph 2

234. The right of access to short extracts should apply on a trans-frontier basis only where it is necessary. Therefore a broadcaster should first seek access from a broadcaster

established in the same Member State having exclusive rights to and transmitting the event of high interest to the public.

Paragraph 3

235. It is important to stress that broadcasters are free to choose, which scenes of an event they consider to be relevant, so that they should be shown to the public. For the duration of such extracts see also the remarks under paragraph 5. The obligation to identify the source of the signal exists under the condition that it is possible for reasons of practicality. Parties are free to decide which means and duration of identification (oral or visual reference to the name and/or insert the logo) they request but should take due account of exclusive rights. Such a reference would meet the need to inform the viewers of the origin of information, on the other hand some broadcasters may prefer not to have their name or logo mentioned within programmes broadcast by other channels so as to avoid confusing viewers. The convention does not regulate how exactly the source has to be identified.

Paragraph 4

236. Parties should facilitate access to events of high interests to the public by granting access to a broadcaster's signal. However, they may choose other equivalent means. Such means include, inter alia, granting access to the venue of these events prior to granting access to the signal.

Paragraph 5

237. Short extracts may be used for Europe-wide broadcasts by any channel including dedicated sports channels. Short extracts should only be used for the purposes of general news programmes so that mere sports news do not qualify for this. The notion of general news programmes should also not cover the compilation of short extracts into programmes serving entertainment purposes, notably those which indiscriminately mix information and entertainment. By relying on the right of access of the public to information, a broadcaster could produce attractive current affairs programmes in particularly inexpensive conditions. This would clearly be an abuse.

238. The second sentence aims to ensure that the practice of broadcasters of providing their live television broadcast news programmes in the on-demand mode after live transmission is still possible without having to tailor the individual programme by omitting the short extracts. This possibility should be restricted to the on-demand supply of the identical television broadcast programme, so it may not be used to create new on-demand business models based on short extracts.

Paragraph 6

239. When defining the modalities and conditions for the provision of short extracts Parties should ensure a balance between the affected rights and interests especially when it comes to the maximum length and time limits regarding their transmission. Recalling the principles of

Recommendation No R (91) 5 of the Committee of Ministers to member states "on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a transfrontier context", it is for the Parties involved to decide on the maximum length of the extracts which are used in general news programmes. In this context it is to be noted that Recital 39 of the Directive 2007/65/EC mentions a maximum length of 90 seconds.

240. The Convention does not touch the issue of the exercise of the right to short reports, so that Parties could take into account that f.i. short extracts should not be broadcast before the exclusive rights holder has had the opportunity to carry out the main broadcast of the event (or even not before a certain time period after the event or the end of the transmission has elapsed). It is legitimate that the latter should enjoy priority of the broadcast during prime time, free from competition from other broadcasters.

241. Reference could also be made of the question whether (how long or how often) or not a short extract (also when provided on demand) may be reused. Also in this case the balance between the conflicting interests must be taken into account.

242. If compensation is provided for it must not exceed the additional costs directly incurred in providing access i.e. only those expenses that incur due to the granting of the access. In any event, no financial charge can be required towards the cost of television rights.

243. If a broadcaster is granted access to the site, the event organiser or site owner should be able to charge for any necessary additional expenses incurred. This takes account of the fact that the provision of extra facilities by the event organiser or site owner for the purposes of enabling a secondary broadcaster to make a short report does not necessarily produce any return benefit for the organiser or site owner.

244. In the implementation of the foregoing principles, the following aspects could be taken into consideration:

a. if a an event is composed of several organisationally self-contained elements, each self-contained element should be deemed to be an event of high public interest;

b. if an event takes place over several days, it should give the right to produce at least one short report for each day;

c. the authorised duration of a short report should depend on the time needed to communicate the information content of the event.

Article 10: Access of the public to events of major importance by means of television

Paragraph 1

245. (181) Apart from events which are deemed to be of high public interest, certain events may be of such importance to society as a whole, that more far-reaching measures to protect access by the public to information on these events are justified. In these cases, the Parties may have recourse to the drafting of a list of designated events which are considered to be of major importance for society and in regard to which the Party concerned shall ensure that broadcasters under its jurisdiction do not broadcast such events on an exclusive basis in such a way as to deprive a substantial proportion of the public in that Party of the possibility of following such events on free television (see paragraph 247 below) by live or deferred coverage. In doing so, Parties shall respect the fundamental rights which are laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and, where appropriate, in their national constitutions. Furthermore, they shall take due account of property rights and the principle of contractual freedom.

Paragraph 2

246. (182) In drafting such a list of designated events, Parties should first of all respect the criteria of transparency and proportionality. Furthermore, they should respect certain criteria developed by the Standing Committee in the guidelines referred to in subparagraph f. The guidelines can be found on the website of the Standing Committee www.coe.int/media. The Standing Committee may supplement or amend these guidelines on the basis of the developments in relation to the implementation of the Article 3j of the Audiovisual Media Services Directive (2007/65/EC).

247. (183) Essential for the implementation of Article 10 is the notion of "free television". Without a definition of this term, broadcasters will not be able to meet the requirements of national legal measures implementing this provision nor will Parties be able to safeguard those measures. Generally, the notion of "free television" is to be understood as broadcasting on a programme service, either public or private, of programmes which are accessible to the large majority of the public of the area of geographical coverage of the broadcaster in their own language(s) without payment in addition to the modes of funding of broadcasting that are widely prevailing in each Party (such as licence fee and/or the basic tier subscription fee to a cable system). Thus, broadcasting services may qualify as "free television" services irrespective of their distribution mode(s), the distinctive element being that there is no need for the public to make special additional payment (beyond the licence fee and/or subscription to basic tier cable services) in order to be able to have access to the relevant broadcasts.

248. (184) In implementing this Article, Parties will exchange the information provided for in Article 23. The Standing Committee will be informed of the results of the Parties' examination of the legal measures to guarantee access to the information, notably with a view to identifying collective measures to be taken by the Parties.

249. (185) The Standing Committee shall also be informed by the Parties of the lists of designated events which are drawn up by them. Such information shall include all necessary elements in order to enable the Standing Committee, in case of a dispute, to carry out a comprehensive assessment of the compatibility of national measures with the spirit

and the wording of paragraph 2 of this Article. Sufficient information is to be provided, in particular, as regards:

- the reasons why listed events are considered of "major importance for society";
- the procedure followed for the choice of the events and the relevant measures.

The Standing Committee may request any additional information it may require.

250. (188) In case of a dispute between the Parties in regard to the implementation of Article 10, should the Standing Committee find that a particular Party should not have listed an event and without prejudice to a possible arbitration procedure under Article 31, the other Parties do not have to recognise that event.

Paragraph 3

251. Paragraph 3 applies only in circumstances where an EU Member State which is also a State Party to the Convention has a list and corresponding measures which are in compliance with Article 3j of the Audiovisual Media Services Directive. The State Party may then ask the Standing Committee to publish the list. In deciding whether to publish the list, the Standing Committee should have regard to the factors listed at article 10 paragraph .2, (a) to (f). If the Standing Committee agrees to do so, then the other States Party shall ensure that broadcasters within their jurisdiction do not exercise any exclusive rights which they may have over events on the list in such a way as to deprive the public in the first State party of the right to watch those events on free television.

Paragraph 4

252. Paragraph 4 offers a possibility for a Party to declare its wish not to be bound by a list notified by another Party to the Standing Committee in view of its mutual recognition. Such declaration should be addressed to the Secretary General of the Council of Europe within a delay of 6 months following the notification of this list to the Parties of the Convention. When a State Party has issued such declaration by way of notification, the requirements of paragraph 2 will not apply to it and it will not therefore need to constrain the way in which its broadcasters dispose of their exclusive rights in the way paragraph 2 envisages. A State Party may revoke such a notification at any time. In that case, the requirements of paragraph 2 will apply to it again with immediate effect. In line with Article 39 (e), the Secretary General shall notify the member States of the Council of Europe, the other states Party to the European Cultural Convention, the European Community and any State which has acceded or has been invited to accede to this Convention of all notifications in this respect.

Paragraph 5

253. In order to ensure legal certainty and transparency for rights holders such as event organisers and broadcasters who might be affected by the existence of mutually recognised lists, publication of these lists by the Standing Committee via Council of Europe websites

was seen to be insufficient. This provision therefore provides that Parties shall inform potential rights holders by ensuring the publication of these lists at national level. This should be done in the most appropriate way including e.g by publication in the official journal, on the websites of the most relevant authorities etc.

Article 11: Cultural objectives

254. (189) The general philosophy underlying this Article is to be found in the preamble to the Convention, which emphasises that the development of European audiovisual production and the circulation of quality European programmes constitute a means of achieving the cultural objectives of the Parties. It is also developed in Recommendation No. R (86) 3 on the promotion of audiovisual production in Europe and in Resolution No. 1 of the 1st European Ministerial Conference on Mass Media Policy (Vienna, December 1986) in which the ministers decided "to take appropriate measures so that television programme services comprise a reasonable proportion of audiovisual works, in particular fiction works, of European origin". Reference is made to the comments made on the definition of “European audiovisual works” in the present Convention where the notion “European" is understood in wider terms than in the Audiovisual media services Directive.

255. The wording of Article 11, which refers to European Parties, makes it clear that the obligations deriving from this Article are only imposed on European Parties to the Convention. The Standing Committee, anticipating the possible accession of non-European Parties to the Convention did not consider it relevant impose any duty on them to show a ‘quota’ of European works on their domestic television services or promote European programming on video-on-demand. The purpose of such a possible enlargement of the Convention to non-European Parties should indeed rather be envisaged as a means to open a forum for dialogue and cooperation on common basic standards.

Paragraph 1

256. (190) The objective pursued by this paragraph is to ensure the development and exploitation, notably in the European context, of creative national productions and European co-productions (fiction, series, serials, films, documentaries, arts and educational programmes, etc.) in order to uphold European cultural identity as regards both its specific national features and common values, and to guarantee pluralistic means of expression.

257. (191)This paragraph therefore provides that each transmitting Party shall ensure, where practicable and by appropriate means, that broadcasters of television programmes provided within its jurisdiction, reserve for European audiovisual works a majority proportion of their transmission time, excluding the time devoted to news, sports events, games, advertising, tele-shopping and teletext services. It is further specified that this majority proportion, having regard to the broadcaster's information, educational, cultural and entertainment responsibilities *vis-à-vis* its viewing public, should be achieved progressively, on the basis of suitable criteria.

258. (192) The requirement for a majority proportion of European audiovisual works in the programmes must not, however, be made at the expense of Southern countries. Works from that part of the world must not suffer from unduly strict quota regulations which would run counter to the duty incumbent on Europe in its exchanges with those countries. Moreover, this requirement for majority European programmes must not be interpreted in such a way as to prejudice Parties' undertakings in the framework of other international organisations.

259. (193) The references to "where practicable", to the responsibilities of the broadcaster *vis-à-vis* its viewing public and to "suitable criteria" are intended to allow the transmitting Party a margin of appreciation in determining the extent to which the "majority proportion" can in fact be achieved progressively, for example having regard to the particular audiovisual situation of the Party concerned, the situation of the individual broadcaster, the nature of the service the broadcaster is providing (single-purpose channel, subscription channel, pay-per-view channel, etc.), or the viewing public concerned.

260. (194) The transmission time devoted to news, sports events, games, advertising, tele-shopping and teletext services does not qualify for inclusion in the calculation of the "majority proportion" referred to in this paragraph. This is because, as indicated in paragraph 256 above, the purpose of this provision is to ensure the development and exploitation of creative works (fiction, series, serials, films, documentaries, arts and educational programmes etc.).

261. (195) It is for each Party to determine the most appropriate means to achieve the "majority proportion" referred to in this paragraph, for instance in the light of its particular audiovisual situation, cultural traditions or financial situation. They could, for example, take the form of a legislative enactment or regulation, accompanied by sanctions, or could be embodied in the broadcaster's authorisation or contract.

262. (196) It follows from the provisions of Article 33, paragraph 1 of the Convention that the provisions of this paragraph are without prejudice to the possibility for a transmitting Party to introduce stricter or more detailed rules for broadcasters of programme services transmitted by media service providers within its jurisdiction.

Paragraph 2

263. The aim of this paragraph is to encourage the growth and development of the independent production sector. That will help to ensure that there are outlets and opportunities for the development of the creative talents of people in State Parties who are active in the cultural field, and to promote the diversity and plurality of the audiovisual material which is available to the European public.

264. It is for State Parties to determine, within the framework of their existing law and practice, how the independence of the producer of an audiovisual work should be defined. It is anticipated that State Parties will in doing so give due consideration to the needs of small and medium-sized producers. State Parties may also wish to authorize financial

participation by co-production subsidiaries of television `companies and other major service providers, but they should also take due 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.

Paragraph 3

265. This paragraph reflects the potential which on-demand audio-visual services have to replace scheduled television broadcasting. Unlike the position in respect of television broadcasting and other 'linear' audiovisual media services, the Convention sets no actual or national 'quota' for the provision of European works in these services, since it is the consumer rather than the service provider who determines what is transmitted. The promotion of the production and distribution of audiovisual works by on-demand services will nevertheless contribute actively to cultural diversity. Support for European works might for example take the form of financial contributions to their production, the acquisition of rights to show them, a minimum share for them in video-on-demand catalogues, or their attractive presentation in electronic programme guides.

266. State Parties should regularly re-examine the way in which they apply this paragraph and paragraph 1 in order to ensure that the production and distribution of European works are promoted in the most effective possible way.

Paragraph 4

267. (201) The main objective of this paragraph is to ensure that the showing of cinematographic works by media service providers under the jurisdiction of the Parties respects time lapses agreed with the rights holders. The latter may wish to ensure that the showing of cinematographic works to which they own rights in audiovisual media services is only possible after a certain period of time. This period may vary, especially depending on the nature of the service concerned (free access television, pay television, video-on-demand, etc.), in order to avoid damaging their strategy for exploiting the market. Under the so-called 'cascade strategy', in particular, cinema distribution, video publishing, availability in video-on-demand services and television showing may take place in stages, so that each type of exploitation only occurs after the revenue from a previous type of exploitation has been maximised.

268. (202) In this respect, it is important that rights holders to cinematographic works are allowed to use their rights to maximise the exploitation of such works, in particular by fixing a time lapse for their broadcasting and their availability in video-on-demand services. *Revenue* from such exploitation constitutes both fair remuneration for the work undertaken by rights holders in producing such works and a source of reinvestment in the production of other works for the benefit of cultural creativity, the programme industry and the public at large.

269. (203) The question of specific time scales for each type of showing of cinematographic works in audiovisual media services is primarily a matter to be settled by

means of agreements between the interested Parties or professionals concerned, via individual or collective agreements. Against this background, this paragraph provides that the Parties shall ensure that the media service providers under their jurisdiction do not provide cinematographic works outside periods agreed with the rights holders, given the importance of ensuring respect for such periods in a transfrontier context.

Article 12: Media pluralism and diversity of content

Paragraph 1

270. (204) The importance of media pluralism and diversity of content for the exercise of freedom of expression and information and for the functioning of a democratic society is underlined in the Declaration of the Committee of Ministers of 29 April 1982 on freedom of expression and information, in the Recommendation of the Committee of Ministers of 19 January 1999 on measures to promote media pluralism, and in the Recommendation of the Committee of Ministers of 31 January 2007 on media pluralism and diversity of media content, The Recommendations mentioned contain useful policy guidelines to the Parties of the Convention. This paragraph emphasises in a general manner the responsibility of the Parties to protect media pluralism against possible dangers. It places no specific obligations on Parties. However, they might in particular pay attention to the potentially adverse effects of media concentration or address the need for effective and manifest separation between the exercise of political authority and or influence and the control of the audiovisual media service or decision making as regards its programme content.

Paragraph 2

271. This provision, concerning the need for Parties to promote transparency of ownership of audiovisual media services is essential to the preservation of media pluralism and one of the key measures to follow the effects of media concentration. Policy guidelines on ownership regulation are contained in Rec(2007)2 mentioned above. Reference is furthermore made to the requirements for transparency and information to the viewer as regulated under Article 5 paragraph 2.

Paragraph 3

272. The wording of this new provision is based on Article 3.2 of Recommendation Rec(2007)2 of the Committee of Ministers on media pluralism and diversity of media content and concerns for the purpose of this Convention broadcasters with a public service mission. Recommendation Rec(2007)3 of the Committee of Ministers on the remit of public service media in the information society contains further guidance on the key elements of the public service remit.

273. Broadcasters who have a public service mission may include privately-owned broadcasters whose licences or other conditions of operation require them to transmit programming which is of benefit to cultural, educational, or other public objectives. The

requirements mentioned in this provision also mirror the spirit of the "White Paper on Intercultural Dialogue" which the Committee of Ministers adopted on 7 May 2008. The white paper provides guidance on analytical and methodological tools and standards to promote intercultural dialogue within and between societies in Europe and between Europe and the wider world. It is addressed to administrators, educators and the media, civil society organisations, religious communities and social partners.

Chapter III: Audiovisual (commercial) communication

Article 13: General standards

274. Article 13 sets out several general standards for any form of audiovisual commercial communication (see the definition above under Article 2 (j)).

275. (207) In addition to the principles set out in this Article, it follows from Article 6 of the Convention that audiovisual commercial communication must comply with the standards set out in paragraphs 1 and 3 thereof, so that it must respect human dignity and the fundamental rights of others as well as the fundamental principle of protection of minors.

Paragraph 1

276. (208) It follows from the provisions of this paragraph that audiovisual commercial communication should not unfairly discredit the products or services of competitors.

Paragraph 2

277. (209) This paragraph underlines the importance attached to respecting viewers' interests. This responsibility of the principal/contracting body or entity of audiovisual commercial communication vis-à-vis consumers is the corollary of the freedom of commercial speech which they enjoy: they should not, for example, take advantage of the trust or lack of knowledge of consumers.

278. (210) The provisions of this paragraph 2 and of paragraph 1 are without prejudice to the civil or criminal law liability of the media service provider in these matters and to the rules on unfair competition.

Paragraph 3

279. This paragraph supplements the provision of Article 6 with respect to the prohibition of discrimination (subparagraph i). For reasons of the protection of public health and the protection of the environment and the protection of consumers, it also adds the obligation not to encourage behaviour being prejudicial to these public policy goals (subparagraphs ii and iii).

Paragraph 4

280. (211) This paragraph in a special way supplements the provisions of Article 6, paragraph 3, on the protection of minors. In addition to the general principle for respect of the individual's interests affirmed in paragraphs 1 and 2, the Convention accords specific protection of the interests of children and adolescents. The will to protect such interests is already reflected in principle 5 of Recommendation No. R (84) 3 of the Committee of Ministers "on principles of television advertising".

281. (212 & 213) Comparable to Article 3 e, paragraph 2 of the AVMS Directive, special attention should be paid to ensuring that audiovisual commercial communication does not cause moral or physical harm to minors. It is recalled that Article 6 paragraph 3 also applies to audiovisual commercial communication which should therefore ensure adequate protection of the physical, mental and moral development of minors (see paragraphs 202-206 above). Audiovisual commercial communications, in all forms, shall therefore not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity; they shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised; they shall not exploit the special trust minors place in parents, teachers or other persons and they shall not unreasonably show minors in dangerous situations.

Paragraph 5

282. (214) This paragraph confirms an essential principle: the editorial independence of the media service providers vis-à-vis advertisers sponsors etc. in respect of the content of programmes. In relation to sponsored programmes, however, this provision is without prejudice to the general rule contained in Article 21, paragraph 1 (a). The same is valid for programmes containing product-placement (see Article 19 paragraph 2 (i).

Article 14: Announcements in the public interest and charity appeals

283. The term of "audiovisual commercial communication" (and therefore also television advertising) does not include announcements in the public interest and charity appeals transmitted free of charge. It is nonetheless essential to make clear that (apart from the regulations of the other chapters of this convention) some general standards should also be relevant for these various forms of publicity and announcement. Moreover, it is recalled that the provisions of Article 6, paragraphs 1 and 3, are applicable also to these above-mentioned forms of publicity and announcement.

Article 15: Duration

284. (216) The provisions of this Article are designed to maintain a balance between the needs of certain broadcasters for advertising revenue and respect for the independence of the broadcaster and the integrity of television programmes, bearing in mind current and future trends in the mode of financing of programme services.

285. (217) This Article aims at ensuring that the amount of transmission time devoted to tele-shopping spots, advertising spots and other forms of advertising broadcast by programme services not exclusively devoted to tele-shopping, is neither excessive nor detracts from the function of television as a medium of information, education, social and cultural development and entertainment. Paragraph 1 is designed to prevent this balance from being upset by an excessive concentration of advertising and tele-shopping spots also during prime time.

Paragraph 1

286. (218) This paragraph provides that the total amount of advertising and tele-shopping spots within a given clock-hour period shall not exceed 20%. As indicated above, its purpose is to avoid an excessive concentration of advertising and tele-shopping spots. The limitation that existed on the amount of daily television advertising was largely theoretical.

287. The hourly limit is more important since it also applies during "prime time". Therefore the daily limit is abolished, while the hourly limit should be maintained for television advertising and tele-shopping spots. However, the limit of 20 % of television advertising spots and tele-shopping spots per clock hour remains applicable. Advertising spots on a split screen must be treated in the same way with regard to this article (see for this also paragraph 48 of the Interpretative communication for Art. 18 of the directive): The provisions of Article 15 on hourly duration of advertising apply in full to split screen advertising. In this respect, the fact that split screen advertising spots and tele-shopping spots within the meaning of this article might only occupy a part of the television screen cannot justify more favourable treatment under these provisions.

288. The notion of a television advertising spot should be understood as television advertising in the sense of Article 2 (k) of this Convention having a duration of not more than twelve minutes. Thus paragraph 1 is not applicable to single forms of advertising being longer than 12 minutes. Concerning the definition of a spot reference can also be made to the judgement of the European Court of Justice of 12 December 1996 RTI C-320/94 due to which (see recital 31 of the AVMS Directive) “spot advertisements are forms of promotion usually lasting a very short time, having a very strong suggestive impact, generally appearing in groups at varying intervals during or between programmes, and produced either by those who supply the products or services or by their agents, rather than by the broadcasters themselves.”

289. The Convention provides in paragraph 3 for specific rules with regard to “long forms” of tele-shopping i.e. “tele-shopping windows”. Consequently tele-shopping should be a spot of a duration of not more than 12 minutes or a window of at least 15 minutes.

290. The concept of clock hour can be understood as referring either to a natural clock hour, or to an overlapping clock hour. Pursuant to the logic of the natural clock hour the reference hours taken into account in the calculation of the hourly amount of television advertising represent periods of 60 consecutive minutes starting at minute 0 and ending at

minute 59. In contrast, pursuant to the logic of the overlapping clock hour, the reference hours taken into account represent periods of 60 consecutive minutes that could start subsequently to minute 0 (e.g. the minute 8 of a given hour) and finish during the following hour (in this example, at the end of the seventh minute of the following hour).

Paragraph 2

291. (225) In order to avoid distortions of competition, the derogation provided for under this paragraph is limited to announcements concerning products which fulfil the dual condition of being both ancillary to and directly derived from the programmes of a broadcaster. In this respect, the term "ancillary products" is understood as referring to products intended specifically to allow the viewers to benefit fully from or to interact with these programmes (for example, an ancillary product will be a book or a video cassette distributed by a broadcaster in support of a programme dedicated to teaching foreign languages, so that the public can supplement teaching).

292. (226) The derogation also applies to announcements by broadcasters in connection with their own programmes, such as the identification of the broadcaster or programme service, the display of the schedule of upcoming programmes services, the preview of films and other programme services in advance, programme trailers announcing forthcoming programmes of the broadcaster. Also trailers consisting of extracts from programmes should be treated as programmes. The derogation in paragraph 2 i) makes clear that such announcements are not to be considered as television advertising within the meaning of this Convention. The same is valid for the announcements in relation to ancillary products.

293. The derogation also applies to the time permissible product-placement (see the definition in Article 2 (o) and especially the restrictions in Article 19) can be seen on the screen.

294. It is necessary to clarify the field of application of the Chapter dealing with audiovisual commercial communication also for these forms of paid announcements/advertisements (see for instance the advertisement about animal welfare in the ECHR Judgement of 28 June 2001, Application no. 24699/94, VGT Verein gegen Tierfabriken vs. Switzerland.). All such announcements which are covered by Article 2 (k) No. 2 of the Convention do not count against the time limits which are set out in Article 15. But all the other standards which the Convention sets for audiovisual media services and audiovisual media communications apply to them, in particular the fundamental standards provided for under Article 6.

Paragraph 3

295. This paragraph provides that tele-shopping windows (in programme services which are not exclusively devoted to tele-shopping) shall be of a minimum uninterrupted duration of 15 minutes. They must also be clearly identified by optical and acoustic means. The convention provides in paragraph 3 for specific rules with regard to “long forms” of tele-

shopping = “tele-shopping windows”, which have a minimum duration of 15 minutes. As a result tele-shopping should be a spot of a duration of not more than 12 minutes or a window of at least 15 minutes.

Article 16: Form and presentation

296. Commercial and technological developments give users increased choice and responsibility in their use of audiovisual media services. Detailed rules governing audiovisual commercial communication for on-demand audiovisual media services thus appear neither to be justified nor to make sense from a technical point of view. Nevertheless all audiovisual commercial communication should respect not only the identification rules but also a basic tier of qualitative rules in order to meet clear public policy objectives. In order to remain proportionate with the goals of general interest, regulation should also allow a certain degree of flexibility with regard to television broadcasting. The principle of separation should be limited to television advertising and tele-shopping. This principle should nonetheless not prevent the use of new advertising techniques.

297. (230 & 231) In this context, as an example reference can be made to the techniques of 'virtual advertising'. It is technically feasible to produce 'virtual' images (images of which the quality and the context in which they are presented are such that the viewer who has not been warned, may perceive them as real images). The use of virtual techniques to insert advertising messages is known from the broadcast of sports events, either by the virtual replacement of advertising messages on boardings around the ground, or by inserting new, sometimes three-dimensional images in other parts of the picture.

298 (232, 233 & 234) In its Recommendation No. R (97) 1 concerning the use of virtual advertising notably during the broadcast of sports events, the Standing Committee considered that the broadcaster, who is exclusively responsible for the content of the signal produced and/or broadcast, should retain ultimate control over this content. Given his/her responsibility towards the viewers, the broadcaster must ensure that virtual advertising messages comply with the rules of the Convention, and in particular that virtual advertising, in its presentation and content, meets the requirements stemming from Articles 6, 13 and 16 of the Convention. Virtual advertising is also the subject of a memorandum by the European Broadcasting Union (EBU).

299. The European Commission considers that this technique complies under specific circumstances with the Directive (see Paragraph 66 of the Interpretative Communication about “virtual sponsorship”). The same should be valid for the Convention but virtual advertising must not affect the comfort and pleasure of the viewer, adversely affect either the integrity or the value of the programmes or prejudice the interests of the rights holders. The possibility of inserting such virtual advertising messages must take into account the necessary protection of these objectives of general interest. Viewers must be informed in advance of the presence of virtual images, and the insertion of the latter is subject to prior permission from the organiser of the event being broadcast and the rights holders. Where the broadcaster has a direct or indirect control and virtual advertising is inserted in return

for payment or for similar consideration, such insertion is admissible, in particular within the framework of the retransmission of sports' events, insofar as it qualifies as sponsorship within the meaning of the Convention. To this extent, virtual advertising may be used, in particular during television broadcasts of sporting events, only on the surfaces of the site or stadium where advertising may be materially affixed and, which are usually intended for such promotional purposes. Virtual advertising messages must not be more visible or conspicuous than those that are usually and materially displayed on site. Further, the provisions concerning sponsorship of Article 21 of the Convention in particular must be entirely complied with.

Paragraph 1

300. The requirement of "recognisability" aims to avoid any confusion between audiovisual commercial communication and the other items of the audiovisual media service. It is established that advertising and tele-shopping programmes shall be readily recognizable as such with a view to guaranteeing the function of audiovisual media services as a medium of information, education, social and cultural development and entertainment, as well as the editorial independence of the broadcaster; this principle is moreover to be found in various codes of conduct. The requirement for television advertising to be distinguishable stresses the difference between product placement, which is part of the storyline, and television advertising, which has to be distinguishable from editorial content, but does not add additional requirements with regard to the wording of previous Article 13 (now Article 16) as amended by the first amending protocol.

301. As far as television broadcasting is concerned advertising and tele-shopping must additionally be kept distinct from the other items by either optical or acoustic or spatial means. Split screen advertising consists of the simultaneous or parallel transmission of editorial content and advertising content. For example, one or more advertising spots appear in a window during the transmission of an editorial programme in such a way that two separate images are visible on the screen. Provided the space set aside for advertising is not excessive, this technique enables the viewer to continue to watch the editorial programme during the transmission of an advertising spot. A spatial separation by optical and/or acoustic means is adequate, provided it identifies advertising clearly and enables the viewer to readily recognise it as such.

Paragraph 2

302. (237) The absence of identification and separation from the other items of the programme service also justifies prohibiting surreptitious audiovisual commercial communication. The Convention defines surreptitious audiovisual commercial communication as the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service providers to serve as advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration.

303. The important criterion is the potential of a presentation to mislead the public, which has to be assessed on a case by case basis taking account of also the nature of the programme. Surreptitious audiovisual commercial communication can be assumed if a publicity ploy is "camouflaged" in a way that the average viewer does not perceive it as such. If – due to the form of presentation – the promotional character of an announcement is obvious to the average viewer then it is not a question of surreptitious audiovisual commercial communication. The announcement then has to be considered as admissible audiovisual commercial communication which in the case of television broadcasting would have to be kept distinct from other items.

304. Surreptitious advertising can insofar be distinguished from (legal) product-placement, as the latter must not have any direct promotional effect.

305. (238) The forms of presentation of products or services which are prohibited under this paragraph are those which attach a value judgment to a product or service (such as extolling the merits of the product or service or expressing a preference for a particular product or service in relation to other similar products or services) or which use the same terms or visual elements as those used in a spot advertisement for the product or service concerned.

306. (239) On the other hand, the presentation of a product or service does not fall under the restrictions when there is no remuneration and it only refers to its characteristic features (for instance when a new book of a famous author is presented) for information purposes, or when such presentation is necessary for the conduct of the programme (announcements for films in a programme devoted to the cinema, or for literary works in a literary programme).

Paragraph 3

307. (235) This paragraph confirms principle 10 of Recommendation No. R (84) 3. It prohibits the transmission of visual or oral messages of which the recipient cannot be consciously aware; such messages are contrary to the principles of identification and separation embodied in paragraph 1.

308. (236) It follows from the definition in 2j that this prohibition also relates to subliminal messages aimed at advancing a cause or idea, if they are included in a programme in return for payment, for similar consideration or for self-promotional purposes.

Paragraph 4

309. (240) This paragraph aims to ensure that the renown of persons regularly presenting news and current affairs programmes is not exploited in such a way that audiences are no longer able to distinguish between news and audiovisual commercial communication.

310. (241) Having regard to the principles established in paragraph 1, it is important that this prohibition is basically not limited to the particular programme service in which the person regularly presents news or current affairs programmes. Nonetheless a case by case study will be necessary to keep a balance between the conflicting interests.

311. (242) This provision is linked to Articles 6, paragraph 2 and 21, paragraph 4, in so far as it highlights the importance attached to news; this is also the reason why the prohibition is limited solely to persons regularly presenting news and current affairs programmes.

312. (243) The term "current affairs" refers to strictly news-related programmes such as commentaries on news, analysis of news developments and political positions on events in news. In its Opinion No. 4 (1995) on certain provisions on advertising and sponsorship, the Standing Committee concluded that "there may be cases where it will be difficult to determine whether a particular programme is a current affairs programme. In these cases, the principle behind this provision must be borne in mind, namely to avoid confusion between "information" and "advertising".

313. (244) The reference to "orally" is intended to exclude use being made of the presenter's voice in advertising, without the person actually appearing on the screen.

Article 17: Insertion of television advertising and tele-shopping

314. (245) This Article aims to establish a reasonable balance between the financial interests of the broadcaster and advertiser, on the one hand, and the interests of viewers, authors and creators or providers programmes, on the other hand. It establishes the conditions in which programmes may be interrupted by advertising or tele-shopping. Advertising and tele-shopping **on a split screen** must be treated in the same way with regard to this article (see for this also paragraph 48 and 52 of the Interpretative communication for Art. 11 of the Directive).

315. Given the increased possibilities for viewers to avoid advertising through use of new technologies such as digital personal video recorders and increased choice of channels, detailed regulation with regard to the insertion of spot advertising with the aim of protecting viewers is no longer justified. Therefore also this Convention (as the comparable Directive) should give flexibility to broadcasters with regard to its insertion where this does not unduly impair the integrity of programmes.

316. This Convention as the Directive is intended to safeguard the specific character of European television, where advertising is preferably inserted between programmes, and therefore limits possible interruptions to cinematographic works and films made for television as well as interruptions to some categories of programmes that still need specific protection.

Paragraph 1

317. (246) Paragraph 1 establishes that television advertising and tele-shopping subject to fulfilment of the conditions in the subsequent paragraphs, may be inserted during programmes in such a way that the integrity of the programme and the rights of the rights holders are not prejudiced. When doing so natural breaks in and the duration and nature of the programme have to be taken into account. The concept of natural breaks should to the extent possible avoid the creation of artificial breaks introduced by the broadcaster. The general requirements of paragraph 1 apply in all the cases specified in the subsequent paragraphs of this Article where television programmes may be interrupted by advertising and tele-shopping.

Paragraph 2

318. (248 & 249) Paragraph 2 specifies that the transmission of audiovisual works such as films made for television (excluding series, serials and documentaries) may be interrupted once for each complete scheduled period of 30 minutes. This means that the transmission of a film made for television, the scheduled duration of which is 60 minutes, may be interrupted twice by advertising or tele-shopping; this paragraph only regulates the possible number of insertions, the broadcaster nevertheless remains free to determine at what point the interruption should occur, provided the general requirements in paragraph 1 are respected. Therefore, where the broadcaster transmits a film made for television, the scheduled duration of which is 50 minutes, he may, for example, choose to insert advertising after a period of 25 minutes has elapsed; where the scheduled duration of the film is 100 minutes, he may, for example, choose a first interruption after a period of 35 minutes has elapsed, followed by a second interruption after a further period of 20 minutes and a final interruption after 87 minutes. The "scheduled period" can be calculated according to the gross-principle by including the time dedicated to advertising and tele-shopping or according to the net-principle by excluding this period of time.

319. The second sentence of this paragraph reflects concern about advertising in children's programmes. A children's programme may only contain an advertising or tele-shopping break if its scheduled duration (including any advertising or tele-shopping break) is longer than 30 minutes. If its duration is over 30 minutes, then there can be one advertising or tele-shopping break for every 30 minutes duration. A children's programme with a scheduled duration of 60 minutes therefore can contain two advertising breaks, while a children's programme with a scheduled duration of 59 minutes can contain only one. Children's programmes with a scheduled duration of exactly 30 minutes, or less, cannot contain an advertising or tele-shopping break at all, though if two such programmes are shown one after the other there can be an advertising or tele-shopping break between them.

Paragraph 3

320. (252) Paragraph 3 reflects the concern that religious services should not be interrupted by advertising or tele-shopping, which corresponds moreover to the current practice of broadcasters and covers the desire to respect religious beliefs and convictions.

Paragraph 4

321. (229) As a general rule, advertising and tele-shopping programmes should be transmitted in blocks comprising two or more separate spots. There may be circumstances where individual spots are permissible, in the case for example of a single long advertisement; or where the period available for advertising or tele-shopping is very short or where the broadcaster has insufficient advertising orders to permit a grouping of spots. But these situations should remain the exception. National authorities have a margin of appreciation to evaluate on a case-by-case basis whether or not an exception can be made to the rule on block advertising. However, the "ratio" of the Convention's provision is clear: block advertising is the overriding rule, and the possibilities for exceptions are limited.

322. The advertising practice of using so-called mini-spots has emerged in connection with the transmission of football matches. It consists of broadcasting an extremely short advertising spot during or between incidents. Without prejudice to the question of whether such incidents may be considered 'natural breaks' within the meaning of Article 17 paragraph 1, national authorities must ensure that the broadcast of mini-spots does not undermine the key principles on the form and presentation of television advertising laid down in Article 16. In the first instance, it is up to the Parties to the convention to ensure that mini-spots are presented in a manner which complies with the basic principle laid down in Article 16 paragraph 1 that television advertising 'shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic and/or spatial means.' This principle has the purpose to allow the viewer to make a distinction between editorial content and commercial communications.

323. It has to be stressed that only in the case of the transmission of sports events (and therefore not in sports news or sports reports) further exemptions to the basic principle can be granted.

Article 18: Audiovisual commercial communication of particular products

324. (253) This Article develops the concerns already expressed in principle 4 of Recommendation No. R (84) 3 on principles on television advertising and reflects the increasingly restrictive position of member States with regard to the advertising of certain specific products which might be harmful to health and/or to advertising which might encourage abusive consumption of certain goods.

Paragraph 1

325. (254) This paragraph prohibits all forms of audiovisual commercial communication (see the definition in Article 2 (j) for tobacco products: cigarettes, cigars, pipe tobacco or cigarette tobacco, chewing tobacco, snuff or any other tobacco-based product. In addition the sponsoring by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products is prohibited (see Article 21, paragraph 2 below).

326. (255) The prohibited audiovisual commercial communication is audiovisual commercial communication within the meaning of Article 2; consequently this provision

does not deal with advertising placed (on the basis of a contract with the organiser) in certain events which are transmitted or retransmitted in television programme services.

Paragraphs 2 and 3

327. (259) Two reasons justify the inclusion of common rules on audiovisual commercial communication for medicines and medical treatment: firstly, the risk that such audiovisual commercial communication could encourage their abusive consumption; secondly the fact that, due to the absence of harmonisation of legislations and to the internationalisation of advertising, domestic legislation on medicines and medical treatment will have an increasing impact beyond national territories.

328. (260) The provisions embodied in paragraphs 2 and 3 of this Article are inspired by two Resolutions, AP (95) 1 (on the classification of medicines which are obtainable only on medical prescription) and the attached list of medicines available on medical prescription, as well as AP (83) 1 (on regulations governing the advertising of medicines to the public) resulting from the Partial Agreement in the Social and Public Health Field concluded within the Council of Europe. They follow the distinction made in those resolutions between medicines and medical treatment which are only obtainable on medical prescription and those which are not.

329. (261) In the absence of harmonisation of legislations in this field, the regulations of the Party having jurisdiction are to constitute the reference for determining medicines and medical treatment available only on medical prescription; however, it is possible that neighbouring Parties clarify, through bilateral agreements, the situation of medicines and medical treatment which are available only on prescription in one Party and not in the other.

330. (265) Medicine means any substance or combination of substances which is used for treating or preventing disease in human beings, as well as any substance or combination of substances, which may be administered to human beings with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in human beings. This definition takes particularly account of the meaning given to the term medicines by European Community Law. In this context, the term "substance", which is used in this definition, as referring to any matter irrespective of origin which may be (i) human, e.g. human blood and human blood products; (ii) animal, e.g. micro-organisms, whole animals, parts of organs, animal secretions, toxins, extracts, blood products etc.; (iii) vegetable, e.g. micro-organisms, plants, parts of plants, vegetable secretions, extracts etc.; (iv) chemical, e.g. elements, naturally occurring chemical materials and chemical products obtained by chemical change or synthesis.

331. (262) According to paragraph 2, audiovisual commercial communication for medicines and medical treatment which are available only on medical prescription are prohibited (see also the special regulation regarding the prohibition of product-placement of medicines and medical treatment). *A contrario*, this paragraph will not apply to medicines or medical treatment which are available in a transmitting Party without a medical

prescription; paragraph 3 will apply in such cases. It is worth recalling that the prohibition under Article 18 paragraph 2 does not apply to non-medicinal products, like shampoos, beauty products etc.

332. (263) Paragraph 3 subjects audiovisual commercial communication for other medicines and medical treatment to a number of general requirements: they must encourage the rational use of the product by presenting it objectively and without exaggerations so that it must not contain exaggerated expressions or treatment indications of too general a nature, suggestions that good health is likely to be endangered if the product is not used, offer a diagnosis or treatment by correspondence, suggest that the efficacy or the safety of a product is due to the fact that it is "natural", or induce fear, etc. It must also comply with the particulars listed in the summary of product characteristics.

333. (264) For the implementation of paragraphs 2 and 3 of this Article, it will be important to make use of the provisions on the exchange of information set out in Article 23 of the Convention.

Paragraph 4

334. (266) Tele-shopping for medicines and medical treatments shall not be allowed. The notion of 'medical treatment' shall be interpreted in the light of the regulations existing in each Party. For example, in certain Parties there are provisions which include in the category of "medical treatment" products or services such as prostheses, products claiming health effects or spa treatments.

Paragraph 5

335. (256) Alcoholic beverage means any beverage with an alcoholic content that might be harmful especially for children and includes for instance cider, beer, wine or any beverage with higher degrees of alcohol but also so called Alco-pops. Parties to the Convention remain nonetheless free to enact stricter rules.

336. (257) Advertising and tele-shopping for alcoholic beverages are subject to a number of rules aimed at ensuring the protection of consumers (in particular, minors) and preventing an excessive consumption of such beverages prejudicial to health.

337. (258) The rules are designed to prevent the consumption of such beverages from being presented in an attractive light (physical performance, therapeutic qualities, social or sexual success etc.) and to prevent audiovisual commercial communication in general from boasting the high or low alcoholic content of a given beverage (see the first sentence of this paragraph). In addition to that paragraph (f) only relates to “high” alcoholic content.

Paragraph 6

338. This paragraph reflects the concerns in connection with the protection of children from consuming food and beverages containing nutrients and substances which in the

overall diet are not recommended. It also acknowledges that in this respect self-regulatory measures can effectively contribute to the overriding goal of the consumer-protection. The wording of this paragraph slightly differs from the corresponding provision in the Directive (Article 3e paragraph 2) so as to ensure that measures can be developed at the appropriate level. This difference should not lead to any difficulties in their implementation.

Article 19: Product-Placement

Paragraph 1

339. The first paragraph expresses the basic principle that product placement in the sense of Article 2 (o) should be prohibited. "Thematic placement" is prohibited according to the regulations in Articles 19 paragraph 2 (i) and 21 paragraph 1(a) as it influences the content of a programme.

Paragraph 2

340. State Parties may nevertheless permit product placement

a) for some kinds of programme, on the basis of some or all of the positive list in the first indent of paragraph 2 and

b) for the provision of production props or prizes without additional payment.

Parties to the Convention should be able to opt-out of these derogations, totally or partially, for example by permitting product placement only in programmes which have not been produced exclusively in that Party or in programmes which have not been produced by the audiovisual media service providers who are running the programme or an affiliate of that media service provider.

341. Whereas production props and prizes are in principle admissible in children's programmes, product-placement in cinematographic works, films, series, sports programmes and light entertainment programmes for children is under all circumstances prohibited. It has to be recalled that the provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value. Parties to the convention are therefore not obliged to treat production props and prizes of negligible value as product-placement, but these then would have to be considered as a sub-form of audiovisual commercial communication.

342. Furthermore product placement has to meet four basic preconditions. Firstly it should be prohibited where it influences the content of programmes in such a way as to affect the responsibility and the editorial independence of the media service provider (i). This is the case with regard to thematic placement. Secondly the product-placement must not have and direct promotional effects (ii); thirdly product-placement must not give undue prominence to the product in question (iii). The undue nature may result from the

recurring presence of the brand, good or service in question or from the manner in which it is presented and appears. In this regard, the content of the programmes in which the brand, good or service appears should be borne in mind. Finally the existence of product-placement must clearly be communicated to the viewer (iv) by avoiding an additional promotional effect (for instance by a neutral logo or the reference to a teletext page).

343. In this respect mention has to be made of the distinction between sponsoring and product placement in the considerations under paragraph 140 above. The definition of product-placement is met when a product is known to the average (informed and attentive) viewer as a brand.

344. As a media service provider will not always be in the position to know whether a programme contains product-placement Parties may choose to waive from the requirement of identification for such programmes that have not been produced by the media service provider itself or an affiliated company.

Paragraph 3

345. Product-placement for tobacco products or from undertakings whose principal activity is the manufacture or sale of tobacco products is under all circumstances prohibited (see also Article 18, paragraph 1) as well as product placement for medicines and medical treatment available only on prescription (see also Article 18, paragraph 2).

Paragraph 4

346. For reasons of legal certainty and clarity as well as to give an adequate period of preparation for the media service providers the preceding paragraphs only apply to programmes produced after the entry into force of the second amending protocol Nr. ……../2009

Article 20: Television advertising and tele-shopping directed specifically at a single party

347. (267) This Article lays down that, where a particular audience in a single Party is targeted specifically and with some frequency by television advertising or tele-shopping programmes in a programme service transmitted from another Party, the advertising or tele-shopping programmes concerned shall not circumvent the rules governing television advertising or tele-shopping in the Party in which the audience is targeted. The purpose of this Article is therefore to avoid situations whereby advantage is taken in the transfrontier character of a programme service and of the different rules applicable to television advertising or tele-shopping in the Parties, in order to circumvent the television advertising or tele-shopping rules in a single Party other than the transmitting Party, thereby creating distortions in competition or affecting the equilibrium of its television system.

348. (268) It is to be noted that this Article does not prohibit the targeting of a particular audience other than that of the transmitting Party, but merely aims to ensure that, when an

audience in a single receiving Party is targeted by advertising or tele-shopping programmes, there is a reasonable equality of opportunity between, on the one hand, advertising or tele-shopping programmes transmitted within the jurisdiction of the transmitting Party concerned and, on the other hand, advertising or tele-shopping programme transmitted by entities or by technical means within the jurisdiction of the receiving Party concerned (including those which are not transfrontier in character in the case of the latter Party).

349. (269) This Article provides two exceptions to the rule of non-circumvention of the television advertising or tele-shopping rules of the Party in which the audience is targeted. The first exception concerns cases in which the television advertising or tele-shopping rules establish discriminations on the basis of the origin of advertising or tele-shopping (for example, stating that advertising emanating from another Party are not allowed in respect of a particular product, whereas advertising transmitted within the jurisdiction of the Party concerned are allowed). Clearly such rules would be contrary to the notion of equality of opportunity referred to above.

350. (270) The second exception, which is not necessarily cumulative with the first one, covers the case where the Parties concerned have concluded bilateral or multilateral agreements in this area, either prior to the adoption of the Convention, or subsequently.

351. (271) The criteria mentioned in this Article ("specifically", "with some frequency", "single Party"; "circumvention") are cumulative; in the absence of one criterion, advertising cannot be considered to be prohibited.

352. (272) In order to determine whether advertising or tele-shopping is specifically directed at audiences in a single Party other than the transmitting Party, the following additional elements might, for example, be retained:

- the (name of the) product or service advertised or shown in the framework of a tele-shopping programme;
- the currency used in advertising or tele-shopping;
- the selling points mentioned;
- the language used in advertising or tele-shopping (speech and/or subtitle).

353. (273) It is to be noted that the mere fact of subtitling or dubbing advertising concerned in several languages may not necessarily preclude the application of this Article. This would be the case, for example, where notwithstanding such dubbing or subtitling, elements referred to in paragraphs 351 and 352 above clearly illustrate that a single audience is in fact being targeted by advertising or tele-shopping concerned.

354. (274) The notion of circumvention referred to in this Article does not imply that, when a particular audience is being targeted in a given single Party, the broadcaster must first acquire detailed knowledge of all the television advertising or tele-shopping rules in that Party, but rather a broad understanding thereof. It follows that failure to respect rules of an obscure, ambiguous or imprecise character would not qualify as circumvention for the

purposes of this Article. Indeed, in this as in other matters, the principles of legal certainty, accessibility and proportionality should be applied.

355. (275) It is understood that, where different advertising or tele-shopping regimes apply to different broadcasters in a Party, for example public and private broadcasters, the most favourable treatment principle shall apply to advertising or tele-shopping specifically targeted at the audience of that Party.

356. (276) It will be for the Party in which the audience is specifically targeted by advertising or tele-shopping in programme services transmitted by entities or by technical means within the jurisdiction of another Party to provide elements to illustrate that the circumvention of its television advertising or tele-shopping rules could lead to distortions in competition or the endangering of its television system.

357. (277) It follows from the preceding paragraphs, for example, that:

- a programme service containing advertising or tele-shopping for products or services the television advertising or tele-shopping of which is prohibited in a receiving Party would not be considered contrary to this Article unless such advertising or tele-shopping are specifically and with some frequency directed solely to audiences in that Party in order to circumvent its advertising or tele-shopping rules;

- a programme service containing a percentage of advertising or tele-shopping which is superior to that authorised in a receiving Party or advertising or tele-shopping which are inserted in a manner which is not authorised in a receiving Party would not be considered contrary to this Article, subject to conformity with the provisions of Articles 15 and 17 of the Convention. However, notwithstanding conformity with Articles 15 and 17, this Article would be applicable if advertising or tele-shopping in question are specifically and with some frequency directed solely to audiences in that Party and can clearly be considered as circumventing the advertising or tele-shopping rules in that Party;

- a programme service transmitting with some frequency advertising or tele-shopping for products or services exclusively available in one receiving Party and in the language of that Party would not be considered contrary to this Article unless the transmission of such advertising circumvents the advertising or tele-shopping rules in that Party.

358. (63) It is to be recalled that the issue of advertising directed specifically to a single Party was analysed by the Standing Committee in its opinion No.2 (1994) on the notion of "retransmission". It followed from the analysis that Article 20 remained important for the contracting Parties and that the way in which the issue was dealt with by the Convention prevented the emergence of distortion in competition between national broadcasters and foreign broadcasters and enabled the countries with a limited linguistic coverage to face competition from broadcasters in the larger countries sharing the same language. In addition, experience had shown that the provision included in the Convention on this issue had been successfully invoked in concrete cases.

Article 21: Sponsorship

359. (278) In accordance with the provisions of Article 2 (m), the notion of sponsored programmes does not embrace sponsored events.

Paragraph 1

360. This paragraph embodies three important principles, namely the guarantee of the independence of audiovisual media services, the prohibition of special promotional references and the requirement for appropriate identification.

361. (283) The first principle is expressed by the requirement that content and scheduling of audiovisual media service must not be influenced by the sponsor (a). The principle underlying this provision is that the broadcaster retains full responsibility over the content and scheduling of the sponsored programme and, consequently, editorial independence with regard to programmes. Therefore sponsorship is prohibited where it influences the content of programmes in such a way as to affect the responsibility and the editorial independence of the media service provider. This paragraph echoes a similar concern already expressed in Article 13, paragraph 5, in relation to the general standards for audiovisual commercial communication. “Thematic placement” is prohibited according to the regulations in Articles 19 paragraph 2 (i) and 21 paragraph 1 (a) as it influences the content of a programme.

362. The second principle (b) is that sponsored programmes and sponsorship credits must not contain specific promotional elements such as encouragement to purchase or hire, or references to the quality or the effectiveness of the product (otherwise it would have to be treated as advertising). The aim is to exclude any promotion of a product or service of the sponsor within the sponsored programme. This marks an important difference to advertising but it reinforces and is consistent with the fundamental requirement of the Convention that audiovisual commercial communications do not affect the editorial content of programmes. The mere fact of the acknowledgement of the identity of the sponsor in accordance with Article 21, paragraph 1, however, shall not in itself be taken as encouraging the purchase or rental of the sponsor's products or services. In the case of game shows and quizzes in which the prizes comprise products or services this has to be regarded as product-placement, as long as the reference to a product or service does not pass the dividing line between advertising and product-placement.

363. (279 & 280) The third principle (c) states that sponsored audiovisual media services and programmes must be clearly identified as such. The identification of the sponsor is a means of warning viewers that special interests might be involved in the production of the programme. Furthermore, the possibility for viewers of immediately identifying the sponsor constitutes, for the sponsor, the guarantee of obtaining the desired increase in renown in return for his/her participation in the direct or indirect financing of a programme. This serves two purposes. For viewers, it acts as an indication that commercial interests other than those of the broadcaster or producer have been involved in making the programme. For sponsors, the sponsorship credits which they receive are an important

reason for their participation. Surreptitious sponsorship (when the sponsor is not identified in any way) is already prohibited under Article 16, paragraph 2.

364. Regarding the moment in time for the identification there are several alternatives to be chosen from: at the beginning and/or during and/or at end of the programme. The insertion of sponsorship credits during the programme itself is not prohibited, provided that this does not amount to influencing the programme's content or to encouraging the purchase or rental of goods or services. Credits can take any appropriate form, such as the company's name or logo or any other symbol, or a reference to one of its products.

365. Beyond this, State Parties are free to enact stricter rules, sponsors should nonetheless be able to choose the most appropriate form of promotion so as to be identified easily by the public. As outlined above however a sponsor identification should no circumstances contain specific promotional elements such as encouragement to purchase or hire, or references to the quality or the effectiveness of the product otherwise it would have to be qualified as advertising or even surreptitious audiovisual commercial communication.

366. As already stated under Article 16 (see above) it is to be noted that the European Commission is considering the compatibility of "virtual sponsorship" with the AVMS Directive (see Paragraph 66 of the Interpretative Communication about "virtual sponsorship"). The same should be valid for the Convention. Virtual messages must therefore not be more visible or conspicuous than those that are usually and materially displayed on site. Further, the provisions concerning sponsorship of articles 21 of the Convention in particular must be entirely complied with.

Paragraph 2

367. (287) This paragraph establishes that, when the principal activity of a natural or legal person is the manufacture or sale of cigarettes or any other tobacco products, he/she may not sponsor a programme. This is to prevent such a person from benefiting, through sponsorship, from the indirect advertising of his/her products or services.

368. (288) Among criteria for determining whether the activity in question is the principal activity, the following might be mentioned: the share of the revenue drawn from the activity in relation to the global revenue of the natural or legal person; the activity for which the person is mainly known by the public (for example: the prior establishment of the activity in relation to connected activities); the nature of the connected activities (for example: when such activities are closely linked to the principal activity).

369. (289) *A contrario*, Article 21 implies that the possibility of sponsoring programmes is available to any natural or legal person whose "principal" activity falls outside the scope of the manufacture or sale of tobacco products.

Paragraph 3

370. (290) Companies in the pharmaceutical sector willingly give financial support to important cultural events. Since, through sponsorship, they may encourage the creation and the "distribution" of such events via audiovisual media services, this Convention authorises them to sponsor programmes at the transfrontier level. However, in the case of companies whose activity includes, inter alia, the manufacture or sale of medicines and medical treatment, their sponsorship may consist of the promotion of the name, trademark, image or activities of the company, including the reference to the name of one of the company's products, but in no circumstances may it promote a specific medicine or medical treatment available only on prescription. If this were not the case, it could lead to the circumvention of Article 18 paragraph 2, which clearly prohibits audiovisual commercial communication for these kinds of medicines and medical treatment.

Paragraph 4

371. (291 & 292) This paragraph reflects the special interest of the member States of the Council of Europe in the guarantee of the plurality of information sources and the independence of news and current affairs programmes. The prohibition of the sponsorship of such programmes reinforces the principles embodied in the preamble, Article 6, paragraph 2, and Article 16, paragraph 4. The term "current affairs" in this Article refers to strictly news related programmes such as commentaries on news, analysis of news developments and political positions on events in the news.

372. For the sake of clarification it is explicitly stated that Parties to the Convention may choose to prohibit the showing of sponsorship logos during children's programmes, documentaries and religious programmes. This leaves the Parties' right to enact stricter rules (see Article 33, paragraph 1 below) unaffected.

Article 22: Television broadcasting devoted exclusively to advertising, tele-shopping and/or self-promotion

373. (295) Over and above tele-shopping spots and tele-shopping windows broadcast within the framework of the traditional programme services, channels exclusively devoted to tele-shopping have increased over the last few years. Such services are an important outlet for goods and services and are more and more used by consumers. This article lays down the principle that, like programme services exclusively devoted to self-promotion, such services are covered by the provisions of the Convention, with the exception of Articles 11 and 12 paragraph 3, which are not relevant in these particular types of programme services. In particular, the general standards provided for under Articles 6 (Responsibilities of the broadcaster) and 11 (General standards concerning advertising and tele-shopping), as well as the rules on transparency provided for under Article 6, fully apply to these services.

374. (296) Given the nature of such channels the limit concerning the amount of advertising spots and tele-shopping spots within a given clock hour does not apply. The same is valid for the regulations about the insertion of advertising and tele-shopping.

375. (293) A specific case concerns television channels aimed exclusively at promoting the products, services, programmes or programme services of a broadcaster under the meaning of Article 2 (h) of this Convention, without conventional programme elements such as news, sports programmes, cinematographic works, television films, documentaries and drama.

376. (294) The Convention allows such services to broadcast other forms of audiovisual commercial communication, provided that these comply with the other provisions of Chapter III in this Convention.

Chapter IV: Mutual assistance

Article 23: Co-operation between the Parties

377. The principal idea underlying this Article is that the implementation of the Convention will be based essentially on co-operation between the Parties. This Article therefore aims to reduce as far as possible the risk of possible conflicts arising between Parties as a result of the transfrontier transmission of television programme services.

378. The main provisions in this Article are inspired by similar provisions in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) but have been adapted to meet the requirements arising from the subject matter of the Convention.

379. While paragraph 1 establishes the principle that the Parties shall render each other mutual assistance, paragraph 2 requires the designation of one or more authorities for this purpose. The Parties are free to choose the appropriate instruments according to their legal traditions and established structures, and notably the form of their competent independent regulatory bodies. It is anticipated that in most cases the authorities designated will be national or regional regulatory authorities whose status and functions comply with the principles contained in Recommendation No. R (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector and referred to in the Declaration on this subject adopted by the Committee of Ministers on 26 March 2008. However, the Convention does not require a State Party to institute a specialised broadcasting authority if it does not already have one. An authority may be designated for the purposes of the Convention only.

380. Paragraph 3 enumerates the means by which the Parties are to render each other mutual assistance through their designated authorities.

381. With regard to sub-paragraph b, the information to be furnished may be of a legal, administrative or factual nature (for example on the transfrontier activities of broadcasters registered in the Party concerned).

382. Sub-paragraph d is aimed at enhancing, where this is appropriate, cooperation between Parties' designated authorities before and during the process of issuing an authorisation, registering or concluding a contract with a broadcaster in cases in which a television broadcast, in the sense of the definition Article 2 (g), is or might be wholly or mostly directed at the territory of that other Party.

383. It is up to each Party to assess whether a particular television broadcast from within its jurisdiction is to be wholly or mostly directed at the territory of another Party, and whether to initiate the consultation procedure described at sub-paragraph d.

384. The assessment of whether a television broadcast is to be wholly or mostly directed at the territory of another Party can only be made on a case-by-case basis. Significant indicators may include the main language of the service, the origin of the television advertising or subscription revenues, and the envisaged existence of programmes or commercial communications targeted specifically at the public in the other Party.

385. The first element will usually be easy to assess. However, the financial and programming characteristics of the proposed new service may not be immediately apparent. It may however be possible to infer conclusions about them by examining some of the factors that are usually examined within domestic licensing procedures. These might include for instance the planned structure of the programme service, programme service guidelines, anticipated weekly programme service framework in the first year of broadcasting, documented description of sources of planned revenues.

386. It might also be relevant that the same programme service had been regulated under the other jurisdiction in the past. The Party with jurisdiction over the broadcaster might also find it useful to seek the views of the other Party involved as to where the broadcast is directed.

387. Sub-paragraph d provides a measure of protection against cases of 'jurisdiction shopping' by television broadcasters – that is, circumstances in which a broadcaster transmitting to a particular country locates, or relocates, in another country for no other reason than to evade the broadcasting rules that the country to which he is transmitting would otherwise impose. Jurisdiction shopping is aimed at finding the lowest level of regulatory obligations adopted at national level, while addressing the given service all the time to the same audience in the Party other than the Party of desired place of establishment. Circumvention of stricter national legal provisions adopted in the public interest by the country to which a programme service is wholly or principally directed should be avoided.

388. There are however numerous other legitimate reasons for broadcaster to be located in a country other than the one to which he is mainly transmitting. These include reasons to do with personnel, resources, tax and broadcasting infrastructure, though that is by no means an exhaustive list.

389. However, co-operation between Parties can still be useful in such cases. In the spirit of co-operation, in order to discuss potentially problematic areas, especially issues of stricter or more detailed rules adopted at the public interest in the country of reception, it may be appropriate for the Party having jurisdiction to contact the Party towards which territory such a television broadcast is to be wholly or mostly directed before authorising such a programme - even if there is no clear case of evading rules or if there are perfectly legitimate reasons for the broadcaster's location.

390. It is important for national regulatory authorities for audiovisual media services to play a role in this process. They are well suited to deal with the issues as it is usually they who are directly involved in the licensing or registration procedures. Recital 65 and Article 3 of the Audiovisual Media Services Directive, 2007/65/EC, also underline the special role that responsible national regulatory bodies can play in this process.

391. (302) Sub-paragraph (e) again reflects the important idea of co-operation underlying Article 19 as a whole in the particular case of a difficulty arising in the application of the Convention, and it should be read in conjunction with Article 30, paragraph 1, which embodies the principle of the friendly settlement of any such difficulty. Co-operation of this kind presupposes that, in many instances, contacts between the broadcasters concerned or between the broadcasters and the competent national authorities concerned will have been instigated in the initial stages.

Chapter V: Standing Committee

Article 24: Standing Committee

392. (303) It was considered that the aims of the Convention would be more easily achieved if the representatives of the Parties were given the possibility of meeting at regular intervals with a view to following the application of the Convention, taking into account any developments in transfrontier aspects of audiovisual media services and the experience gained from the implementation of the Convention's provisions. It was felt that much of the responsibility for the functioning of the Convention should be left to those representatives meeting in the Standing Committee so that the Convention would have the capacity to respond to new situations brought about by technical and societal developments. In order to make sure that the Standing Committee is in a position to carry out this responsibility Parties are encouraged to include in their delegations at least one person with experience in the regulation of audiovisual media services.

393. (304) The Committee is to meet whenever one-third of the Parties or the Committee of Ministers of the Council of Europe so requests, or on the initiative of the Secretary General of the Council of Europe in accordance with the provisions of Article 27, paragraph 2, or at the request of one or more Parties in accordance with Articles 25, paragraph 1, sub-paragraph c, and 30, paragraph 2. It follows that the committee will not be in permanent session, but only whenever the need is felt.

394. (305) It is specified in paragraph 2 that each Party may be represented on the Standing Committee by one or more delegates, each delegation having one vote. However, since Article 34, paragraph 1, makes provision for the European Community to become a Party to the Convention, this paragraph further specifies that, within its areas of competence, the European Community shall exercise its right to vote with a number of votes equal to the number of its Member States which are Parties to the Convention. The European Community shall not however exercise its right to vote in cases where the Member States concerned exercise theirs and vice versa.

395. (306) In Council of Europe conventions where a committee is to be set up, member States which are not party to the convention have the right to be represented by an observer. Because, for the reasons indicated in paragraph 368 below, the Convention is open for signature by the Parties to the European Cultural Convention which are not members of the Council of Europe, this right has been extended to the latter which are not Parties to the Convention.

396. (307) Because of the special nature of the matters dealt with in the Convention, it was considered appropriate to empower the Standing Committee to seek the advice of experts in the discharge of its functions. Likewise, the Committee may, on its own initiative or at the request of the body concerned, invite any international or national governmental or non-governmental body technically qualified in the fields covered by the Convention to be represented by an observer at one or part of one of its meetings. The decision to invite such experts or bodies requires a majority of three-quarters of the members of the Standing Committee present.

397. (308) A majority of the Parties constitutes a quorum for holding a meeting of the Standing Committee. This rule also applies for the conduct of meetings of the Committee.

398. (309) The general rule in paragraph 7 that a majority of three-quarters of the members present is required for the decisions of the Standing Committee is designed to ensure that such decisions are representative of the Parties' views.

399. Paragraph 8 provides for the possibility to take decisions by written procedure, including electronic voting. This provision is necessary for the efficient functioning of the Standing Committee in between meetings. It is important to note that this option may only be used on specific issues on which a debate or exchange of views will not be necessary. These will mostly concern decisions on practical aspects related to the working methods, the invitation of an expert in compliance with Article 24 paragraph 4 etc. The choice of the decision making procedure can also be taken by electronic voting. Decisions taken by electronic voting require a majority of three-quarters of all Parties.

Article 25: Functions of the Standing Committee

400. (310) This Article enumerates the functions of the committee. The list of functions is exhaustive. These functions are confined to the application and interpretation of the

Convention and are without prejudice to the further elaboration of a European mass media policy within the framework of existing Council of Europe bodies competent in the field.

401. (311) One of the principal functions of the committee is to make recommendations to the Parties concerning the application of the Convention. It is also possible that questions concerning its interpretation will arise, all the more so since the Convention deals with an area which is subject to rapid changes. The Standing Committee is empowered to examine any such question raised by a Party.

402. (312) A further important task of the committee is to suggest any necessary modifications of the Convention and to examine those proposed in accordance with the provisions of Article 27.

403. (313) The co-operation referred to in Article 23 is echoed at the level of the Standing Committee; it is to use its best endeavours to secure a friendly settlement of any difficulty referred to it (see paragraph 438 below).

404. (315) The Standing Committee has furthermore been given the task to monitor the implementation by the Parties of the provisions of Article 10 of the Convention concerning access of the public to major events. In this context, it will draw up guidelines for the drafting of measures in order to avoid differences between the implementation of Article 10 of the Convention and that of corresponding European Community provisions. It will - in the shortest delay possible - give an opinion on the lists submitted by Parties for mutual recognition and other measures taken. Finally, it will publish a regularly updated overview of mutually recognised national lists and implementing measures. (see paragraphs 245-250 above).

405. Finally, paragraph 3 refers to the Standing Committee's monitoring role with regard to the use made by Parties of the possibility to take measures with regard to Articles 29, paragraphs 1 sub b, 2 and 3 and Article 33, paragraph 3. It imposes a duty on the Standing Committee to give an opinion on the measures concerned within 3 months following their notification.

Article 26: Reports of the Standing Committee

406. (316) Committees instituted in the framework of Council of Europe conventions report, as a rule, to the Committee of Ministers. In addition, this Article specifies that the Standing Committee's report shall be transmitted to the Parties.

Chapter VI: Amendments

Article 27: Amendments

407. (317) Any Party may propose amendments to the articles of the Convention. They are communicated to all member States of the Council of Europe, to the other Parties to the European Cultural Convention, to the European Community and to any other State which

has acceded to, or has been invited to accede to the Convention in accordance with Article 35.

408. (318) When the Standing Committee examines a proposed amendment, a majority of three-quarters of the members of the Standing Committee is required for its adoption before its submission to the Committee of Ministers for approval (see, in this context, paragraph 398 above).

409. (319) The provisions of this paragraph do not rule out the possibility for the Standing Committee to propose amendments in accordance with Article 25, paragraph 1, sub-paragraph b (see above, paragraph 402).

410. (320) Before approving an amendment, the Committee of Ministers may, in certain cases, wish to consult the existing Council of Europe bodies competent for media and new communication services policy.

411. (321) In principle, any amendment shall enter into force on the thirtieth day after all the Parties have informed the Secretary General of the Council of Europe of their acceptance thereof. However, the Committee of Ministers may decide in certain circumstances, after consulting the Standing Committee, that such amendments shall enter into force following the expiry of a two-year time lapse, unless a Party notifies the Secretary General of an objection. This procedure, the purpose of which is to speed up the entry into force of amendments while preserving the principle of the consent of all the Parties, might for example apply to amendments merely aimed at clarifying the terminology used in the Convention, in the light of new technical developments in the audiovisual media services sector, at specifying or supplementing the functions of the Standing Committee (cf. Article 25 of the Convention) or at amending the provisions concerning the settlement of disputes (cf. Chapter VIII and Appendix to the Convention) or the final provisions of the Convention on technical matters such as the modalities of accession by non-member States to the Convention (cf. Article 35 of the Convention).

Chapter VII: Restrictions to the principle of freedom of expression and retransmission

412. Article 3 requires Parties to ensure the freedom of reception and retransmission. Parties may, within the limits foreseen by Article 10 of the European Convention on Human Rights (ECHR), still take measures that restrict freedom of reception and retransmission of audiovisual media services, but only under the conditions and following the procedures laid down in this Convention.

413. Article 28 aims to establish a balance between the transmitting and receiving Parties by establishing specific procedures to be followed when a Party invokes violations of this Convention with regard to television broadcasting. These procedures are designed, on the one hand, to prevent the arbitrary suspension of retransmission by a receiving Party and, on the other hand, to provide a receiving Party with some means of reaction in the case of transmissions contrary to the terms of the Convention.

414. With respect to on-demand audiovisual media services, Article 29 provides sufficient safeguards for Parties wishing to take measures on a case-by-case basis against a media service provider that is prejudicing one of the objectives specified in this Article or presenting a serious risk of prejudice to such an objective. Such a case can constitute at the same time a violation of this Convention, but it is also possible that an on-demand audiovisual media service only conflicts with the national law of the respective Party. The larger margin of discretion left to the Parties compared to television broadcasting is justified by the lighter regulation imposed on non-linear audiovisual media services, which should comply only with the basic rules provided for in this Convention, together with continuing divergence of national rules in certain areas. In particular, Parties should continue to have the possibility to prevent the transmission of online-content from other Parties which violates stricter national provisions about the protection of minors or of human dignity.

Article 28: Television broadcast

Paragraph 1

415. (323) This paragraph concerns the situation , where a receiving Party finds a violation of the Convention with regard to television broadcasting (that notion , as defined in Article 2 of the Convention, covers all the programmes within a single service provided by a given broadcaster). In such a case, the alleged violation must be communicated to the transmitting Party and the two Parties shall endeavour to overcome the difficulty on the basis of the provisions of Articles 23, 30 and 31. It highlights, therefore, that the procedures laid down in the subsequent paragraphs of this Article are to be considered in the light of the mechanisms of mutual assistance and friendly settlement of disputes, as well as, where appropriate, arbitration, provided for in Chapters V and VIII of the Convention. Only if these mechanisms have not brought an acceptable result the receiving Party may envisage taking measures against the incriminated television broadcast. Article 4 of this Convention underlines the importance of freedom of reception and retransmission in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which guarantees the freedom of expression. An interference of the receiving party not only restricts the freedom of the broadcasting company to communicate its contents, but also the freedom of the audience to receive such programmes regardless of frontiers. According to the case-law of the European Court of Human Rights when determining if there is an interference there is no need to make distinctions according to the content of the programmes (ECHR judgement in the case of Groppera Radio AG and Others v Switzerland, n° 10890/84, 28 March 1990, § 55, A173): Even measures against programmes consisting exclusively of light entertainment and commercials can only be justified if they satisfy the conditions in paragraph 2 of Article 10 ECHR, that is to say the interference by the receiving Party must be "prescribed by law", have a legitimate aim or aims and be "necessary in a democratic society" in order to achieve them. The measures taken at national level (e.g. a prohibition from feeding a foreign programme into a cable network) must be justifiable in principle and proportionate (not excessive).

416. (324) According to the European Court of Human Rights' settled case-law, the receiving state enjoys a certain margin of appreciation in assessing whether and to what extent an interference is necessary. The rules of the Convention on Transfrontier Audiovisual Media Services limit the receiving state's margin of appreciation additionally. Paragraphs 2, 3 and 4 of this Article seek to determine the circumstances in which a receiving Party may or may not suspend provisionally the retransmission of a television broadcast. This Convention prohibits to ban a programme before a given period of time (two weeks in cases according to paragraph 2 and eight months in cases according to paragraph 3) has elapsed and excludes any ban when it is only based on certain reasons of minor importance (paragraph 4).

417. (325) Paragraphs 2 and 3 set out the specific conditions in which provisional suspension may be envisaged (after two weeks or eight months). The terms of paragraphs 2 and 3 mean that there are no circumstances in which a single, isolated alleged violation can entitle a receiving Party to suspend retransmission of a television broadcast. Another limit follows from the Court's case law on article 10 ECHR: The measures may not amount to a form of censorship directed against the content or tendencies of the programmes concerned (ECHR judgement in the case of Groppera Radio AG and Others v Switzerland, n° 10890/84, 28 March 1990, § 73).

418. (326) It is also to be noted that the time-limits fixed in these two paragraphs apply even when the procedures of mutual assistance, conciliation and arbitration referred to in paragraph 1 are prolonged over a longer period of time.

419. (327) Where Article 28 authorises the provisional suspension of the retransmission of a television broadcast, the receiving Party cannot take such action until it has instigated whatever procedures the suspension requires under its domestic law. This follows from the condition in Article 10 paragraph 2 ECHR that any interference must be prescribed by law. The domestic law must afford a measure of legal protection against arbitrary interferences by public authorities and thus provide for legal remedies which allow the broadcaster and/or the audience to contest the authorities' action taken. The decisions of the receiving Party's authorities to suspend the retransmission of a television broadcast could also be challenged at the European Court of Human Rights. In such a case it is likely that the President of the Chamber to which the case is allocated will grant interim measures he considers should be adopted in the interests of the Parties or of the proper conduct of the proceedings before the Court (Rule 39 of the Rules of Court). He could thus decide to indicate to the Government of the receiving party that the retransmission of the incriminated foreign television programme should not be suspended until the Chamber has taken its decision.

Paragraph 2

420. (328) This paragraph determines the circumstances in which a receiving Party may provisionally suspend retransmission within a short period of time, that is, if the alleged violation persists within two weeks following the communication of the alleged violation to the transmitting Party and the implementation of the procedure set out in paragraph 1.

421. (329) However, since such provisional suspension is a grave measure, the possibility of envisaging recourse to it has been restricted to cases of alleged violations of a manifest, serious and grave nature, which raise important public issues and which concern a limited number of Articles: 6, paragraphs 1 or 3, first indent, or 18, paragraphs 1, 2, 4 or 5. These Articles concern the respect of the dignity of the human being, television programmes who might seriously harm minors, as well as audiovisual commercial communication for tobacco products and medicines and medical treatment available only on prescription as well as the criteria for advertising alcoholic beverages. When considering applying this paragraph, the Parties will have due regard to the principle of proportionality, which is an essential criterion resulting from the case-law of the European Court of Human Rights whenever restrictions are imposed on the fundamental freedoms embodied notably in Article 10 of the European Convention on Human Rights. This is the purpose of the qualification "manifest, serious and grave nature which raises important public issues", which is designed to limit the application of this paragraph to alleged violations of a sufficiently serious nature to warrant such action. Clearly, therefore, alleged violations of a minor or technical character could not justify action under this paragraph.

Paragraph 3

422. (330) This paragraph provides that in all other cases of alleged violation of the Convention, with the exception of those referred to in paragraph 4 of this Article, a receiving Party may suspend provisionally the retransmission of the incriminated television broadcast after a period of eight months following the communication of the alleged violation to the transmitting Party and provided that the alleged violation persists. This concerns public issues that cannot justify a provisional suspension after two weeks, for instance the proportion of television advertising within a given clock hour (Article 15), the requirement that audiovisual commercial communication should be readily recognizable as such (Article 16, paragraph 1), the rules on insertion of television advertising and teleshopping (Article. 17), the rules on product-placement (Article. 19) or the rules on sponsorship (Article 21). Of course, the principle of proportionality must be strictly respected in this constellation as well.

Paragraph 4

423. (331) According to this paragraph, the provisional suspension of retransmission may in no event occur in respect of alleged violations of Articles 6, paragraph 2, and Articles 8, 9, 11 or 12. These Articles concern the requirement that news fairly present facts and encourage the free formation of opinions, the right of reply, the access of public to information, cultural objectives and media pluralism and diversity of content. A provisional suspension is also excluded if an alleged violation does not concern any article of this Convention at all but concerns only rules within the receiving Party's domestic law. In such a case, the receiving Party must refrain from direct action and follow the procedure in Article 33 paragraph 2 of this Convention.

Article 29: On-demand audiovisual media services

Paragraph 1

424. This paragraph allows Parties to take measures such as sanctions or injunctions that may restrict the provision of on-demand audiovisual media services from other Parties where there is a need to protect certain identified interests. Such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal content or the disabling of access to it.

425. The reference to a "given" service means that the Party of destination may not, under this paragraph, take general measures in respect of a category of on-demand audiovisual media services. To be covered by this paragraph, the measure must, therefore, have been taken on a case-by-case basis against a specific on-demand audiovisual media service which is provided by a given media service provider.

426. Any measures taken by a Party relying on this provision are subject to strict conditions under paragraphs 1 to 3.

427. In an exhaustive list, this paragraph specifies all the reasons which might justify a restriction on the ground of defending the general interest, namely public policy, public health, public security and the protection of consumers. Restrictions based on the concept of "public policy" must be clearly and adequately justified and the public policy reasons cited in this paragraph are intended as examples Recourse by a national authority to the concept of public policy presupposes a genuine and sufficiently serious threat affecting one of the fundamental interests of society. Economic objectives, for example, cannot constitute grounds of public policy within the meaning of this paragraph.

428. Any measures under this paragraph must be taken against a specific, identified service that effectively prejudices one of the objectives spelt out or presents a serious and grave risk of so doing. This wording allows the Party in which the service is provided to take not only punitive but also preventive measures where there is a serious and grave risk to those objectives.

429. In any case, the measures have to be proportionate to their stated objective. See paragraph 421 above as well as paragraphs 436 and 437 below.

430. There are three notification conditions:

- the Party taking the measures must have asked the Party in which the media service provider is established to take measures;

- the latter must not have taken any measures or any measures it did take have been inadequate;

- the Party taking the measures must have notified the Standing Committee and the Party in which the provider is established of its intention to take such measures.

431. The first condition requires the Party in which the media service provider is established to have been informed and put in a position to resolve the problem at its own level. The second condition is that, in the view of the Party of destination, it has not done this adequately. The third condition requires prior notification of the Standing Committee in order for it to be able to exercise its function under Article 25, paragraph 1 (d) and of the Party of origin. This paragraph does not specify any precise deadline by which the Party of the media service provider must act following the notification received from the Party in which the service is provided. However, in the light of Article 23 of this Convention Parties should provide the assistance and information requested as quickly as possible.

432. It is clear from this paragraph that the notification requirement in no way deprives the receiving Party of the right to institute court proceedings, including preliminary proceedings. Parties, in conformity with conditions established in this Article, may also apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Standing Committee and the Party of origin – as long as these investigative or other measures do not qualify as sanctions or injunctions. Lastly, it should be pointed out that the dialogue with the Party in which the provider is established and notification of the Standing Committee are matters for the Party's administration and not, for example, the courts.

Paragraph 2

433. This paragraph provides that the receiving Party may also bypass the requirement to contact the Party in which the media service provider is established and the Standing Committee if it appears that the matter is one of urgency.

(434). However, where such urgent action is taken, the Party must notify the Standing Committee and the Party of origin as soon as possible that the measures have been taken, and provide each of those bodies with a statement of its reasons for considering the case to be one of urgency.

Paragraph 3

434bis Paragraph 3 confers the Standing Committee a monitoring role with regard to the use made by Parties of the possibility to take measures with regard to the preceding paragraphs. Where the Standing Committee is of the opinion that measures of a Party are incompatible with the Convention, the Party concerned has to refrain from taking the measure or urgently put an end to it. The Standing Committee shall give its opinion in the shortest time possible and, according to Article 25, paragraph 3, within 3 months following notification;

Paragraph 4

435. The general objective of this Convention, as defined in Article 3, is to ensure freedom of expression and information via the free circulation of audiovisual media services which comply with the terms of the Convention. Although Article 29 gives a wide margin of discretion with regard to the restriction of on-demand audiovisual services from other State Parties, any measures which might be taken by the Parties under this Article must nevertheless comply with Article 10 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights.

436. Paragraph 3 implies that such measures respect the requirements laid down by the European Court of Human Rights to accept a restriction to freedom of expression and information. In this context, the proportionality requirement mentioned above under points 421 and 429 is particularly important and subject to careful examination.

437. In conducting this examination a number of tests have to be applied in order to ascertain the conformity of a measure. First, it is essential that the measure taken falls within one of the areas expressly referred to in paragraph 1. With regard to the non-discrimination test, account will need to be taken of the objective circumstances in order to determine whether there is actual discrimination. The non-duplication test requires examination of the legal arrangements in the country of origin to determine whether there is duplication between the proposed measures and, say, the protection offered in the country of origin and the checks carried out there. If this were to be the case, it could be concluded that the objective of general interest pursued by the country of destination was already met by the rules in force in the media service provider's country of establishment. Finally, any restriction has to be 'proportionate to the legitimate aim pursued' and the reasons adduced by the national authorities to justify the restriction must be 'relevant and sufficient'. According to the case law of the European Court of Human Rights, the authorities must strike a fair balance between the relevant interests of, on the one hand, the protection of public interests such as the prevention of criminal offences and, on the other, the right to freedom of expression. The need for any measures against an on-demand audiovisual media service must be established convincingly. For instance, the Court sees little scope under Article 10 paragraph 2 of the European Convention on Human Rights for restrictions on debate on questions of public interest. On the other hand, a measure may be necessary against publications that are gratuitously offensive to others and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.

Chapter VIII: Settlement of disputes

Article 30: Conciliation

438. (348) This Article elaborates the principle - already evoked in Articles 23 and 25 - of the friendly settlement of difficulties, firstly through bi- or multilateral co-operation between the parties concerned and, secondly, if this proves necessary and unless one of the parties concerned objects, through the intervention of the Standing Committee.

439. (349) Paragraph 2 provides that, where the matter is brought before the Standing Committee, the latter may examine the question by placing itself at the disposal of the parties concerned in order to reach a satisfactory solution and, where appropriate, to formulate an advisory opinion on the subject.

440 (350) Paragraphs 2 and 3 refer respectively to "as rapidly as possible" and "without delay". This is to avoid undue delays in the conciliation procedure which could be prejudicial to the solution finally reached.

441. (351) Emphasis is placed on the importance of exhausting the possibilities of co-operation and conciliation laid down in Article 23 and the present article before envisaging recourse to arbitration.

Article 31: Arbitration

442. (352) This Article provides for arbitration in cases where a dispute cannot be settled under the conciliation procedures set out in Article 30, although it was recognised that such cases should be rare because of the emphasis placed on mutual assistance and conciliation between the parties in the preceding articles. Recourse to arbitration was considered a necessary means of finally settling such disputes in the absence of a friendly settlement, notably because the arbitration tribunal's award is final and binding on the Parties to the dispute.

443. (353) The arbitration procedure set out in the appendix may be instituted by common agreement between the parties concerned. However, in the absence of such agreement within six months following the first request to open the procedure of conciliation, the dispute may be submitted to arbitration at the request of only one of the Parties. It was thought that this possibility of having recourse to arbitration at the request of only one of the parties - in the absence of a common agreement to do so within the six-month time-limit - would constitute an additional incentive for the parties concerned to reach a friendly settlement.

444. (354) Paragraph 2 of this Article enables Parties to issue a declaration, recognising as compulsory *ipso facto* and without special agreement in respect of other Parties accepting the same obligation, the application of the procedure of arbitration set out in the appendix. Such a declaration may be made at any time and independently of any dispute involving the Party making the declaration.

445. (355) The appendix to the Convention sets out the procedure for arbitration. It provisions are inspired by similar provisions in other Council of Europe instruments: in particular the European Convention for the Protection of Animals during International Transport (1968) and the Convention on the Conservation of European Wildlife and Natural Habitats (1979).

446. (356) Paragraph 2 of the appendix covers situations in which a dispute arises between two Parties, one of which is a Member State of the European Community, in the event of the latter being itself a Party to the Convention.

447. (357) In the last sentence of paragraph 4, the expression "the same procedure" means that, in this hypothesis, the third arbitrator will be designated by the President of the European Court of Human Rights.

448. (358) Paragraph 6 covers situations in which two or more parties determine by agreement that they are in the same interest. It provides that, in such situations, they shall appoint an arbitrator jointly. This provision concerns exclusively the composition of the arbitration tribunal and is without prejudice to the rights of the parties to put forward their views individually.

449. (359) Paragraph 7 embodies the principle of co-operation between the parties to the dispute, the Standing Committee and the arbitration tribunal for the effective conduct of the proceedings.

450. (360) Paragraph 8 states *inter alia* that the arbitration tribunal shall draw up its own rules of procedure. This implies that the tribunal is empowered to determine the means by which it is to conduct its procedure, including, where appropriate, the consultation or hearing of experts.

Chapter IX: Other international agreements and the internal law of the parties

Article 32: Other international agreements or arrangements

451. (361) This Article specifies the relations between the Convention and other international agreements or arrangements under which the Parties may agree to establish between them particular regimes, which are either derogatory in relation to the rules arising from the Convention or which extend the scope of those rules. It only concerns, therefore, such agreements or arrangements and not, more generally, all other treaties by which the Parties to this Convention may be bound (see in this context, the comments on Article 4, paragraphs 150 to 154 above).

452. (362) Paragraph 1 is designed to cover the particular situation of those Parties which are members of the European Community or otherwise bound by Community law. It states that, in their mutual relations, those Parties shall apply Community rules and shall not therefore apply the rules arising from the Convention except in so far as there is no Community rule governing the particular subject concerned. Since it governs exclusively the internal relations between the Parties members of the European Community, this paragraph is without prejudice to the application of this Convention between those Parties and Parties which are not members of the European Community. The public website of the Standing Committee will contain an updated list of States bound by community rules.

453. (363) Paragraph 2 is designed to enable Parties to conclude other international agreements completing or developing the provisions of the Convention or extending their field of application.

454. (364) Paragraph 3 is concerned solely with particular cases where two States conclude a bilateral agreement to establish arrangements - possibly derogatory - for the application of the Convention in their mutual relations. For example, one could envisage the situation of two neighbouring States one of which, due to unavoidable spillover, receives programme services which, whilst conforming to the legislation of the other State, do not respect all the provisions of the Convention. This paragraph states that, where such an agreement exists, the Convention does not alter the rights and obligations of the two Parties arising from such an agreement in so far as they do not affect the enjoyment of other Parties of their rights, or the performance of their obligations, under the Convention.

Article 33: Relations between the Convention and the internal law of the Parties

Paragraph 1

455. (365) As is already indicated in paragraph 158 above, the Parties remain free to apply stricter or more detailed rules that those provided for in the Convention to programme services transmitted by entities or by technical means within their jurisdiction, within the meaning of Article 5 paragraph 2. It was thought advisable to specify this point in the text of the Convention, particularly for those Parties where an international treaty, duly ratified, has a rank superior to ordinary legislation.

Paragraph 2

456. Paragraphs 2, 3 and 4 relate to television broadcasting (linear services) only, not to non-linear services.

457. Paragraph 2 sets out a special consultation procedure, for cases in which a Party has exercised its freedom to adopt within its national law more detailed or stricter rules than those stated in the Convention of general public interest, such as rules intended to protect minors, consumers or other general public interests, for instance in the fields of culture, politics, economics or health policy.

458. When such a Party assesses that a broadcaster under the jurisdiction of another Party provides a television broadcast which is wholly or mostly directed towards its territory, and that broadcast is incompatible with those more detailed or stricter national rules of general public interest, it may contact the Party having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed.

459. The assessment of whether a television broadcast is wholly or mostly directed at the territory of another Party should be made on a case-by-case basis. Significant indicators might include the main language of the service, the origin of the television advertising or

subscription revenues, and the existence of programmes or commercial communications targeted specifically at the public in the other Party.

460. The consultation procedure described at paragraph 2 is initiated by the Party receiving the broadcast in question, which contacts the Party having jurisdiction over the broadcaster. Party initiating this consultation must give grounds for its request.

461. It is advisable to support the request by demonstrating that the broadcaster is transmitting material of the kind complained of, or at least has firm plans to do so, and that this material would contravene the receiving Party's own domestic broadcasting rules.

462. On receipt of a request by the first Party, the Party having jurisdiction shall examine the case. If it finds the request to be substantiated, it shall request the broadcaster to comply with the rules of general public interest in question which have been adopted by the country to which given programme service is wholly or mostly directed.

463. There are no specific formal requirements for the form of this consultation procedure.

464. The Party having jurisdiction shall inform the first Party of the results of their request as soon as possible, but no later than within two months of the request being made.

Paragraph 3

465. Paragraphs 3 and 4 concern situations in which the consultation procedure under paragraph 2 has not led to a solution which is satisfactory for the receiving Party.

466. In these circumstances, the receiving Party can take appropriate measures of its own to resolve the problem. It can however take such measures only if the broadcaster in question has established itself in the Party having jurisdiction solely in order to circumvent the stricter rules, in the fields covered by the Convention, which would be applicable to it if it were established within the receiving Party.

467. Parties should assess whether in a given case broadcaster in question has established itself in the Party having jurisdiction for no other reason than to circumvent the receiving Party's stricter rules or not, waging different factors. The unwillingness of the broadcaster in question to respect stricter of more detailed rules adopted in the general public interest in the receiving Party, demonstrated within procedure described at paragraph 2 might be relevant in this assessment. But Parties should bear in mind that there are also legitimate reasons which broadcasters might have to be located in a country other than the one which they are transmitting to.

468. Any proposed measures shall be objectively necessary, applied in a non-discriminatory manner and be proportionate to the objectives which they pursue. Such measures may include inter alia restriction of retransmission of a given television broadcast and/or measures taken against intermediaries.

Paragraphs 4 and 5

469. Before applying measures described under paragraph 3 the receiving Party shall notify the measures it proposes to take to the Standing Committee in view of an opinion. The notification of the measures should explain the reasons why the receiving Party is of the opinion that all requirements of the preceding paragraph are met.

470. The Standing Committee shall examine the case and give an opinion on the compatibility of the notified measures with the Convention, within 3 months. . If the proposed measures are the subject of a negative opinion from the Standing Committee, the Party in question shall refrain from taking any proposed measures.

Chapter X: Final provisions

Articles 34 to 39

471. (367) These articles are largely inspired by the "Model Final Clauses for Conventions and Agreements concluded within the Council of Europe" approved by the Committee of Ministers in February 1982. Some particular points, however, might be underlined.

Article 34: Signature and entry info force

Paragraph 1

472. (368) Since the Parties to the European Cultural Convention which are not members of the Council of Europe share largely the same concerns as the member States of the Council with regard to the issues which the Convention addresses, and since representatives of two of those Parties took part in the preparatory work as observers, it was decided to open the Convention for signature by those Parties at the same time as the member States.

473. (369) Furthermore, this paragraph also makes provision for the European Community to become a Party to the Convention.

Paragraph 3

474. (370) This paragraph lays down a procedure for the provisional application of the Convention prior to fulfilment of the conditions for its entry into force laid down in paragraph 2. Such a procedure is to be found in certain Council of Europe instruments (Convention on the elaboration of a European Pharmacopoeia, 1964; Third Protocol to the

General Agreement on Privileges and immunities of the Council of Europe, 1959) and other international instruments. This particular provision is inspired by the Convention on the Early Notification of a Nuclear Accident, adopted in 1986 within the framework of the International Atomic Energy Agency. It provides that a State may, at the time of signature or any later date prior to the entry into force of the Convention in respect of that State, declare that it shall apply the Convention provisionally.

475. (371) It was thought advisable to provide for such a clause in the Convention because of the pace of developments in the field of transfrontier television broadcasting and the need for the Convention's provisions to be applied as rapidly as possible.

476. (372) It follows from the preceding observations that the provisions of paragraph 3 are without prejudice to the requisite internal procedures for the formal ratification, acceptance or approval of the Convention.

Article 35: Accession by non-member States

477. (373) After the Convention has entered into force, and after having consulted the Contracting States, the Committee of Ministers may invite any State which is not referred to in Article 29, paragraph 1, to accede to the Convention.

Article 3: Territorial application

478. (374) Since this provision is mainly aimed at territories overseas, it was agreed that it would be clearly against the philosophy of the Convention for any Party to exclude from the application of this instrument parts of its main territory and that there was no need to specify this in the Convention.

Article 37: Reservations

479. (375) Given the specific nature and purpose of the Convention, namely to lay down basic standards by which television programme services may enjoy unhindered transfrontier circulation, it was considered essential not to provide unlimited possibilities for States to make reservations when signing or depositing their instruments of ratification, acceptance, approval or accession of the Convention. Paragraph 1 of this Article therefore specifies the only reservation which may be made. This reservation allows a State that has stricter rules on television advertising for alcoholic beverages in its domestic legislation (such as a complete prohibition on television advertising for alcoholic beverages) to restrict the retransmission of foreign television broadcasts that do not comply with the prohibition of advertising for alcoholic beverages.

480. (376) In so far as the content of authorised reservations is the result of negotiations during the drafting of the Convention, it was agreed, as specified in paragraph 2, that a reservation made in accordance with paragraph 1 may not be the subject of an objection.

481. (377) Paragraphs 3 and 4 are inspired by the model final clauses referred to in paragraph 471 above.

Appendix: Arbitration

482. (378) The arbitration procedure set out in the appendix is described in paragraphs 445 to 450 above.