



## EPHA Position Paper on the Revision of the “Television Without Frontiers” Directive

Subject	Directive on Audiovisual Media Services – A Revision of the “Television Without Frontiers” Directive
Date	June 2006

*The European Public Health Alliance (EPHA) represents over 100 non-governmental and other not-for-profit organisations working in support of health in Europe. EPHA aims to promote and protect the health interests of all people living in Europe and to strengthen the dialogue between the EU institutions, citizens and NGOs in support of healthy public policies.*

### Summary

- EPHA calls for severe restrictions on the commercial communications to children of foods that contribute to an unhealthy diet, therefore EPHA urges a 6am-9pm watershed on audiovisual commercial communications of products high in fat, sugar, or salt in a new article of the Directive.
- While EPHA welcomes the ban on audiovisual commercial communications for alcoholic beverages aimed at minors and we strongly suggest the inclusion of more objective parameters. Specifically, a new rule should be added to article 15 setting a 6am-9pm watershed and Article 3h to be expanded to include alcoholic beverages.
- EPHA encourages the Commission to opt for co-regulation rather than self-regulation provided that (i) it is supported by effective legislation, (ii) there are independent advisory bodies involved closely in the regulation process and (iii) minimum criteria of co-regulation are included in the text of the Directive.
- EPHA urges that cigarette and tobacco bans are upheld in the proposed Directive and extended to non-linear services as well, as the only way of providing more effective protection.
- EPHA welcomes the audiovisual commercial communications bans on medicines and medical treatment and urges to be extended to all audiovisual media services, and not just television.
- EPHA believes that both surreptitious advertising and product placement of unhealthy foods, alcohol, tobacco and medicinal products must remain banned. In addition, we believe that the ban should be extended to other audiovisual media, where television services are also offered.
- EPHA calls for clarification of the scope, in particular with regard to audiovisual commercial communication including product placement and surreptitious advertising and the definition of linear and non-linear services.

## Introduction

EPHA welcomes the revision of the Television Without Frontiers (TWF) Directive and we generally agree with the approach of the Commission to find a *technology neutral* approach for regulation of all audiovisual commercial communications whether linear or non-linear. However, this approach should not result in downward harmonisation and in the abolition of important audiovisual commercial communications rules in the TV sector.

EPHA's comments and concerns are rooted in public health concerns, especially the protection of minors. It is generally agreed that this Directive must remain a minimum harmonisation directive that allows individual Member States to go beyond the minimum requirements of the Directive, therefore it is of utmost importance that the Directive includes provisions to protect the public health of minors. This concern is in line with the Commission's impact assessment<sup>1</sup>.

The revision of the advertising framework impacts directly on public health issues such as food, tobacco, alcohol and medicinal products. So too does the ability of the commercial sector to co-regulate or self-regulate. The scope of the Directive is creating confusion at all levels and thus has the potential to pose serious threats to the safeguarding of the public health of Europeans. The regulation of non-linear services in particular is problematic, especially in protecting minors and protecting citizens' health.

## Audiovisual Commercial Communication

### Audiovisual Commercial Communications of Unhealthy Foods

The revised directive presents an opportunity to protect children across the EU from the over promotion of unhealthy foods and drinks<sup>2</sup> by including such restrictions among the basic tier of rules for all audiovisual media services. EPHA is very concerned that the revised Directive does not address the ever-increasing problem of obesity and the issue of audiovisual commercial communications of unhealthy foods and drinks.

The European Union is facing an obesity epidemic, rising fastest amongst children. Intensive marketing of unhealthy foods targeting children has been shown to be a significant contributor to the dramatic increase in childhood obesity<sup>3</sup>. In 2006, almost 22 million children in the EU are estimated to be overweight or obese (out of a total of 71.5 million children), rising by 1.2 million per year<sup>4</sup>.

Research shows that audiovisual commercial communication of food *do* affect children's eating habits. A UK study undertaken by Professor Gerard Hastings, looked at the impact of audiovisual commercial communication of food on children. The study, "*A Systematic Review of the Effects of Food Promotion on Children*"<sup>5</sup>, was conducted for the UK

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1 Impact Assessment document may be found at [http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/proposal\\_2005/index\\_en.htm](http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm)

2 Defined here as foods and drinks that are high in fat - particularly saturated fat - salt or sugar and low in essential minerals.

3 European Heart Network "The marketing of unhealthy food children in Europe" 2005 available at <http://www.ehnheart.org/content/listpublication.asp?level0=1456&level1=1552&level2=1556>

4 Of these children, 5.1 million are obese, rising by 0.3 million per year. At present rates, by 2010, over 26 million children in the EU will be overweight or obese, rising by some 1.3 million children per year. Of the overweight children, 6.4 million will be obese, and that figure is rising by over 350 000 per year. *Source: Estimated burden of paediatric obesity and co-morbidities in Europe. Part 1. the Increase in the prevalence of child obesity in Europe is itself increasing; Rachel Jackson-Leach & Tim Lobstein, International Journal of Paediatric Obesity, 2006;1:26-32*

5 Food Standards Agency. Does food promotion influence children? A systematic review of the evidence (2003).

Food Standards Agency (FSA) and found that -

- a large proportion of food audiovisual commercial communications is directed at children
- children enjoy and engage with food promotion
- the advertised diet is less healthy than the recommended one
- food promotion affects children's preferences, purchase behaviour and consumption. This effect is independent of other factors and operates both at brand and category level

EPHA is concerned that there is an imbalance between the recommended diet and the diet advertised to children via commercial communications. Many Member States are already introducing restrictions on the type and amount of audiovisual commercial communications of food to children. Considering the reality of obesity and the role of audiovisual commercial communications of unhealthy foods, **EPHA calls for restrictions on the commercial communications to children of foods that contribute to an unhealthy diet.**

In addition, EPHA urges that restrictions on the audiovisual commercial communications and promotion of food to children must cover the times when children are most likely to be watching television and not just cover dedicated children's programming. Research in the UK<sup>6</sup> highlights that the most popular programmes amongst 2-9 year olds are those shown in the early evenings. Therefore, **EPHA urges a 6am-9pm watershed on audiovisual commercial communication of unhealthy foods and drinks.** This would offer a practical means of extending protection to older children and would be consistent with other broadcasting controls. This would also guarantee a clear legislative framework for the broadcasters, because it is based on more objective parameters.

### **Audiovisual Commercial Communications of Cigarettes and Other Tobacco Products**

Directive 2003/33/EC on Tobacco Advertising and Sponsorship prohibits advertising of cigarettes and other tobacco products in the press and other printed publications, in radio and in information society services. It also bans tobacco industry sponsorship of radio programmes and of cross-border events. **EPHA urges that these bans are extended to non-linear services**, as the only way of providing more effective protection of citizens' health. Non-linear commercial communications calls for the same protection of public health as linear.

### **Audiovisual Commercial Communications of Alcohol**

As regards alcohol, only audiovisual commercial communications aimed at minors and/or encouraging immoderate consumption are prohibited. While **EPHA welcomes the ban on audiovisual commercial communications for alcoholic beverages aimed at minors, we strongly suggest the inclusion of more objective parameters**, which are easy to implement, monitor and measure. For example a recommendation of the Working group on Alcohol under the UK presidency in November 2005 recommends a **watershed** set between **6am-9pm**. Therefore, EPHA strongly suggests that a new rule should be added to article 15 specifying -

*“Audiovisual commercial communications for alcoholic beverages should not be broadcast before 9pm.”*

EPHA welcomes the proposed insertion of a new Article 3h concerning product placement and sponsorship, in which the placement of certain products such as tobacco or prescription drugs are prohibited. However, **EPHA calls for Article 3h**

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6 Which? survey of 815 parents of 0-16 year olds in Great Britain between 9<sup>th</sup> February and 7<sup>th</sup> March 2006, in Which? briefing: Ofcom's Proposals On Food Advertising To Children (April 2006).

**to be expanded to include alcoholic beverages**, specifically specifying -

*“Audiovisual media services may not be sponsored by undertakings whose principal activity is the manufacture or sale of alcoholic beverages. Further, audiovisual media services must not contain placement of alcoholic beverages or product placement from undertakings in furtherance of the manufacture or sale of alcoholic beverages.”*

### **Audiovisual Commercial Communications of Medicinal Products**

In the case of prescription medicines and medical treatment (Article 14), a distinction depending on whether the audiovisual commercial communications is placed in linear or non-linear media is unjustified. The audiovisual commercial communications ban is intended generally to protect health, and cannot therefore be aimed solely at the consumers of traditional TV programmes. In addition, it is a fact that in countries outside Europe where medical prescription products is authorised, the level of audiovisual commercial communications of these products in comparison with “cosmetics & hygiene” products is higher<sup>7</sup>. The authorisation of such products in the non-linear environment will go against consumer protection. Therefore, **EPHA urges that audiovisual commercial communications bans on medicines and medical treatment be extended to all audiovisual media services, and not just television.**

### **Co-Regulation and Self-Regulation**

The proposed Directive *encourages* Member States to have recourse to co-regulatory regimes in the fields covered by the Directive. The Commission believes that such instruments can deliver a high level of consumer protection.

**EPHA believes that co-regulation should be the general rule, and not the exception to self-regulation. As well as Member States co-regulatory regimes, we call for setting up a body at European level with the necessary legal support. In addition, EPHA urges that the criteria of co-regulation be included in the text of the Directive, to ensure minimum harmonisation standards across the EU.**

The advisory expert group should be made up of at least 50% of professionals working in the area of public health as well as professionals working in audiovisual commercial communication in order to be recognised as a valid entity by all people involved.

According to Inter-Institutional Agreement on Better Law-making (IIA), co-regulation is defined as:

*“A mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).”<sup>8</sup>*

Despite claims from the industry that self regulation on audiovisual commercial communications is effective, many citizens have concerns it is often not sufficient to restrain unacceptable practices. Self-regulation is most commonly adopted by industries under threat of government regulation. This is particularly the case with regard to a commercial sector that involves products which can be harmful to health, such as tobacco, processed food and alcohol. There are numerous studies to dispute the effectiveness of self-regulation including the Commission's own recent landmark report

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<sup>7</sup> Comparative study of the impact of regulatory measures on television advertising markets - Carat, July 2005

<sup>8</sup> OJ C 321/1 of 31.12.2003

on alcohol in the EU which states that -

*“Self-regulation of commercial communications by the beverage alcohol industry does not have a good track record for being effective”<sup>9</sup>.*

For more information regarding the effectiveness of co-regulation, see EPHA's briefing paper entitled *“An Introduction to Co-regulation and Self-regulation in the EU”*<sup>10</sup>.

## **Scope of the Directive**

The scope of the draft Directive provides for a regulatory framework for both linear and non-linear delivery of audiovisual content. However, there is currently confusion, even at top levels<sup>11</sup>, on what exactly the Directive would cover. **EPHA calls for clarification of the Directive's scope, in particular with regard to audiovisual commercial communication including product placement and surreptitious advertising and the definition of linear and non-linear services.** Ambiguity on the scope of the Directive has the potential to pose serious threats to the safeguarding of the public health of Europeans. For example, what is the scope of the regulatory framework in non-linear services and how does this affect the current audiovisual commercial communications ban for cigarettes and other tobacco products?

The amending Directive introduces new definitions based around the notion of *“audiovisual media service”*. EPHA calls for further clarity in the Directive on the differences between the terms *“audiovisual media services”* and *“audiovisual services”* and *“audiovisual products”*.

Since the proposal only covers moving images with or without sound, the draft Directive does not cover electronic versions of newspapers or audio transmissions and radio. With regard to all these non-audiovisual services, the Commission did not identify a need or a justification for harmonised rules, despite its wide consultations. EPHA believes that such services should not be regulated in the same way as television but we do urge for **a common set of qualitative rules for radio, electronic magazine/newspapers and other non-linear services.**

## **Country of Origin Principle**

The country of origin principle remains a basic obligation of audiovisual media services. This principle sets down that broadcasters only have to comply with the national law of the member State in which they are located. Once this compliance is verified, a broadcast that is transmitted to another member state is not be subject to secondary control under the national law of the receiving State. This is seen by the Commission as essential for the creation of an internal market.

However, it is extremely difficult to predict all the consequences that may result (see case law of the European Court of Justice). The country of origin principle affects the legislation of individual Member States by choice of location. Therefore, the possibility of circumvention of stricter rules in some Member States by choice of location needs to be expressly addressed and properly enforced.

**EPHA calls for minimum harmonisation standards across the EU allowing individual Member States to go beyond the minimum requirements of the directive.**

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9 For the full report on Alcohol in Europe by the Institute of Alcohol Studies, see the Commission's website [http://ec.europa.eu/health-eu/news\\_alcoholineurope\\_en.htm](http://ec.europa.eu/health-eu/news_alcoholineurope_en.htm)

10 See EPHA's website at <http://www.eph.org/a/1684>

11 See reports to the several hearings on this topic that have taken place in the European Parliament: [http://www.europarl.europa.eu/hearings/default\\_en.htm](http://www.europarl.europa.eu/hearings/default_en.htm)

## Further Reading

- Open Society Institute report on Television across Europe "Television across Europe: Regulation, Policy, and Independence"  
*[http://www.soros.org/initiatives/media/articles\\_publications/publications/eurotv\\_20051011?skin=printable](http://www.soros.org/initiatives/media/articles_publications/publications/eurotv_20051011?skin=printable)*
- EPHA article on Regulation of Television Advertising  
*<http://www.eph.org/a/1717>*
- Eurocare and European Heart Network responses to revision of the "Television without Frontiers" Directive  
*<http://www.eph.org/a/1915>*