

# Statement of the Position of ARD and ZDF on the Topic Paper for the Liverpool Conference on Audiovisual Policy

## “Commercial Communications”

### On section I: Common Policies Governing all Types of Commercial audiovisual Communications

#### 1. Definition of Commercial audiovisual Communications

ARD and ZDF are in favour of the commission's broad definition of commercial audiovisual communications as an overarching concept, extending to any and all activities that serve to directly or indirectly promote the sale of goods or services, or to enhance the image of a company or organisation. The view of ARD and ZDF is however that the various different types of commercial communications require more precise definition, as different rules should be applied to classic advertising spots for example than to programme sponsorships. For ARD/ZDF, the definitions presented in the topic paper are well-suited and appropriate as a starting point in this direction.

#### 2. Minimum Standards for Commercial Audio-visual Communications

In the view of ARD and ZDF it is of critical importance that uniform minimum standards be established for all types of commercial audiovisual communications.

Only by doing so will it be possible to obtain a coherent regulatory framework. We expressly approve of the way in which the topic paper addresses this fundamental concern.

In the opinion of ARD and ZDF, the following points should be incorporated into minimum standards for commercial audiovisual communications:

- Identification of commercial communications
- Separation of commercial communications and editorial content
- Prohibition of advertiser influence upon editorial content
- Prohibition of surreptitious and other subliminal advertising methods
- Protection of human dignity and observance of youth protection laws
- Protection of public welfare, safety and the environment

The proposal is thus advanced to retain the existing provisions of the TVWF Directive (particularly Art. 10, 12, 13–16), adapting them as necessary to the new regulatory framework. In this context the idea of permitting pharmaceutical advertising through the highly problematic form of product placement as regards its mode of functionality makes no apparent sense. The same applies for other products already subject to advertising restrictions due to specific risks posed or their significance to the general public (tobacco, alcohol, etc). Product placement is particularly dangerous in connection with these kinds of product groups due to the typically subconscious promotional effect.

#### 3. Extension of Minimum Standards to Linear and Non-linear Services

ARD and ZDF have expressed their approval of extending the scope of application of the TVWF Directive.

Basic regulations for commercial audiovisual communications must also apply in the view of ARD and ZDF to the extended scope of the directive, to both non-linear and linear services equally.

This seems appropriate, as the potential dangers posed by commercial communications are virulent to the same degree with linear as with non-linear services.

#### 4. Permitting Product Placement

The paper discusses that many experts and observers have expressed doubt that prohibiting product placement is a proper solution, making reference to current developments in the advertising markets. Actual transgressions in this area should not however be seen as justification for softening the rules for separation and transparency.

ARD and ZDF express their unequivocal opposition to formally permitting product placement.

1. The topic paper justifiably emphasizes that adequate protection of recipients entails adherence with transparency and separation requirements. Allowing product placement however would *de facto* undermine the separation requirement. The transparency requirement is also not robust enough. Putting a notice at the start and/or finish of a programme is not an effective means of preventing consumers from being misled about the commercial nature of specific product placements within the programme. For one, a significant number of recipients will not even have seen the notice because they have either tuned in later or have switched away before the end. Also, "zapping" is one of the most widespread viewing patterns. But even if recipients read the notice it is in no way certain that they will have internalized its meaning as a warning instead of as a note from the sponsor, for example. It also seems mostly an illusory notion that recipients would actually associate the notice with specific product placements in the programme. Rather, it appears likely that the notice will only be perceived in passing, or that memory of it will subsequently fade in any case. This is all the more probable given the subconscious way in which product placements are effective by virtue of their integration into the production.  
The notices on the unethical business practices directive and that Commission's statement dated 23 April 2004 are also ineffective. The concept of "legal product placement" for example found in the directive is not applied in relation to broadcasting and therefore implies nothing in terms of legality in a broadcasting context. Nor is product depiction with sponsor notices as found in the Commission's statement comparable with forms of advertising integrated into production such as product placement.
2. Not only in Germany but in all other member nations as well, authenticity and objectivity of editorial content represent the guiding principles for the functioning of media systems. The media plays an eminent role in and is an important platform for the formation process of public opinion. It is of no consequence whether print media, public sector or private commercial broadcasting may be concerned in this regard. It is likewise irrelevant whether journalistic reporting or television game shows may be concerned. Entertainment also plays a role in influencing public opinion. This fact is obvious, especially looking at children and youths, a substantial part of whose perception of reality is frequently derived from programming such as daily soaps, around which to some extent they even orient their lives. With respect to the public opinion the creation process it is thus paramount that individual citizens can rely on editorial content being subject to the basic principles of journalistic independence and accuracy. Allowing commercial objectives to influence editorial content would fundamentally compromise the media's function as a guarantor. The principle of separating advertising from programming therefore represents a protection of the public opinion formation process as such.
3. Allowing product placement poses the obvious danger that editorial content may not be produced in accordance with journalistic principles but instead with such considerations as how product placement might help obtain refinancing. Providers of editorial content would increasingly be drawn into the gravitational pull of third-party commercial interests. This effect would hardly be tolerable even in the actual production phase where product placement takes place. Secondary effects must also be considered however. What would happen for example in a situation where the company promoted via product placement becomes the subject of critical reporting in the public eye? Would there be a guarantee that the media firm involved would continue to observe its journalistic duties in an un-biased manner despite accepting payment for placement? Doubt would seem appropriate here. The concern is thus ultimately that the editorial independence of media firms would be increasingly compromised. Requiring the separation of advertising thus also protects the objectivity and independence of media firms themselves. This consideration is touched upon in the topic paper in marginal fashion (end question 4), but is not advanced with the desired emphasis.
4. If product placement is allowed, this will automatically result in delimitation problems vis-à-vis other placements and specialized advertising forms. Take for example the so-called practice of thematic placement. With this form of placement, no specific products are incorporated into editorial content but rather specific thematic plot lines. These provide a positive depiction of the industries thematized, resulting in an

indirect benefits for the companies concerned. Thematic placement should not be permitted in any form, as it is a specialised advertising technique imperceptible by the average viewer, thus functioning in an entirely subconscious manner. This type of practice cannot possibly be part of any reasonable discussion on deregulation.

If product placement is to be permitted however, there needs to be a very precise definition for it delimiting it from other surreptitious advertising forms. Whether this can be accomplished appears doubtful in view of the rapid pace of developments in the advertising market. The mandatory separation of advertising and programming thus also serves to protect against the increasing commercialization of audiovisual services.

### **On Section II: Quantitative Requirements for Television Advertising**

In contrast to the basic principles of commercial communications, compliance with which must be absolutely mandatory, ARD and ZDF do see deregulation potential with regard to quantitative requirements applicable to television advertising. With respect to the potential elimination of restrictions on daily advertising times, there may be valid reasons, particularly on the part of private commercial content providers. The same applies to relaxing rules on interruptive advertising. With respect to these latter considerations, we suggest retaining the existing provisions under Art. 11 (5) of the directive and maintaining a sharp focus on the copyright integrity of film productions, the broadcast of which may be interrupted by advertising.

ARD and ZDF have no occasion to further address section II of the paper.

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