Article 17: Sponsorship

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Article 17

1. Sponsored television programmes shall meet the following requirements:
   (a) the content and scheduling of sponsored programmes may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster in respect of programmes;
   (b) they must be clearly identified as such by the name and/or logo of the sponsor at the beginning and/or the end of the programmes;
   (c) they must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services.

2. Television programmes may not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.

3. Sponsorship of television programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking but may not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the broadcaster falls.

4. News and current affairs programmes may not be sponsored.

Relevant Recitals: 31 (Directive 89/552 EEC); 43 (Directive 97/36 EC)

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A. GENERAL

I. PURPOSE

(1) The purpose of the regulation of sponsoring in Article 17 in conjunction with Article 1(e) of the Directive is (a) to underline that sponsoring of programmes is legal, (b) to restrict the sponsor’s influence on the programme content violating responsibility and editorial independence of the broadcaster and (c) to make sponsoring so perceptible to the viewer, that the viewer is able to judge for him- or herself whether external, i.e. non-editorial interests have shaped the audiovisual content in question.

(2) The general function of the regulation on sponsoring is, therefore, closely related to the three aims which are pursued by the principle of separation of advertising and editorial content: consumer protection, neutrality of media in the economic competition of third parties, and autonomy of media against undue influence from the economic sphere.1

II. BACKGROUND

1. Acceptance of Sponsoring in the EU

(3) In its Judgment of 18 March 1980,2 the ECJ accepted, in the absence of any approximation of national laws, the Belgian non-discriminatory ban on commercial advertising and publicity for commercial sponsors, if the Belgian rules could be considered as being in the general interest. Given the fact that television advertising and sponsoring of television programmes was subject to widely divergent systems of law in the various Member States, harmonization seemed obvious. Given the aforementioned purpose, in the view of the Commission, harmonization should allow for the permissibility of private financing of broadcasting programmes. Before the introduction of the TWFD, however, sponsoring was not usual; in many countries it was forbidden.3 Where it was permitted, it concerned minor forms only, such as for example, sponsored publicity for radio (Greece and Ireland), for local broadcasters (Italy and Luxembourg) or for subscriber-television broadcasters like Canal Plus in France. Nevertheless, various forms of sponsoring did exist at the time and were more or less tolerated, like the sponsoring of sports events broadcast on television, co-productions, the awarding of prizes in entertainment programmes, or the provision of programmes produced by private companies and offered to broadcasting companies (so-called bartering, see infra, paragraph ###). An absolute ban on

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1. Compare supra, the comment on Art. 10 TWFD.
these activities would, according to the Green Paper,\textsuperscript{4} be contrary to these accepted practices and it would be unrealistic if one would, for example, plead for a ban on the use of cars in television films with the argument that the public could identify the manufacturer of a certain car.

\textbf{(4)} Right from the start, the Commission had a keen eye for the interests of commercial advertisers and for the financing of TV-programmes. Although the Commission acknowledged possible dangers with respect to the \textit{independence of programme makers}, it was not considered necessary to protect their interests by generally prohibiting ‘the transmission of sponsored broadcasts whose content has any relevance to the interests of the sponsor.’\textsuperscript{5} From this sentence, it is clear that financial and commercial interests at least were considered on an even level with the interest of a proper functioning of broadcasting as a means for independently produced information and entertainment. This is confirmed by the fact that the regulation on editorial independence is vague in its wording and does not provide any firm guideline. Moreover, the Commission’s \textit{Green Paper} seems to stress the particular value and expertise of sponsors serving the public interest. The \textit{Green Paper} notes in this respect that a prohibition would affect precisely those broadcasts in which the sponsors would be most interested in. ‘If this were done (i.e. the introduction of a prohibition on sponsored programmes)’, the Commission continues, ‘the sponsors expertise could not be tapped and placed at the service of the public.’\textsuperscript{6}

\textbf{(5)} However, the Green Paper, leaving the responsibility for the production of television programmes overall to the broadcasters, thereby has also \textbf{underlined the interest of the freedom of expression of the broadcasters}. The reference in Article 17(1)(a) to the responsibility and the editorial independence of the broadcaster with respect to programmes shows the importance of the freedom of expression. The Green Paper, after all, points out that the broadcasters themselves, in providing programmes,

\begin{quote}
have to decide by reference to editorial and journalistic criteria whether and how far sponsored films or documentaries meet the requirements imposed by the programme makers in terms of quality, objectivity and balance.\textsuperscript{7}
\end{quote}

These criteria, however, are not elaborated in the preparatory documents. The Green Paper mentions only one relevant criterion: news should only refer to companies, products or services, if this reference is necessary.\textsuperscript{8}

\textbf{(6)} To summarize, the Commission sees a \textbf{twofold purpose} of Article 17:

\begin{itemize}
\item \textsuperscript{4} \textit{Ibid.}, p. 281.
\item \textsuperscript{5} \textit{Ibid.}
\item \textsuperscript{6} \textit{Ibid.}, p. 281.
\item \textsuperscript{7} \textit{Ibid.}, p. 281.
\item \textsuperscript{8} \textit{Ibid.}, p. 280.
\end{itemize}
On the one hand there may [...] be a need for special provisions to protect the programmes of the broadcasting organization in order to counter the possible danger involved in this form of financing, namely that of the influence of external commercial or other external interests on the formation of programmes by the broadcasting organisation. On the other hand, it was not considered necessary to protect the interests of independent broadcasting by generally prohibiting the transmission of sponsored broadcasts whose content has any relevance to the business interests of the sponsor.⁹

(7) These arguments have resulted in an acceptance of the sponsoring of television programmes, **responsibility resting in the hands of the broadcasting organization**. Three conditions should be considered as fundamental rules, to be taken into consideration by the broadcasting organization. News should only refer to companies, products or services if this reference is necessary. Commercial companies should only be mentioned as a producer or a co-producer of a television programme in the beginning or at the end of the sponsored programme.¹¹ Advertisements for the products or services of the sponsor should be forbidden in the programme itself or in programmes, immediately following or preceding the sponsored programme.¹²

### 2. Relaxation of Restrictions

**a) Sponsor Logos During Programmes**

(8) Indeed, in its First Report TWFD¹³ the Commission was already of the opinion that Article 17(1)(b) should also allow sponsor logos during the programme and not only at the beginning or at the end. The Court, in its decision on **RTI**, confirmed this opinion.¹⁴ The respective Italian Law (Article 4 - Decree No 581/93 of 9 December 1993 regulating sponsorship of broadcasting and offers made to the public (Gazzetta Ufficiale No 8 of 12 January 1994, Decree No 581/93)) determined that sponsorship of television programmes may appear only in invitations to view and in trailers immediately preceding the programme itself, and...
in appreciation for viewing or other messages of that type appearing at the end of the programme. It was argued, that Decree No 581/93 is more restrictive than Article 17 of the Directive. Article 17 indeed does not prohibit further references to the sponsor or its products in the course of the programme, provided those references do not encourage purchase in a particular manner by making special promotional references (Article 17(1)(c)). The conclusion that Article 17 merely lays down a minimum requirement as regards the mention of the sponsor’s name and/or logo only, is confirmed by the fact that the Commission’s initial proposal\(^\text{15}\) – which expressly restricted mention of the sponsor to the beginning and the end of the programme – was not adopted. To this proposal, the European Parliament not only gave a favourable opinion on 20 January 1988,\(^\text{16}\) but also sought, at the second reading, to introduce an amendment aimed at re-establishing the original provision.\(^\text{17}\) Nevertheless, ultimately, an explicit restriction was not incorporated in the text of Article 17. For this reason, the Court decided that Article 17(1)(b) must be interpreted as **permitting mention of the sponsor’s name and/or logo** during a programme. It must, of course, be borne in mind that Article 17(1)(c) provides, that sponsored television programmes must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services.

\(^{(9)}\) However, under Article 3(1) of the Directive, Member States remain free, as regards television broadcasters under their jurisdiction, to lay down stricter or more detailed rules in the areas, which it covers. It is thus implicit that, even if Article 17(1)(b) does not prohibit mentioning the sponsor’s name or logo during a programme, Member States may impose **stricter rules** in this area on broadcasters within their jurisdiction, provided they do not infringe the freedoms guaranteed by the EC Treaty and, in particular, the freedom to provide services and the free movement of goods (see, **infra**, paragraph ###).

\(b)\) **Lifting the Ban on Sponsoring for Prescription Drugs**

\(^{(10)}\) In its same First Report, the Commission also proposed lifting the ban on sponsoring by companies whose principal activity consisted of the production and sale of medicinal products and medical treatments, available on prescription only, the main argument being that these companies were unjustly discriminated with respect to companies whose activities in this field consisted of less than 49 per cent of their total activities.\(^\text{18}\) The Commission’s Initial Proposal\(^\text{19}\) on Article 17 did not mention sponsoring for medical products and treatments at all. Article 17 only contained a ban on sponsoring by companies whose principal activity is the manufacture and the sale of tobacco products. The EESC, however, stressed that,
in order to avoid unacceptable self-medication, the viewer must not associate sponsorship by pharmaceutical companies with a particular medicinal product. This advice has been followed in the Commission’s Amended Proposal: such sponsorship should not circumvent the prohibition of television advertising for medical products and medical treatment only available on prescription. Therefore, the amended Article 17 allowed for sponsorship by the pharmaceutical industry, provided these companies did not promote specific medical products or medical treatments ‘only available on prescription in the Member State within whose jurisdiction the broadcaster falls’ (emphasis added). The italics refer of course to the interpretation of Article 2. If differences exist between Member States in their respective prescription policies, it should be understood that the general ban on making special promotional references to products or services of the sponsor (Article 17(1)(c)), would provide for coping with these differences.

III. DEFINITION

(11) Sponsorship is defined in Article 1(e). In the commentary on Article 1(e), the following elements are interpreted: (a) ‘any contribution’, (b) ‘made by a public or private undertaking not engaged in television broadcasting activities or in the production of audio-visual works’, (c) ‘to the financing of television programmes’ and (d) ‘with a view to promoting its name, its trade mark, its image, its activities or its products.’ (see supra the comment on Article 1e TWFD ###).

IV. COMPATIBILITY WITH/RELATION TO OTHER EC LAW AND/OR INTERNATIONAL LAW

1. Freedom to Trade and Sell and the Freedom to Provide Services

(12) Sponsored programmes, are often programmes with a special format, intended to serve the interests of both broadcasters and sponsors. Restrictions with regard to sponsored programmes may influence the programme format and, hence, the freedom to receive and retransmit this kind of programmes. Moreover, whereas sponsoring could also be considered as a special form of commercial communication, restrictions could hinder manufacturers of goods and providers of services in aiming their commercial communication to the audience.

The restrictions of Article 17 TWFD are (a) the requirement that content and scheduling of sponsored programmes may not be influenced by the sponsor, (b) the identification of the sponsor, (c) the ban on special promotional references to the

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20. EESC, Opinion TWFD II.
21. Commission, Proposal TWFD II(2), Rec. 34.
products of the sponsor, (d) the total ban on sponsoring by tobacco-companies and (e) the partial ban on sponsoring by pharmaceutical undertakings.

(13) The restrictions (d) and (e) are related to respectively Directive 2003/33/EC on advertising and sponsorship in respect of tobacco products and Directive 2001/83/EC on a Community Code relating to medicinal products for human use. Article 5 of Directive 2003/33 prohibits sponsorship of events or activities involving or taking place in several member States or otherwise having cross-border effects. Recital 5 of the first Directive expressly confirms that sponsorship of events on a purely national level is not regulated. The requirement of having cross-border effects, however, is not stipulated in Article 4 that prohibits the sponsoring of radio programmes by undertakings whose principal activity is the manufacture or sale of tobacco products. Apparently, a ban on sponsorship of broadcast programmes by the tobacco industry concerns a field that should be regulated at Community level. In Germany/EP and Council 22 the Court indeed concluded that, at the time of the introduction of Directive 2003/33, disparities existed between national rules on sponsorship in respect to tobacco products which were such as to obstruct fundamental freedoms and, thus, had a direct effect on the functioning of the internal market, justifying intervention by Community legislature (paragraph 51).23 Even more so, similar intervention, such as a total ban on television sponsoring by tobacco manufacturers, could, therefore, be considered justified at the time of introduction of the TWFD in 1989.

(14) Recital 44 of Directive 2001/83/EC states that the prohibition in Article 14 TWFD of television advertising of medical products which are only available on medical prescription, should be made of general application, by extending it to other media. ‘Advertising’ in Article 86 of Directive 2001/83 is defined among others as ‘any inducement designed to promote the prescription, supply, sale or consumption of medicinal products.’24 Article 17(3) TWFD determines that sponsorship of television programmes by undertakings whose activities include the manufacture or the sale of medicinal products and medical treatment may not promote specific medicinal products or medical treatments available only on prescription in the Member States. This prohibition, therefore, is not a prohibition of sponsorship but of advertising, in the sense of Directive 2001/83. The prohibition on advertising of medical products which are only available on prescription, also contained in Article 14 of the Directive, therefore, is generally accepted in the Member States; the protection of health constitutes an overriding reason relating to the general interest which may justify the restriction on the freedom to provide services.25

(15) The kind of activities restricted by paras (a), (b) and (c) may influence the programme format; their prohibition could hinder manufacturers of goods and providers of services in aiming their commercial communication to the audience. It should

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23. See also supra, the comments on Art. 13 TWFD.
24. See also supra, the comments on Art. 14 TWFD.
be remembered that the Court’s decision in RTI\textsuperscript{26} mitigated the influence of the restriction according to paragraph(b) on the programme format. Nevertheless, these provisions formulate restrictions on the freedom to provide services and on the free movement of goods. The restriction on the freedom to commercialize a programme format by making special promotional references to those products or services, thereby restricting the freedom of services, however, could be justified, as the Court decided in ARD,\textsuperscript{27} by the imperative need of general interest to protect consumers against abuses of advertising or, as an aim of cultural policy, the maintenance of a certain level of programme quality. With respect to the freedom to trade and sell goods, it is worthwhile to remember the German High Courts’ \textit{(Bundesgerichtshof)} decision in the case of ‘Feuer, Eis und Dynamite’.\textsuperscript{28} The Court considered the obligation to inform the public about the sponsoring of a movie film not as a prohibition of the sale of a work of art, but merely as a prohibition of a certain \textbf{mode of sale}, that affected neither the nature of the work nor the artist’s creative freedom. Distinguishing the prohibition of the sale of a work from a certain mode of sale, the Court implicitly recognized the decision of the ECJ in Keck (see supra, ###). Prohibitions concerning the mode of sale (‘certain selling arrangements’) are not to be considered as a quantitative restriction or as a measure with equivalent effect in the sense of Article 28 EC.\textsuperscript{29}

\textbf{(16)} Under Article 3(1) of the Directive, Member States remain free, as regards television broadcasters under their jurisdiction, to lay down stricter or more detailed rules in the areas, which it covers. However, these stricter and more detailed rules, according to the considerations, accompanying the Directive, should be taken by the Member States with due regard to Community law.

\textbf{(17)} It is thus implicit that, even if Article 17(1)(b) does, for instance, not prohibit the mentioning of the sponsor’s name or logo during a programme, Member States may impose stricter rules in this area on broadcasters within their jurisdiction, provided they do not infringe the \textbf{freedoms guaranteed by the EC Treaty} and, in particular, the freedom to provide services and the free movement of goods. These restrictions may be imposed in the coordinated areas, that is, with regard to editorial independence, identification of the sponsor and product placement. The question, in particular, of whether these restrictions could hamper the freedom to provide goods as laid down in primary EC-law must be answered in the same way as has been demonstrated supra.

\section*{2. Freedom of Expression}

\textbf{(18)} According to Article 6 EC, the European Commission and the ECJ have to recognize the fundamental principles of the freedom of expression as laid down

\textsuperscript{26} ECJ, \textit{RTI}, op. cit.
\textsuperscript{27} ECJ, \textit{ARD v. ProSieben}, op. cit.
\textsuperscript{28} \textit{Bundesgerichtshof} (German Federal Supreme Court), [1995] \textit{GRUR} 744; F. Henning-Bodewig, ‘\textit{Werbung im Kinospielfilm - Die Situation nach ‘‘Feuer, Eis und Dynamite’’}’, [1996] \textit{GRUR} 321.
Advertising and information about goods and services in general is protected by the freedom of expression as laid down in Article 10 ECHR. European and national restrictions, therefore, must comply with Article 10(2) ECHR. This of course also holds true for restrictions in the field of TV-sponsoring. Commercial messages contained in broadcast programmes cannot be excluded from the scope of Article 10 ECHR.

(19) The cases of the European Court of Human Rights (ECtHR) on the borderlines between advertising and (consumer) information could be summarized as follows. There are three cases in which the ECtHR considered the interests in a case in full, with respect to disputed national restrictions on objective and truthful information, related in one way or another to goods and services. The Court grants full protection to information about goods and services, if this information:

- Contains no incitement of the public to purchase a particular product;
- Could be considered as participation in a debate reflecting the general interest;
- Contains information about a genuine problem;
- Is not incorrect and not misleading;
- Could only by way of a secondary effect be considered as commercial publicity;
- Is produced through an initiative, taken by a journalist.

(20) This approach of the ECtHR guarantees sufficient editorial freedom with respect to information about goods and services of the sponsor. Information about goods and services that does not fulfil these (cumulative) criteria is considered as information of a commercial nature that is not to be tested fully against the protection of the freedom of expression. In this respect, the Member States keep a certain margin of appreciation in assessing the existence and extent of the necessity of an interference. Cases like Markt intern/Germany demonstrate that a sponsored magazine with information of a commercial nature is indeed treated differently by the Court.

B. DETAILED COMMENTARY

I. EDITORIAL INDEPENDENCE

1. General

(21) Article 17(1)(a) states that the content and scheduling of sponsored programmes may in no circumstances be influenced by the sponsor in such a way

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30. ECtHR, 13 October 1993, Appl. 16844/90 (NOS/Netherlands).
32. ECtHR, 20 November 1989, Appl. 10572/83 (markt intern Verlag).

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as to affect the responsibility and editorial independence of the broadcaster in respect of programmes. 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. The Directive provides for no further guidelines. The Green Paper leaves decisions in this field entirely with the individual broadcasting organization. Obviously, according to the Green Paper, these decisions will also have to be taken in view of the financial resources of the broadcasting organization. Furthermore, sponsors’ special expertise could be placed at the service of the public (see supra, paragraph ### A I). These considerations leave broadcasting organizations ample space to operate within a rather grey area and oblige Member States to provide for specific measures in order to guarantee the editorial independence of broadcasting organizations. Measures in this area further the right of free speech by determining the limits of editorial freedom. This special characteristic of the measures sometimes renders their application difficult.

2. Guarantees with Respect to the Editorial Independence

a) Introduction

(22) National legal guarantees with respect to the editorial independence of the broadcaster differ from country to country. These differences are for the most part dependent on the way the broadcasting organization is financed. Since public service broadcasters, different from commercial broadcasters, should in principle not be free to make profits by commercializing their programmes or let particular third parties profit by public broadcasting programmes, public broadcaster have to meet higher standards than the minimum rules the directive lays down. The higher standard in this respect is that decisions on the scheduling or the content of a television programme should not be influenced by commercial or other purposes of third parties, governmental institutions included. This is not the place to give a comparative survey of national legal guarantees. However, some of them are worth mentioning as neither the Directive nor the Court’s jurisprudence give firm guidelines. The British ITC Code of Programme Sponsorship provides for the most elaborate guidelines.

(23) Editorial independence is mainly threatened by cooperation between the broadcaster and third parties, governmental institutions included. Cooperation mostly takes place with regard to so-called masthead and similar title sponsored programmes, consumer advice programmes, business and finance programmes and to merchandising and licensing arrangements.

33. See for example Art. 55 of the Dutch Media Act: public broadcasters ‘shall not use any of their activities in the service of realising profits for third parties.’ See also, infra para. 26 and 27.
b) Restrictions on Title Sponsoring and Masthead Programmes

In this special form of TV-sponsoring, the name of the sponsor is optically and acoustically linked into the title of the show or other programme and into all accompanying activities in other media. Title sponsoring appears usually when print media and television broadcasters cooperate, i.e. when the programme format and the title of the television programme are the same as the title and the editorial formula of the printed magazine: thus providing for a continuous promotion on television for the printed magazine. The financial background for this kind of publicity normally is a title licence agreement between the broadcaster and the publisher of the printed magazine. Title sponsoring in this field is called ‘mast heading’ (in line with the meaning of ‘masthead’ as an imprint with respect to papers), a masthead programme being a television programme made or funded by a periodical, newspaper, book or information software publisher. This may include websites that have significant editorial content and could be regarded as the web equivalent of a published magazine. The television programme may incorporate the name of the publisher’s product in its title and have similar editorial content. National rules on this form of sponsoring differ. The strictest form of regulation provides the British ITC Code on Programme Sponsorship. According to Rule 8.4. of the Code, magazines that share the name of an advertiser, or operate as supplementary marketing initiatives to other types of business, may not supply masthead programming. This Rule excludes sponsored magazines from access to television programmes. Masthead programmes in cooperation with other magazines are permitted, if, according to Rule 13, the programmes are not a television version of a specific edition of the parent publication and there are no references within the programme specifically to the parent publication or to any articles or other matter in that publication. Internal references to the programme title should only be used sparingly. Any visual references should be minimal. These rules are designed to limit the exposure a masthead brand is given within a programme. This rule acknowledges that masthead programming operates as a limited exception to the rules preventing sponsors from having influence over the content of programmes. The inclusion of the magazine’s name in the programme title should act as a badge of origin for the programme content, not as a promotional tool for an advertiser to promote other, non-magazine, activities. This kind of title sponsoring is legal in Germany, provided that the television programme

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36. See for this definition: Rule 2.2. of the British ITC Code on programme sponsorship.

37. However, masthead programming is often not a case of problematic sponsoring, if the name or title is provided for a normal license fee. In this case the element of ‘any contribution’ is lacking. It is then a problem of possible surreptitious advertising and not of sponsoring.
c) Restrictions on Consumer Advice Programmes

(25) Item sponsoring integrates the products of the sponsor in the programme itself by giving attention to the products in a programme format that is particularly directed to consumer groups with possible interest in the product category (for example cosmetics, household products, cars). Editorial independence might be highly influenced if products of the sponsor are subject to editorial review. In their regulations, some Member States demonstrate being aware of such concerns. So, Article 8.4 of the British ITC Code of Programme Sponsorship determines that programmes or series, offering or including reviews or advice on products or services (including where to go and what to see), may not be sponsored by advertisers whose business involves the marketing or provision of products or services of the type featured. This restriction is designed to prevent advertisers with a particular interest in a certain field, influencing (or potentially influencing) editorial content. Therefore, a programme that includes reviews about cars could not be sponsored by a car manufacturer whose product is reviewed (or might potentially be reviewed) in the programme. Instructional (‘how to do’) programmes, which do not include purchasing advice or reviews, may be sponsored by advertisers who supply products or services relevant to the area concerned.

(26) While business and finance programmes are not specifically prohibited from sponsorship, such programmes may usually not be sponsored or are restricted in the choice of sponsor. This is due to the prohibition on sponsorship of programmes, which include reports on current affairs. For example, programmes, which contain interpretation or comment on relevant news stories or topical issues, market reports, current company profiles, etc., are some of the programmes that could not be sponsored.

d) Rules on Merchandising and Licensing Arrangements

(27) Cooperation between public broadcasting organizations and commercial parties may lead to threats to the editorial independence of the broadcast organization or to general the principle that public organizations may not be a vehicle for excessive private profit of commercial parties. The last principle, for example, is laid down in Article 55 of the Dutch Media Act.

(28) According to Rule 8.6. of the British ITC Code, programme makers may enter into merchandising arrangements with third parties in order to produce

Section 20(2) on ‘Verlags-TV’ of the Joint Guidelines of the Media Authorities (Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring im Fernsehen in der Neufassung vom 10 February 2000).

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products based on programme characters or other elements of the programme. However, these third parties may not fund any programme with which they are involved in this way. This rule is designed to prevent the market in programmes, particularly children’s programmes, being distorted by advertisers who, if this rule did not exist, might wish to make or fund programmes based on existing commercial products. Such programmes could be offered to broadcasters at a discount, reflecting their undoubted promotional value for the advertiser concerned. It is not seen this way in other Member States. **Animation programmes** are often either co-financed by a toy manufacturer (in legal terms, it is often constructed as a pre-sale licence of merchandising rights, paid as a flat fee or in advance on a merchandising revenue participation of the film producer) or produced by a subsidiary of the toy manufacturer. Broadcasters then are obliged to warn viewers with a sponsor credit. Co-finance of toy manufacturers has become an integral part of financing animation. Children’s interests are safeguarded by the prohibition to advertise for toys related to the programme directly before and after the airing of such programmes.

(29) Two German cases (**Guldenburg** and **Boro**) throw further light on the special characteristic of measures determining the limits of editorial freedom. In the **Guldenburg** case it is questioned whether a public broadcaster can act against the merchandising by a third party of the popularity of a programme developed and transmitted by ZDF, ‘Das Erbe der Guldenburgs’. The third party has deposited the programme’s name ‘Guldenburg’ as a trademark for products such as spirits and perfume. Can ZDF obtain an injunction to cancel the registration of the trademark? The **BGH** (German Federal Supreme Court) dismissed the claim. ZDF considered its editorial freedom had been violated. This freedom included, according to ZDF, not only the freedom to determine the content of a programme, but also the freedom to exploit commercially its programme title, in particular by initiating an action to cancel the registration of the trade mark by a third party. The **BVerfG** (German Federal Constitutional Court), that had to decide whether the **BGH**'s decision did or did not infringe a fundamental right of ZDF, held just the opposite opinion. ZDF must be prohibited from exploiting its trade name commercially, because by this prohibition it becomes impossible for third parties (directly or indirectly) to exert influence on the design and contents of the programme of the public broadcaster. Editorial freedom requires exactly this: that direct or indirect influence of third parties on the programme is reduced. The decision of the **BGH** in the **Guldenburg**-case could, according to the **BVerfG**, therefore only regard the economic and financial interests of ZDF and not its (fundamental) editorial freedom. One may compare this decision to the similar Dutch case of **Belfleur**. In this case, the **Commissariaat voor de Media** (Media

Authority) held that a trade mark licence of a programme title, lent by a public broadcaster to the publisher of an illustrated magazine, led to a violation of the editorial independence of the public broadcaster, because the licensor generally is obliged with regard to the licensee to make use of the mark and is therefore obliged to continue the broadcasting of the programme under the programme title.

(30) A sophisticated form of title sponsoring is represented in the German Boro-case. In this case, the German public broadcasting company ZDF broadcasted a ‘crime’ series entitled ‘Wer erschoss Boro’. The solution of each episode was broadcast one week later. Viewers could win an amount of Deutsche Mark (DEM) 10,000 (approx. EUR 5,000) if they guessed the right solution. To this end a book was published, entitled ‘Wer erschoss Boro, Handakte des Kommissars’, containing pictures and pre-printed return cards. The publisher of the book paid DEM 100,000 to ZDF for the use of the title and sold over 300,000 copies at DEM 15 each, a turnover of four and a half million DEM. ZDF announced this handy book in its TV programmes. Altenburger, a manufacturer of detective board games, sued ZDF because of unfair competition. In my view, the Boro-construction is ingenious and could be considered as a fine piece of media innovation, which should not be hampered by competition rules, one of the aims of which is the advancement of innovation. This is what the lower court stated. Nevertheless, according to the BGH, ZDF, behaving as a competitor on the market of games, competed unfairly by breaking specific media rules: a public broadcasting company should, in the making of its programmes, be guided only by editorial and not by commercial motives.

e) Bartering and Sponsor Publicity

(31) Bartering occurs when goods or services are exchanged, in principle without exchanging money (see also supra ###). Bartering in relation to TV programmes covers several publicity practices:

– advertiser supplied programmes in exchange for advertising time (sometime before or after the programme or during the advertising break) or a reference to its name in the programme credit titles, excluding any explicit reference to its product or services within the programme itself;
– financial bartering with regard to TV-games, quizzes, etc.: the advertiser provides the prizes in exchange for advertising breaks during the programme;
– advertiser supplied programmes within which its products or services are mentioned (product placement).

(32) The Dutch SALTO-case shows an example of the last practice. The Dutch local public broadcasting company SALTO made broadcasting time available

41. Bundesgerichtshof (German Federal Supreme Court), Wer erschoss Boro?, [1990] ZUM 291.

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during the late night hours to a programme supplier who in turn cooperated with the owner of a sex telephone line. The programme supplied to SALTO consisted of a soft pornographic film, which was repeated every twenty minutes. The film featured an actress who had a telephone conversation with somebody while slowly undressing. Anybody who wished to hear the voice of the actress had to call the telephone number of the owner of the telephone line at a rate of fifty cents per minute. This number was not broadcasted, but widely available because of much free publicity in the print media (not advertising). SALTO was paid an amount of Dutch Guilders (DLF) 1,500 (approx. €650 EUR) for one hour broadcasting; the provider of the telephone service made an excessive profit on the use of the service because of the publicity generated by the use of the broadcasting time of the local public broadcaster. The Dutch Commissariaat voor de Media (Media Authority), however, considered this piece of media-innovation an infringement of the principle that the programmes of public broadcasters should not serve as a means for excessive private profits by third parties.

3. Responsibility of the Broadcasting Organization

(33) Cooperation between broadcast organizations and third parties vary from the simple supply of facilities to the partaking of advertisers in the editorial board of a TV programme; it will be clear that the last option is a dangerous one, seen from the viewpoint of the broadcasters’ editorial independence and his own responsibility for the content of his programmes. The essential point here is that the decision concerning acceptance and transmission of such a programme must remain fully under the editorial responsibility of the broadcasting organization.

(34) Commissioned productions, produced by third parties, raise the problem of broadcaster supervision of sponsor contracts between advertisers and third party producers. This problem has sometimes been solved, by requiring the broadcasting organization to exercise a reasonable diligence to obtain, from its employees or from other persons with whom the broadcasting organization deals directly in connection with a programme, sufficient information to enable the broadcaster to comply with disclosure requirements. Other solutions require the broadcasting organization to contract directly with any sponsor in the production chain.

(35) Productions that are purchased and broadcast are usually treated differently from in house productions or commissioned productions. Purchased productions reflect the problems concerning the reporting of sports events. There also, a broadcaster could be confronted with commercialization, which he himself is sometimes not allowed to engage in. Disclosure rules are difficult to apply to films for theatrical release which could end up on television years later. Most rules

44. Art. 56a of the Dutch Media Act.
permit the broadcasting of this kind of film, even when they contain product placement that would not be permitted if the film were produced by the broadcasting company for broadcasting on television.

II. IDENTIFICATION OF THE SPONSOR

(36) Sponsored television programmes must be clearly identified as such by the name and/or logo of the sponsor. Article 17(1)(b) does not prohibit the mentioning of the sponsor’s name or logo during the programme, as has been explained, supra, paragraph ###. Disclosure of the sponsor’s identity must take place by mentioning the name and/or the logo of the sponsor. The Directive is silent on further conditions. It does not provide for guidelines concerning the length, the frequency or the character (still or moving images) of the identification.45 There may also be bumper credits (entering and/or leaving a commercial break). The publicity effect of the TWFD definition of sponsorship includes promoting the activities or the products of the sponsor. One may doubt if this could mean that the disclosure rule requires that the products or the services of the sponsor have to be mentioned. Article 17(1)(c) prohibits in particular the making of special promotional references to products or services of the sponsor. The showing of products in a neutral form, therefore, is not forbidden and one may wonder if this could also be the case for the way the sponsor is identified. On the other hand, by mentioning only the name or the logo of the sponsor as a means of identification, it could be defended that Article 17(1)(b) restricts the publicity effect to this item only. Article 17(1)(b) does not contain the broader expression ‘appropriate credits’, as in Article 17(1) of the CTT.46 In its Fourth Report,47 the Commission i.a. mentions developments in the field of virtual advertising. The Commission’s view, as stated in its Interpretative Communication48 clearly favours a liberal interpretation of Article 17 with respect to this technique. It is expressly stated that Article 17 does not contain a prohibition to refer to the products of the sponsor. Only encouragement of the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services, is forbidden. Therefore the Commission advises another liberal interpretation of the rules on sponsoring by determining:

46. ‘Appropriate credits’ may be, according to the Explanatory Report (para. 281), the company name or the name of one of its most well-known products, logo or any other means of identifying the sponsor, on the condition that such credits do not contain specific promotional elements (encouragement to purchase, reference to the quality or the effectiveness of the product, etc.). The ECTT thus uses a wider range of identification means, including the name of the most well-known products of the sponsor.
47. Commission, Fourth Report TWFD.
48. Commission, Interpretative Communication, point. 3.1.2, paras 53 et seq.
During the broadcasting of sponsored programmes, special promotional references to the products or services of the sponsor or a third party shall be not allowed, unless the reference expressly serves as an indication of the sponsor or as a clarification of the connection between the programme and the sponsor’s company. (emphasis added.)

A special promotional effect, resulting from the means implemented to identify the sponsor, therefore, is not forbidden per se. One may note that these remarks are presented as an interpretation of the existing text of the article and not as a proposal for an amendment.

(37) The practice in the Member States differs. The principal purpose of sponsor credits, according to the British ITC Code on Sponsoring, must be to create an association between the sponsor and the actual programme being sponsored. The link between the programme and sponsor must be reflected in the sponsor credits, either visually or orally or both. Use of the products of the sponsor within the sponsor’s credits, however, is not excluded, but any such use must help to reflect the link between the sponsor and the programme. This philosophy does not exclude mentioning the sponsor’s products or services, provided that no encouragements as to the purchase of products and services take place. In contrast to these rules, Article 10 of the Dutch Rules on Sponsoring by Commercial Broadcasters\(^49\) forbids advertising sponsor credits, which contain identifiable products, services or packaging of products or indirect references to products or services by way of image or sound. According to No. 10.3 and 4 of the German Advertising and Sponsoring directives, instead of naming or showing the sponsor, the naming or showing of the company logo, product name or trademark is also possible, which may be done by means of a moving picture. In any case, the sponsorship announcement must produce an obvious reference to the sponsored broadcast and must not, apart from an image-forming slogan, contain any additional advertising messages.\(^50\)

III. **Undue Promotional Effects**

1. **General**

   (38) The scope of the ban on special promotional references in sponsored programmes according to Article 17(1)(c) has, to some extent, already been discussed above - mainly in the context of analysing legitimate means of identifying

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the sponsor (see supra at paragraphs 18 et seq.). Promotional effects resulting from the mentioning or showing of products in programmes may in particular be at stake in the case of product placement. It is a promotional tactic used by marketers in which characters in a fictional play, movie, television series, or book use a real commercial product. The tactic is not restricted to fiction: programmes on cooking, housekeeping and other consumer-orientated programmes lend themselves very well to the tactics of product placement. Typically, either the product and logo is shown or favourable qualities of the product are mentioned. The product price is not mentioned or any negative features or comparisons to similar products. Quite generally, product placement involves placing a product in highly visible situations. The most common form is movie and television placements. The combination of programme sponsoring and product placement, promoting the products of the sponsor, is a very popular marketing tactic. Script sponsoring is a tactic which integrates the publicity for the sponsor in the programme itself, for instance in dialogues or by choosing appropriate locations. As an example, the Dutch case of Medisch Centrum West may be mentioned. This medical ‘soap’ shows a doctor, who is being asked by a nurse what sleeping drug to offer to a patient, who recently fell down from a staircase, apparently due to the use of a sleeping drug with long-term ‘hang over’ effects. Our doctor thinks for a moment and answers: ‘Give her LORAMET, the drug that has shorter “hang over” effects’, LORAMET being the trademark of the pharmaceutical company who was a co-sponsor of the programme.

2. Prohibition on Encouragement

(39) Sponsored television programmes must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services. The reference in this paragraph to the promotion of a third party’s products or services is designed to avoid the emergence of practices of cross–sponsorship between two or more sponsors and two or more sponsored programmes.

(40) This rule is at the heart of the sponsor regime: liberalization of the sponsor regime with regard to the place of sponsor publicity or with regard to the possibilities of virtual advertising always is tempered by references to this rule. In its Interpretative Communication, the Commission, however, expressly stated that Article 17 does not contain a prohibition to refer to the products of the sponsor. Only encouragement of the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services, is forbidden. The Commission allowed references to products or services that expressly serve as an indication of the

51. See also the comments on Art. 10 TWFD.
52. J.J.C. Kabel/M.M. Reijntjes (eds), op. cit., pp. 482–484.
53. Commission, Interpretative Communication, para. 3.1.2.
sponsor or as a clarification of the connection between the programme and the sponsor’s company.\textsuperscript{54} It is difficult to understand how these references could function as a neutral disclosure of the fact that the programme has been sponsored. These developments with regard to product placement may have serious consequences, not only for the interpretation of Article 17(1)(c) but also with regard to the ban on surreptitious advertising.

IV. PROHIBITED SPONSORSHIP

1. Sponsoring by Tobacco Companies

(41) According to Article 17(2), television programmes may not be sponsored by undertakings whose principal activity\textsuperscript{55} is the manufacture or sale of cigarettes and other tobacco products. This paragraph contains a ban on financing of television programmes by tobacco companies. Financing of television programmes by other companies in order to promote the name, trademark, image, activities or products of tobacco companies will fail, due to the ban on direct and indirect advertising for tobacco products on television (Article 13). This ban is independent of the advertisers’ characteristics.

2. Sponsoring by the Pharmaceutical Industry

(42) Sponsorship of television programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking but may not promote specific medicinal products or medical treatments available only on prescription in the

\textsuperscript{54} The \textit{Explanatory Report ECTT} (para. 286) mentions one possible exception: in the case of game shows and quizzes in which the prizes comprise the products or services of the sponsor, one single oral or visual reference to the name or logo of the sponsor or to the same product or service is allowed as information for the public. With the exception of this case and other cases in which the presentation of a product is necessary for the conduct of the programme (announcements for films in a programme covering cinema, or for literary works in a literary programme), any other form of presentation of products or services within sponsored programmes is prohibited, according to the \textit{Explanatory Report}.

\textsuperscript{55} The \textit{Explanatory Report}, ECTT (para. 288) contains some criteria to determine whether the activity in question is the principal activity. It mentions 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) and the nature of the connected activities (for example: when such activities are closely linked to the principal activity). Art. 18 ECTT implies that the possibility of sponsoring programmes is available to any natural or legal person whose ‘principal’ activity falls outside the scope of Art. 15 ECTT. This includes natural or legal persons who do not have access to television advertising, for example, where the advertising of certain products or services is confined to other media than television.
Member State within whose jurisdiction the broadcaster falls, Article 17(3).\(^{56}\) It is not clear whether this rule only applies to the identification of the sponsor, or whether it also relates to product references in the sponsored programme. It is also not clear whether the term ‘promote’ allows for the showing or mentioning, in a neutral manner, of medicinal products. Nevertheless, product placement of medicinal products will be partly held up by the ban on (indirect) advertising for specific medicinal products or medical treatments available only on prescription in the Member State, in Article 14(1); see Rec. 43.

3. **News and Current Affairs**

(43) Article 17(4) sets out that news and current affairs programmes may not be sponsored. The Directive contains no further explanation of the concept of news and current programmes which is also used in Article 11(5). The Explanatory Report on the ECTT clarifies the terms. 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.\(^ {57}\) In its Opinion No. 4 (1995) on certain provisions on advertising and sponsorship, the Standing Committee concluded that these programmes must involve a critical and investigative journalistic approach likely to engage the political responsibility of the broadcaster. According to the Committee, the principle behind this provision must be borne in mind, namely to avoid confusion between ‘information’ and ‘advertising’.\(^ {58}\) This would advocate for a relatively broad interpretation of the term.

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56. Art. 18(1) ECTT differs insofar as it is concerned with undertakings, in the present case, whose principal activity is related to products or services in the meaning of Art. 17(3) TWFD. Cf. supra, at footnote 57###. Art. 18(2) of the Convention, however, contains an exception: companies whose activity includes, inter alia, the manufacture or sale of medicines and medical treatments may sponsor programmes by promoting the name, trademark, image or activities of the company; any reference to medicines or specific medical treatment available only on medical prescription in the transmitting Party, nevertheless, is excluded.


58. Paragraph 243.