

SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4771 GIBRALTAR Thursday 15th October 2020

LEGAL NOTICE NO. 356 OF 2020

BROADCASTING ACT

BROADCASTING ACT (AMENDMENT) REGULATIONS 2020

In exercise of the powers conferred on him by section 9(1)(a) of the Broadcasting Act 2012, and all other enabling powers, and in order to transpose in the Law of Gibraltar Directive (EU) 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action concerning the provision of audiovisual media services, the Minister has made these Regulations-

Title.

1. These Regulations may be cited as the Broadcasting Act (Amendment) Regulations 2020.

Commencement.

2. These Regulations come into operation on the 19 September 2020.

Amendment of the Broadcasting Act 2012.

3. The Broadcasting Act 2012 is amended in accordance with the provisions of these Regulations.

Amendment of section 2.

4. In section 2—
 - (a) in subsection (1), in the definition of “audiovisual commercial communication”, the word “entity” is substituted with the word “person”;
 - (b) in subsection (1), in the definition of “audiovisual commercial communication”, the words “or user generated video” are inserted between the words “included in a programme” and the words “in return for payment”;
 - (c) in subsection (1), in paragraph (a) in the definition of “audiovisual media service”, the words “or a dissociable section thereof” are inserted between the words “the principal purpose of which” and the words “is the provision of programmes”;
 - (d) in subsection (1) the following new definition is inserted directly following the definition of “DTT”: -

““editorial decision” means a decision which is taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day to day operation of the audiovisual media service;”;

- (e) in subsection (1), in the definition of “product placement”, the words “or a user generated video” are inserted between the words “featured within a programme” and the words “in return for payment or for similar consideration;”;
- (f) in subsection (1), in the definition of “programme”, the words “, irrespective of its length,” are inserted between the words “individual item” and the words “within a schedule”;
- (g) in subsection (1), in the definition of “programme”, the words “and whose form and content is comparable to the form and content of radio or television broadcasting;” are deleted and a “;” is placed after the words “media service provider”;
- (h) in subsection (1), the definition of “sponsorship” is replaced in its entirety with:

““sponsorship” means any contribution made by a public or private undertaking or natural person not engaged in providing audio media services, audiovisual media services or video sharing platform services, or all of them, or in the production of audio works or audiovisual works, or both, to the financing of audio media services, audiovisual media services, video sharing platform services or user generated videos, or all of them, or programmes with a view to promoting its name, its trade mark, its image, its activities or its products;”;

- (i) in subsection (1), the following new definitions are inserted directly following the definition of “TFEU” -

““user generated video” means a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video sharing platform by that user or any other user;

“video sharing platform provider” means a natural or legal person who provides a video sharing platform service;

“video sharing platform service” means a service the principal purpose of which, or a dissociable section thereof or an essential functionality of it, is the provision of programmes, user generated videos, or both, for which the video sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, to the general public by means of electronic communications networks and the organisation of which is determined by the video sharing platform provider, including by automatic means or algorithms by displaying, tagging and sequencing.”;

- (j) in subsection (1C)(2), in paragraph (b) the words “programme related” are inserted immediately before the words “audiovisual media service” each time they appear;
- (k) the following new subsections shall be inserted immediately following subsection (1C)(4): -

“(4A) Media service providers shall inform the Authority about any changes that may affect the determination of jurisdiction in accordance with subsections (1), (2) and (3).

(4B) The Authority shall establish and maintain a list of media service providers in Gibraltar, which it shall communicate to the Commission, and shall indicate on which of the criteria set out in this section their jurisdiction is based.”.

Amendment of section 28.

5. Section 28 is replaced in its entirety with-

“28.(1) No audio media service or audiovisual media service shall contain any:

- (a) incitement to violence or hatred directed against any group of persons or a member of a group based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation;
- (b) public provocation to commit a terrorist offence;

(2) any measures taken for the purposes of this section shall be necessary and proportionate.”.

Amendment of section 28A.

6. Section 28A is replaced in its entirety with-

“28A.(1) The Authority shall ensure, through proportionate measures, that media service providers provide continuous and progressively accessible services to persons with disabilities.

(2) Media service providers shall report on a regular basis to the Authority on the implementation of the measures referred to in subsection (1).

(3) The Authority shall report to the Commission on the implementation of the measures referred to in subsection (1) by no later than the 19 December 2022 and every three years thereafter.

(4) For the purposes of this section, the Authority shall encourage media service providers to develop and submit accessibility action plans in respect of making their services more accessible to persons with disabilities.

(5) The Authority shall designate a single, publicly available online point of contact which shall be easily accessible by persons with disabilities for providing information and receiving complaints in respect of accessibility issues.

(6) The Authority shall ensure that emergency information, public communications and announcements in natural disaster situations that is made available to the public through audiovisual media services, is provided in a manner which is accessible to persons with disabilities.”.

Amendment of section 29.

7. In section 29, the following new subsection is inserted immediately after subsection (3):

“(3A) Audiovisual commercial communications for alcoholic beverages in on-demand audiovisual media services shall comply with the provisions of section 29D except for sponsorship and product placement.”.

Amendment of section 29A.

8. In section 29A, the word “television” is inserted after the word “Isolated”.

Amendment of section 29B.

9. In section 29B-

(a) in subsection (2), the words “, or both,” are included after the word “teleshopping”;

(b) in subsection (3), the words “or teleshopping” are deleted;

(c) the following new subsection is inserted immediately after subsection (3)-

“(3A) The transmission of teleshopping is prohibited during children’s programmes.”.

Amendment of section 30.

10. Section 30 is replaced in its entirety with the following-

“30.(1) The proportion of television advertising spots and teleshopping spots within the period between 06:00 and 18:00 shall not exceed 20% of that period.

(2) The proportion of television advertising spots and teleshopping spots within the period between 18:00 and 00:00 shall not exceed 20% of that period.

(3) Subsections (1) and (2) shall not apply to-

- (a) announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes or with programmes and audiovisual media services from other entities belonging to the same broadcasting group;
- (b) sponsorship announcements;
- (c) product placements;
- (d) neutral frames between editorial content and television advertising or teleshoping spots, and between individual spots.”.

Amendment of section 31.

11. In section 31-

- (a) in subsection (2), the “.” after the word “products” is replaced with “,”;
- (b) in subsection (2), the words “and electronic cigarettes and refill containers.” is added after the word “products,”.

Amendment of section 32.

12. Section 32 is replaced in its entirety with-

“32.(1) The following section applies only in respect of programmes produced after 19 December 2009.

(2) Product placement shall be allowed in all audiovisual media services except in-

- (a) news and current affairs programmes;
- (b) consumer affairs programmes;
- (c) religious programmes; and
- (d) children’s programmes.

(3) Programmes that contain product placement by virtue of subsection (2) shall meet the following requirements-

- (a) their content and organisation within a schedule, in the case of television broadcasting, or within a catalogue in the case of on-demand audiovisual media services, shall in no circumstances be influenced in such a way as

to affect the responsibility and editorial independence of the media service provider;

- (b) shall 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;
- (c) they shall not give undue prominence to the product;
- (d) except where the programme was produced by someone other than the media service provider itself or an affiliate thereof, viewers shall be clearly informed of the existence of product placement, at both-
 - (i) the start of the programme; and
 - (ii) where the programme resumes after an advertising break, when the programme resumes.

(4) Programmes shall not contain product placement of-

- (a) cigarettes and other tobacco products, as well as electronic cigarettes and refill containers, or product placement from undertakings whose principal activity is the manufacture or sale of those products; or
- (b) specific medicinal products or medical treatments available only on prescription in the jurisdiction which the media service provider falls under.”.

Amendment of section 35.

13. In section 35 –

- (a) in subsection (1), the words “and audiovisual media services provided by media service providers” are included after the word “broadcasters”;
- (b) in subsection (2), the words “including age verification measures where applicable” are included after the words “any technical measure”;
- (c) subsection (4) is replaced in its entirety with-

“ (4) Personal data of minors collected or otherwise generated by media service providers pursuant to this section shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising.”.

Amendment of section 40.

14. In section 40-

- (a) In subsection (1), the words “and section 41” are removed where they appear;
- (b) subsection (2) is replaced in its entirety with-

“ (2) The Authority shall have the power to take measures provisionally derogating from subsection (1) in respect of audiovisual media services provided by a media service provider from Member States if the following conditions are fulfilled-

(a) in the judgment of the Authority the audiovisual media service includes-

(i) incitement to violence or hatred directed against any group of persons or a member of a group based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation;

(ii) content which, in the opinion of the Authority, is likely to impair the physical, mental or moral development of minors, except where the Authority is satisfied that by means of the time of the broadcast concerned or by any technical measure, including any acoustic warning, visual identification or age verification, minors will not normally hear or see such programmes;

(iii) a serious risk of prejudice to public health;

(iv) public provocation to commit a terrorist offence;

(v) a serious risk of prejudice to public security, including the safeguarding of the security and defence of Gibraltar;

(b) during the previous 12 months, the media service provider has infringed any one of paragraphs (a)(i), (a)(ii) or (a)(iii) on at least two prior occasions;

(c) during the previous 12 months, the media service provider has infringed any one of paragraphs (a)(iv) or (a)(v) at least on one prior occasion;

- (d) the Authority has notified the media service provider, the Member State having jurisdiction over that provider and the Commission in writing of the alleged infringement and of its intention to restrict transmission should any infringement occur again;
 - (e) the Authority has respected the right of defence of the media service provider and has provided the media service provider the opportunity to express its views on the alleged infringements; and
 - (f) consultations with the Member State having jurisdiction over the media service provider and the Commission have not produced an amicable settlement within one month of receipt by the Commission of the notification provided for in paragraph (d).”;
- (c) in subsection (3), the words “audiovisual media service” are inserted after the word “television”;
- (d) the following new subsections (3A) and (3B) are inserted immediately following subsection (3)-

“(3A) The Authority may, no later than one month after the alleged infringement, take a measure pursuant to subsection (2) without complying with the requirements of paragraphs (d), (e) and (f) of subsection (2) where it deems the matter to be of urgency, but shall, in such cases, ensure that the Commission and the relevant Member State, are notified as soon as practicable of the measure taken, and indicate the reasons for the urgency.

(3B) The Authority shall-

- (a) put an end, as a matter of urgency, to any measure it adopts pursuant to subsection (2);
- (b) refrain from adopting a proposed measure pursuant to subsection (2),

where the Commission informs it, in accordance with Article 3(5) of the AVMS Directive, that the measure, or proposed measure, is contrary to European Union law.”;

- (e) in subsection (4), the words “and Article 3(3)” are inserted after the words “Article 3(2);
- (f) the following new subsection (4A) is inserted immediately following subsection (4)-

“(4A) A measure shall only be taken by the Authority pursuant to subsection (2)(a)(v) where the reason for the intended adoption of the measure is the safeguarding of the internal security or defence of Gibraltar and is of such a nature as to fall within the Governor’s constitutional responsibilities and the Governor has informed the Minister that the measure needs to be taken who so directs the Authority.”

Amendment of section 41A.

15. Section 41A is replaced with-

“41A.(1) On-demand audiovisual media services provided by media service providers under Gibraltar jurisdiction shall secure at least a 30% share of European works in their catalogues and shall ensure the prominence of those works.

(2) If a media service provider under Gibraltar jurisdiction is required to contribute financially to the production of European works, the Authority may also require media services providers that target audiences in Gibraltar but which are established in other Member States to make such financial contributions.

(3) The financial contributions referred to in subsection (2) shall be-

- (a) proportionate and non-discriminatory;
- (b) based only on the revenues earned by the media service provider in Gibraltar and any financial contributions made by that provider in the Member state where it is established shall be considered;
- (c) compliant with European Union law.

(4) Subsection (1) and (2) shall not apply to media service providers with a low turnover or a low audience.

(5) The Authority shall have the power to waive the obligations and requirements appearing in subsections (1) and (2) where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services.

(6) The Authority shall ensure that reports are sent to the Commission in accordance with the AVMS Directive on the implementation of this section.”.

Insertion of sections 45 and 46.

16. The following new sections are inserted immediately following section 44-

“Provisions applicable to video-sharing platform services.

45.(1) For the purposes of this Act, a video-sharing platform provider established in Gibraltar and which falls within the definition of “established service provider” in the Electronic Commerce Act 2001 shall be under Gibraltar jurisdiction.

(2) A video-sharing platform provider which is not established in Gibraltar pursuant to subsection (1) shall be deemed to be established in a Member State for the purposes of this Act if that video-sharing platform provider-

- (a) has a parent undertaking or a subsidiary undertaking that is established in that Member State;
- (b) is part of a group and another undertaking of that group is established in that Member State.

(3) In this section-

“parent undertaking” means an undertaking which controls one or more subsidiary undertakings;

“subsidiary undertaking” means an undertaking controlled by a parent undertaking, including any subsidiary undertaking of an ultimate parent undertaking;

“group” means a parent undertaking, all its subsidiary undertakings and all other undertakings having economic and legal organisational links to them;

(4) For the purposes of applying subsection (2), where the parent undertaking, the subsidiary undertaking or the other undertakings of the group are each established in different Member States, the video-sharing platform provider shall be deemed to be established in the Member State where its parent undertaking is established or, in the absence of such an establishment, in the Member State where its subsidiary undertaking is established or, in the absence of such an establishment, in the Member State where the other undertaking of the group is established.

(5) For the purposes of applying subsection (4), where there are several subsidiary undertakings and each of them is established in a different Member State, the video-sharing platform provider shall be deemed to be established in the Member State where one of the subsidiary undertakings first began its activity, provided that it maintains a stable and effective link with the economy of that Member State.

(6) Where there are several other undertakings which are part of the group and each of them is established in a different Member State, the video-sharing platform provider shall be deemed to be established in the Member State where one of these undertakings first began its activity, provided that it maintains a stable and effective link with the economy of that Member State.

(7) For the purposes of this Act, Article 3 and Articles 12 to 15 of Directive 2000/31/EC shall apply to video-sharing platform providers deemed to be established in a Member State in accordance with subsection (2).

(8) The Authority shall establish and maintain an up-to-date list of the video-sharing platform providers established or deemed to be established in Gibraltar.

(9) The Authority shall communicate the list referred to in subsection (8), including any updates thereto, to the Commission.

(10) If the question as to whether Gibraltar or a Member state has jurisdiction cannot be determined in accordance with the provisions of this section, the matter shall be brought to the Commission's attention without undue delay.

46.(1) The Authority shall ensure that video-sharing platform providers under Gibraltar jurisdiction take measures to protect-

- (a) minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development in accordance with the provisions of section 35;
- (b) the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in section 28(1)(a);
- (c) the general public from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under Gibraltar and European Union law.

(2) Video-sharing platform providers under Gibraltar jurisdiction shall comply with the requirements provided in section 29 with respect to audiovisual commercial communications that are marketed, sold or arranged by those video-sharing platform providers.

(3) The Authority shall ensure that video-sharing platform providers under Gibraltar jurisdiction take measures to comply with the requirements set out in section 29 with respect to audiovisual commercial communications that are not marketed, sold or arranged by those video-sharing platform providers.

(4) The Authority shall ensure that video-sharing platform providers under Gibraltar jurisdiction clearly inform users where programmes and user-generated videos contain audiovisual commercial communications, provided that such communications are declared under paragraph (c) of subsection (7) or the provider has knowledge of that fact.

(5) The Authority shall encourage video-sharing platform providers under Gibraltar jurisdiction to develop codes of conduct regarding the reduction of the the exposure of children to audiovisual commercial communications for foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars.

(6) The appropriateness of the measures referred to in subsections (1) and (3) shall be determined by the Authority by having regard to-

- (a) the nature of the content;
- (b) the harm it may cause;
- (c) the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content; and
- (d) the general public interest.

(7) The measures referred to in subsections (1) and (3) shall consist of, as appropriate:

- (a) including and applying in the terms and conditions of the video-sharing platform services the requirements referred to in subsection (1);
- (b) including and applying in the terms and conditions of the video-sharing platform services the requirements set out in section 29 for audiovisual commercial communications that are not marketed, sold or arranged by the video-sharing platform providers;
- (c) having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications as far as they know or can be reasonably expected to know;
- (d) establishing and operating transparent and user-friendly mechanisms for users of a video-sharing platform to report or flag to the video-sharing platform provider concerned the content referred to in subsection (1) provided on its platform;

- (e) establishing and operating systems through which video-sharing platform providers explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point (d);
- (f) establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors;
- (g) establishing and operating easy-to-use systems allowing users of video-sharing platforms to rate the content referred to in subsection (1);
- (h) providing for parental control systems that are under the control of the end-user with respect to content which may impair the physical, mental or moral development of minors;
- (i) establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the video-sharing platform provider in relation to the implementation of the measures referred to in points (d) to (h);
- (j) providing for effective media literacy measures and tools and raising users' awareness of those measures and tools.

(8) Personal data of minors collected or otherwise generated by video-sharing platform providers pursuant to paragraphs (f) and (h) of subsection (7) shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising.”.

Dated: 15th October 2020.

ALBERT ISOLA,
Minister with responsibility for broadcasting,
for the Government.

EXPLANATORY MEMORANDUM

The Broadcasting Act 2012 (“the Act”) implements Directive 2010/13/EC of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action concerning the provision of audio-visual media services (“the Directive”).

These Regulations amend the Act to implement the amendments made to the Directive by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 (“the Amending Directive”).

The Amending Directive amends the Directive in view of changing market realities.