

Audio-Visual Media Services Directive

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Television Without Frontiers Directive

The TVWF Directive established a single market in television broadcasting services. It applies to television broadcasts made over wires and over the air (including by satellite) and explicitly does not apply to services provided on individual demand (Article 1(a)). The Directive:

- Harmonised the laws on television broadcasting throughout the EEC (now the EU) and established the so-called “country-of-origin” principle by which television broadcasts are required to comply only with the laws of the member state from which they emanate.
- Set minimum standards for the protection of minors.
- Established rules on advertising and sponsorship.
- Required television broadcasters to transmit a certain quota of “European” works rather than simply buying in programmes from outside the EU. (European works are defined in the Directive, and are, broadly speaking, works originating or produced in member states.)
- Established the remedy of “right of reply”. This remedy allows people and other legal entities, such as companies, to require that any publication of inaccurate facts about them in the media, or any other publication of information which affects their legal rights, should be publicly corrected.

Need for change

The European Commission proposed updating the TVWF Directive after a public consultation process which highlighted the following shortcomings of the Directive as it currently stands:

- The increasing convergence of technologies and markets means that viewers can choose to watch programmes that are the same as, or similar to, those broadcast on television via services which, because they are transmitted using technologies outside the scope of the TVWF Directive, fall outside its scope of regulation. This leads to an unfair situation in which television broadcasters who are regulated by the TVWF Directive are in direct competition with media service providers who are not.
- The regulation of content provided on-demand (and by way of other services not regulated by the TVWF Directive) is harmonised only to a very limited extent, so such services do not experience the benefits of the internal market on matters covered by the TVWF Directive, and could potentially be required to comply with local regulations in each member state in which they are transmitted. (There is, however, harmonisation of other aspects of on-demand services under the Electronic Communications Framework Directive (2002/21/EC) and the E-Commerce Directive (2000/31/EC)).
- Traditional television broadcast advertising revenue is declining because of two factors which make television a less attractive medium for advertisers:
 - increased competition from alternative audio-visual media services, which has reduced traditional television viewing time; and
 - the increased ease with which viewers can use digital techniques to skip adverts.

The AVMS Directive will deal with these issues by:

- Extending regulation to all audio-visual media services. The intention is that this will create a level playing field for competition between all audio-visual media services offering the same or similar “television-like” services. This will include extending the country-of-origin principle to the services which do not currently benefit from it under the TVWF Directive.
- Relaxing the rules on television spot advertising and clarifying that product placement is allowed in certain circumstances to enable commercial broadcasters to increase their advertising revenue.

The TVWF Directive has been implemented in the UK by the Broadcasting Act 1990, the Broadcasting Act 1996 and the Communications Act 2003.

Licensing and regulatory arrangements are overseen by the communications regulator Ofcom (which in 2003 took over the roles of a number of pre-existing regulators, including the Independent Television Commission and the Broadcasting Standards Commission) and the BBC Trust. Member states may impose more detailed or stricter rules on television broadcasters operating under their jurisdiction. In the UK the relevant rules are contained in Ofcom's 2005 Broadcasting Code. The Code states expressly that Ofcom does not regulate the internet.

Unless stated otherwise, or unless it is clear from the context, in this practice note references to article and recital numbers are to the article and recital numbers in the Consolidated text. **Because the Consolidated text is a working document, the published text is subject to change without notification. This practice note is based on the original version of the Consolidated text dated 3 March 2007, and will be updated when the next version of the Directive is formally published.**

SCOPE

Extension to all audio-visual media services important definitions

The TVWF Directive only regulates services which are transmitted in certain specific ways: that is, over wires or over the air (including by satellite). By contrast, the AVMS Directive will regulate "audio-visual media services" regardless of how they are transmitted.

There has been much debate on how to define "audio-visual media services" so as to catch the services the Commission wants to regulate, and definitions have changed between the various drafts of the directive. In the Consolidated text an "audio-visual media service" is a service under the editorial responsibility of a media service provider, the principal

Chronology of the Commission's proposals

The history of the Commission's proposals to date, and the future stages they will undergo, are set out below.

- 13 December 2005: The European Commission published its proposed revisions to the TVWF Directive (Commission text) (see Commission Proposal for a Directive amending the TVWF Directive, 13 December 2005).
- 13 November 2006: The Council of Europe reached a general approach to the Commission text (Council text) (see General approach, 15 November 2006).
- 13 December 2006: The European Parliamentary Committee report, which contained the European Parliament's amendments to the Commission text (Parliament text), was approved by a vote of the Parliament (see European Parliament legislative resolution on the proposal for a Directive amending the TVWF Directive, 13 December 2006).
- March 2007: The Commission published a "consolidated text" including the Parliament's first reading amendments and the Commission's own amendments (Consolidated text) (see Consolidated text). This is a working document, which is amended from time to time by the Commission (and re-dated) without notification to the public.
- Around May 2007: The Council will consider the proposals with the aim of reaching a common position, after which the proposals will return to the Parliament for a second reading.
- Early 2008: Likely timing of adoption of the AVMS Directive by the Parliament and the Council.
- Member states will be required to implement the AVMS Directive within two years from adoption.

There are currently four drafts of the proposed Directive in circulation:

- The Commission text containing the original proposals.
- The Council text, which amends the Commission text.
- The Parliament text, which also amends the Commission text but clearly takes into account the Council text.
- The Consolidated text, which constitutes the Commission's revised proposals, which also accept the Parliament's proposals (and which is subject to change without notification).

purpose of which is the provision of programmes to inform, entertain or educate the general public by electronic communications networks (*Article 1(a)*).

A "programme" is a set of moving images with or without sound constituting an individual item in a schedule or catalogue whose form and content is comparable to that of television broadcasting (*Article 1(aa)*). A "media service provider" is a person with editorial responsibility for the choice of content

who determines the manner in which it is organised (*Article 1(b)*).

A key element in the definition of audio-visual media services is the concept of "editorial responsibility". Editorial responsibility is "responsibility for the composition of the schedule or the compilation of programmes in a professional capacity in order to deliver the media content within a set time-frame or to allow it to be ordered from a catalogue" (*Article 1(kd)*).

The term “audio-visual media service” also includes “audio-visual commercial communication” (ACC). An ACC is promotional images with or without sound, which accompany or are included in programmes in return for payment or for self-promotional purposes (*Article 1(f)*). In other words, an ACC is any kind of audio-visual advertisement and examples included in the definition are television advertising, sponsorship, teleshopping and product placement.

Television broadcasts (linear services) and on-demand services (non-linear services)

Audio-visual media services, other than ACCs, are defined as either television broadcasts (linear services) or on-demand services (non-linear services). The definitions of both concepts vary between the different texts of the draft Directive but are all aimed at the same outcome.

A television broadcast (or linear service) consists of scheduled programmes transmitted chronologically to potential viewers. The viewer has no choice when to watch them: the broadcaster “pushes” the programmes out to the viewer. The new definition of television broadcast will encompass, among other services, analogue and digital television, IPTV (internet protocol television), mobile TV (television delivered via mobile phone), webcasting and near video-on-demand.

An on-demand service is a service which allows viewers to determine what they watch and when by “pulling” programmes from a catalogue compiled or edited by a media service provider. Video-on-demand services are one example of this.

A concern during the course of the negotiation of the AVMS Directive has been how to tie down the definitions so as to ensure that they will apply to any new methods of service delivery which may be invented in the future. The Parliament suggesting adding a “catch-all” provision in the definition of on-demand (or non-linear) services which would extend the category to include any audio-visual me-

Exclusions

Some services will fall outside the scope of the AVMS Directive. These are listed below.

Audio-only Services

Radio and other services with no audio-visual element will not be regulated by the AVMS Directive. (Note that silent films **will** be regulated because the definition of audio-visual media services includes programmes without sound.)

Games of chance and online games

After publication of the Commission text, there was concern that the European gaming (that is, games of chance and betting) industry would be caught by the Directive and, being a highly portable worldwide industry, would move outside Europe to avoid them. However, the subsequent texts clarify that services will be caught only if their principal purpose is the distribution of **programmes** (that is, audio-visual content). Recital 14 clarifies that games of chance and online games will not normally be caught because their principal purpose is not the distribution of audio-visual content. However, this leaves open the question of how video games will be treated if, as is increasingly common, they contain non-interactive “cutaway” video sequences.

User-generated videos and private websites

There was also concern after publication of the Commission text that user-generated videos, such as those published on MySpace and YouTube, would be caught. Recital 13 clarifies the position: an audio-visual media service is a “service” under the EC Treaty, and a service under the Treaty is an economic activity normally provided for remuneration. The definition of audio-visual media services does not cover “merely incidental” content (*Recital 14*) and non-economic activities which are normally not provided for remuneration, such as weblogs and other user-generated content or any form of private correspondence, such as e-mails and private websites (but see Keeping up with services and technology). Private correspondence is also excluded on the basis that it has no mass-media element.

Electronic versions of newspapers and magazines

Recital 15 states that the Directive will not cover electronic versions of newspapers and magazines. Presumably this is because any audio-visual content they contain is incidental to their services and not their principal purpose (but see Arbitrary exemption for newspapers).

Mere transmission

The definition of a “media service provider” excludes anyone who merely transmits or bundles audio-visual media services for which they have no editorial responsibility, so these activities are not caught by the new Directive. Furthermore, the AVMS Directive will not affect the liability exemptions in the E-Commerce Directive (*Recital 17*). These exemptions release service providers from liability for information where they are acting as a “mere conduit”, “caching” information or “hosting” (for more detailed information on these exemptions, see Practice note, Liability for website content).

Stand-alone text-based services

These are excluded (*Recital 16*), because they contain no moving images.

dia service not covered by the definition of linear services and which did not otherwise fall within the definition of on-demand services. However, the Commission has not taken up this suggestion in its Consolidated text.

The two-tier regime

The AVMS Directive will introduce a two-tier system of regulation which will place a greater regulatory burden on television broadcasters and lighter regulatory requirements on on-demand service providers. The Commission’s proposal was to regulate the on-demand sector

more lightly because it is mainly made up of newer industries, often comprising small and medium-sized companies which might not be able to cope financially with heavy regulation, or might as a result be driven outside Europe. The intention was that the heavier burden of regulation will fall on those television broadcasters who are used to being regulated under the TVWF Directive. However, the heavier regulation will also impact on new television broadcasts using IPTV, mobile TV, webcasting and so on.

The AVMS Directive sets out a set of basic rules which will apply to all audio-visual media services and additional regulation which will apply, as at present, only to television broadcasts.

BASIC RULES APPLYING TO ALL AUDIO-VISUAL MEDIA SERVICES

Country-of-origin principle

The AVMS Directive will extend the country-of-origin principle to all audio-visual media services. This means that audio-visual media services transmitted by a media service provider under the jurisdiction of a particular member state have to comply only with the laws applicable to audio-visual media services in that member state (*Article 2(1)*). Audio-visual media services will not have to comply with the laws of any other member state into which they transmit. This simplifies regulatory compliance for media service providers who, within the EU, only need to ensure that they comply with regulation in the country in which they are established.

The method for working out where a media service provider is established under the AVMS Directive is the same as the method used to determine where a broadcaster is established under the TVWF Directive. The establishment of a media service provider can be calculated on the basis of the location of its head office and editorial decision makers, and in certain circumstances the location of its workforce will also have to be considered (*Article 2(3)*). Where these provisions do not apply, for example where the media

service provider operates from outside the EU, a media service provider will be established in a particular member state for the purposes of the Directive if they use a satellite uplink or satellite capacity in that member state (*Article 2(4)*).

As in the TVWF Directive, a member state will have the right to require media service providers to comply with rules that are stricter and more detailed than those set down by the AVMS Directive (*Article 3(1)*). Because of the application of the country-of-origin principle, media service providers may wish to avoid such stricter rules by establishing themselves in another member state, and the AVMS provides mechanisms aimed at preventing “forum shopping” in certain circumstances. The texts vary from one another, but all provide mechanisms aimed at stopping media service providers from circumventing rules of general public interest or public policy by establishing themselves in another country.

Freedom of reception

The requirement in the TVWF Directive for member states to ensure freedom of reception for television broadcasts will be extended to all audio-visual media services (*Article 2a(1)*). For television broadcasts, member states may restrict freedom of reception where an audio-visual media service may harm children, incite hatred or offend against human dignity. A member state will be able to restrict reception of television broadcasts only in collaboration with the member state in which the media service provider is established and the Commission. Normally, the objecting member state will have to notify these bodies in advance and consult with a view to finding a settlement (*Article 2a(2)*).

There has been some variance of opinion between the legislative bodies as to how derogation should be dealt with in respect of on-demand services. In the Parliament text and the Consolidated text, derogation from the principle of freedom of reception for on-demand services is on the same basis as for television broadcasts. The Council text permits derogation on a wider range of grounds by making derogation in accor-

dance with Articles 3(4), (5) and (6) of the E-Commerce Directive.

Member states can also restrict access to on-demand services in urgent cases without fulfilling the conditions set out in Article 2a.

Co-operation between national regulatory authorities

The AVMS Directive introduces a new requirement for co-operation between national regulatory authorities and between national regulatory bodies and the Commission, in particular with reference to co-operation on dealing with providers who transmit offending material into other member states (*Article 23b(2)*).

Qualitative advertising rules

Member states will have to ensure that all forms of advertising (including, for example, sponsorship, product placement and teleshopping) on all audio-visual media services comply with a set of qualitative rules. These are set out in Article 3g. Again, the texts differ but aim to achieve more or less the same result. The rules are as follows:

- ACCs must not be surreptitious, that is, potentially misleading as to their nature. An ACC would be misleading if it were not acknowledged to be an advertisement. The use of the term “surreptitious” is a hang-over from the TVWF Directive, which completely banned surreptitious forms of advertisement like product placement, and sits a little strangely in the revised Directive which does permit product placement in certain circumstances. Presumably the point is that product placement is not allowed to be surreptitious and must be acknowledged as such.
- ACCs must not use subliminal techniques. The Parliament text gives the example of sound volume being raised during advertisements.
- ACCs must not prejudice respect for human dignity, include discrimination on grounds of race, sex or nationality, be offensive to religious or political beliefs, encourage behaviour prej-

udicial to health or to safety or encourage behaviour grossly prejudicial to the protection of the environment.

- ACCs for cigarettes and other tobacco products are prohibited.
- ACCs for alcoholic drinks must not be aimed at minors or encourage excessive consumption.
- ACCs for prescription medicines are prohibited.
- ACCs must not exploit children or cause them moral or physical detriment.

The Parliament text introduced a requirement for member states and the Commission to “encourage” the development of codes of conduct on the advertisement of junk food and alcohol during children’s programmes (Article 3g(2)).

Sponsorship

The rules relating to sponsorship of television programmes will be extended to all audio-visual media services and are set out in Article 3h as follows:

- Content and scheduling (where applicable) must not be influenced by sponsorship in a way that affects the responsibility and editorial independence of the media service provider.
- Sponsored programmes must not directly encourage the purchase or rental of goods or services.
- Sponsored programmes must be identified as such.
- Those whose principal activity is the manufacture and/or sale of cigarettes and other tobacco products cannot sponsor programmes.
- Medicine manufacturers and sellers can only use their name to sponsor programmes; they cannot use prescription-only product names for sponsorship purposes.
- News and current affairs programmes cannot be sponsored.

Product placement

Product placement is the inclusion of or reference to a product, service or trade mark in a programme in return for payment (*Article 1(k)*). The UK’s view is that the TVWF Directive contains an implicit prohibition of product placement because of the requirement for advertising to be identified as such and to be separate from other parts of the programme service (*Article 10(1), TVWF Directive*). However, not all member states have interpreted the Directive this way; for example, product placement has been permitted widely in Spain. However, it is explicitly prohibited in the UK under the Ofcom Broadcasting Code (except, in certain circumstances, in programmes acquired from outside the UK and in films made for the cinema) (*section 10.5, Broadcasting Code*). The Broadcasting Code does, however, permit prop placement: that is, the use of products or services which have been supplied for less than value, as long as such use is editorially justified. There is nothing specific on prop placement in the TVWF Directive.

The effect of the AVMS Directive will be that member states may permit product placement in certain circumstances, and subject to controls. The drafting of these provisions has changed during the course of the Directive’s negotiation. The Commission text permits product placement in particular circumstances, while the subsequent texts prohibit it but allow for derogation for cinematographic works, films and series made for audio-visual media services, light entertainment and sports broadcasts. Derogation is also permitted where goods or services are provided free of charge (*Article 3i(2)*), the practice usually referred to as “prop placement”. Product placement must not be permitted in certain types of programmes including children’s programmes, news, current affairs and documentaries.

The proposed introduction of product placement has caused concern among consumer groups and will therefore only be permitted under the following strict conditions, which are intended to protect the viewer:

- Content and scheduling of programmes must not be influenced by product placement in a way that affects the responsibility and editorial independence of the media service provider.
- Programmes must not directly encourage the purchase or rental of goods or services.
- Programmes must not give undue prominence to the product in question.
- Viewers must be clearly informed of the presence of product placement. There has been a difference of opinion among all three European bodies as to how much notification viewers need to be given of the presence of product placement. The Commission originally suggested notifying viewers at the beginning of a programme. The Council suggested notification should be given at the end as well. The Parliament added that viewers should also be notified every 20 minutes during a programme. The Commission has suggested in its redraft that notification should be at the beginning and end, and after every advertising break. Rather perversely, the effect of these rules may actually be to increase the attractiveness of product placement to advertisers because their brand will be mentioned to the viewers, without additional cost, at every advertising break. This may lead to increased product placement in programmes presumably the opposite of the drafters’ intention.
- Programmes must not include product placement of tobacco products, cigarettes or prescription medicines.

No form of ACC, including product placement, may be surreptitious. The TVWF Directive requires that television advertising and programmes be kept separate. By keeping the prohibition on surreptitious advertising, and introducing the requirement to clearly inform viewers of the presence of product placement in a programme, the AVMS Directive seeks to preserve the spirit of the separation principle even where product placement occurs.

Broadcasters in the UK will welcome the introduction of product placement. An Ofcom consultation on the subject revealed that, in general, broadcasters favour a controlled introduction of product placement, believing that it will not damage editorial integrity.

Consumer groups were shown in the same survey to oppose its introduction and, given the breadth of possible derogations, they can take little comfort from its introduction being worded as a ban. However, while product placement should allow broadcasters to make some additional revenue from advertising, the Ofcom consultation also revealed that financial benefits to broadcasters are unlikely to be great.

The amendments contained in the AVMS Directive will be helpful in clarifying the position on product placement and prop placement across the EU.

European content quotas

The requirements in the TVWF Directive for television broadcasters to devote a certain amount of time to European works and a certain amount of time, or 10% of their budget, to European works created by independent producers will remain unchanged in the AVMS Directive (*Articles 4 and 5*). All member states met these quotas easily after the TVWF Directive was implemented, so they remain uncontroversial.

These quotas will not apply to television broadcasts intended for regional, rather than national, audiences (*Article 9*).

Quotas cannot be applied to on-demand services in the same way as they can to scheduled services. However, Article 3f(1) contains a requirement for providers of on-demand services to promote the production of, and access to, European works (*Article 3f(1)*). It is very difficult to understand how this might be enforced. Recital 35 attempts to give some examples, but they all fall apart on even minimal inspection:

- The first example given is that there

might be “a minimum share of European works proportionate to [a service provider’s] economic performance”. This phrase is very opaque but is perhaps intended to refer to some sort of sliding scale of “European-ness” depending on the economic size of the service provider. If so, then it begs the question of how to measure whether any such targets have been achieved – a problem discussed in the next paragraph.

- The second example given is a requirement for a “minimum share of European works in a video-on-demand catalogue”. Depending on how this was interpreted by a national regulator, such a requirement would either be trivially easy for a service provider to comply with (by including a large amount of European content whether or not any customers actually watched it), or else would seem to entail service providers disabling popular US content for a period of time at the end of each measuring period to ensure that European content viewing quotas were achieved. Neither interpretation is satisfactory and both would also be extremely bureaucratic for a regulator to measure and enforce.
- The final example given is the “attractive presentation of European works in electronic guides”. Clearly this is a highly subjective test and, again, would be almost entirely unenforceable in practice.

Identification

Member states will have to ensure that audio-visual media service providers identify themselves with their name, address, contact details and, where applicable, their regulatory or supervisory institution (*Article 3c*).

Protection of minors

Member states must ensure that services are not made available in a way which might seriously impair the physical, mental or moral development of minors (*Article 3d*).

Incitement of hatred and offence against human dignity

Member states will have to ensure that audio-visual media services and ACCs do not incite hatred based on race, sex, religion or nationality (*Article 3e*).

Rights for cinematographic works

Member states will have to ensure that media service providers do not transmit cinematographic works outside periods agreed with rights-holders (*Article 3f(2)*).

ADDITIONAL RULES FOR TV BROADCASTS

Quantitative advertising rules (advertising quotas)

The quantity of advertisement allowed during television broadcasts will be increased in relation to most types of programme.

The rule that the proportion of short forms of advertising (such as advertising spots) should be no more than 20% per hour will remain (*Article 18(1)*). The daily limit contained in the TVWF Directive will be abolished on the basis that it remains largely theoretical, because no member state currently comes anywhere near this limit and also because it is ineffective in controlling the use of advertising during prime time, unlike the rule controlling hourly advertising.

The rule in the TVWF Directive that there must be a gap of at least 20 minutes between advertising and teleshopping breaks within any one programme will be removed. Certain categories of programme, including series, serials, documentaries, current affairs and religious programmes will be able to contain advertising breaks at any frequency (subject to the 20% per hour limit and the requirements not to jeopardise the programme’s integrity, to take account of natural breaks and not to prejudice the rights of the rights-holder (*Article 11(1)*)). In these types of programmes, television broadcasters will be able to

add additional advertising slots without necessarily increasing the length of any one slot, and so be able to advertise for a higher percentage of time in any one hour. These changes will be particularly liberating for documentary, current affairs and religious programme makers who were previously only allowed to advertise every 20 minutes if the programme was longer than 30 minutes.

The Commission, the Council and the Parliament have all come up with different rules on how much advertising there can be in films, news programmes and children's programmes, although this partially reflects the progress of debate on the issue. Under the TVWF Directive, films can only be interrupted once every 45 minutes plus once more if they run for at least 20 minutes longer than two times 45 minutes (that is, for an hour and 50 minutes). The Commission suggested this be reduced to once every 35 minutes and the Council and the Parliament reduced this again to a maximum of once for every period of 30 minutes, which is the position in the Consolidated text.

Under the TVWF Directive, news programmes and children's programmes can be interrupted every 20 minutes if their duration is 30 minutes or longer. The Commission suggested this should be once every 35 minutes which would mean no ACCs at all during a 30-minute programme. The Council's draft allows interruptions for advertising once in every news programme of at least 30 minutes, but only once every 30 minutes in children's programmes where the programme is more than 30 minutes long. The Parliament's draft allows one advertising spot for every 30-minute scheduled period for both news and children's programmes. The Consolidated text returns to the Council's position on children's programmes, allowing them to be interrupted for every period of at least 30 minutes only where they are more than 30 minutes long.

Longer children's and news programmes will be worse off under the AVMS Directive in terms of advertising revenue because the Directive will only allow them to be interrupted once every 30 minutes instead of every 20 minutes.

Advertising during religious services will remain prohibited as it is under the TVWF Directive (*Article 11(2)*).

The limits in the TVWF Directive on how much airtime can be devoted to teleshopping will be removed.

Although Ofcom will be free to impose stricter advertising quotas in the UK than those laid down in the AVMS Directive, UK business and government are generally in favour of relaxing the rules and there is likely to be some liberalisation in the UK as a result of the AVMS Directive.

It remains to be seen how these quotas will work for services such as mobile TV. Mobile TV providers expect viewers to watch snippets of less than 30 minutes at a time, with the result that the logic of rules established in relation to 30-minute programme slots is lost.

Qualitative advertising rules

Under the TVWF Directive, programmes and advertising must be kept separate from one another (*Article 10*). This will no longer be possible under the AVMS Directive because of the introduction of product placement. However, the AVMS Directive will require television advertising and teleshopping to be recognisable as such and to be separated from other parts of the programme service.

Exclusive rights and short extracts

Under the AVMS Directive, a member state will be able to prevent broadcasters having exclusive rights to certain events regarded by the member state as being of major importance for society, in the same way as they can under the TVWF Directive (*Article 3a(1)*). Member states have to draw up a list of all such events and notify the Commission (*Article 3a(1) and (2)*).

The AVMS Directive will introduce a right for broadcasters to use coverage of events to which another broadcaster has exclusive rights, for the purpose of making short reports for news broadcasts (*Article 3b(1)*). This will only apply to "events of high in-

terest to the public". Broadcasters may choose extracts from the transmitting broadcaster's signal (*Article 3b(2)*) or gain access another way where national law permits, for example, by attending the event itself. There is no definition of an "event of high interest to the public". Member states will have to lay down the precise requirements for short extracts, such as how long they can be and when they can be transmitted in relation to the event itself.

Right of reply

The right of reply gives people and other legal entities, such as companies, the right to require that any inaccurate facts published about them in the media, or any other publication of information which affects their legal rights, should be publicly corrected. Under the AVMS Directive as currently drafted, the right of reply, which exists under the TVWF Directive, remains applicable solely to television broadcasts. There has been some discussion about extending this right, and Recital 38a in the Parliament text says that the right of reply is a particularly appropriate legal remedy in the online environment because of the ability to correct information immediately.

Protection of minors

Member states must ensure that programmes broadcast under their jurisdiction do not contain anything which might seriously impair the physical, psychological and moral development of minors, particularly pornography or gratuitous violence (*Article 22(1)*). Where broadcasters of such programmes are not under their jurisdiction, member states must require these programmes to be broadcast at times children would not normally see them or make sure that viewing is restricted using technological measures (*Article 22(2)*).

OTHER PROVISIONS

Self- and co-regulation

The Commission text introduced a requirement for member states to encourage co-regulatory regimes in the areas dealt with by the AVMS Directive. The

Council and the Parliament texts retained and expanded on this provision, so that member states will be required to encourage self- and/or co-regulatory regimes in these areas. Such regimes will have to be broadly acceptable to the main stakeholders in the member states in which the regimes apply, and provide for effective enforcement (*Article 3(7)*).

This provision acknowledges the role that industry can play in regulation, both in terms of the expertise it can offer and the importance of getting the regulated players on-side if regulation is to be effective. It also recognises that many of the emerging audio-visual media service industries have already adopted self-regulating arrangements.

Media literacy

Media literacy refers to the “skills, knowledge and understanding to enable consumers to use media effectively”. Media literacy enables consumers to:

- Make informed choices.
- Understand the nature of content and services.
- Take advantage of the opportunities on offer from new communications technologies.
- Better protect themselves against harmful and offensive material.

(*Recital 26(a)*.)

The Parliament text added a requirement for member states to promote the development of media literacy among consumers (*Article 3(3b)*, *Parliament text*). The Consolidated text does not include this requirement, but when the Commission assesses compliance with the Directive under Article 26, it must consider media literacy.

Comment

Scope

A concern during the negotiation of the AVMS Directive has been whether the terminology adopted is wide enough to cover future technological develop-

ments, the fear being that the fast pace of development and change in this sector may mean that the AVMS Directive is out of date by the time it is implemented. There has been particular concern over whether the terms “linear services” or “television broadcasting” and “non-linear” or “on-demand” services are clear enough and broad enough. The Commission intends to regulate all “television-like” services and pinning down exactly what this means has proved difficult, although the term “television-like” is not itself used in the operative part of the Directive. In a recent report, the House of Lords expressed concern that regulation of “television-like” services may lead to “like services” being regulated in a “like” manner (that is, the creation of a perfectly level playing field for all services, rather than regulation being lighter for on-demand services) (*see Television without frontiers? Report with evidence*).

The UK government and UK industry would prefer not to see any extension of current regulation in this area, particularly to new media industries. Because of “light touch” regulation of these industries in the UK, many companies have chosen to locate here in preference to mainland Europe, and this has benefited the UK economy. Any increase in the regulation of these industries could lead to some small companies collapsing, others leaving the UK and relocating outside Europe and prevent other companies from setting up in the first place.

Keeping up with services and technology

Much of the debate around the various definitions in the AVMS Directive has resulted from the rise of new media services like YouTube during the drafting process. The final result aims, it seems, to avoid regulating the individual users of YouTube (who are not acting in a “professional capacity”). However, newer services show that the current definitions could quickly look antiquated. YouTube, for example, has announced that it will share advertising revenue with members who upload particularly popular content. At what point will such users become “professional”, meaning that

their content falls within the scope of the Directive? There is no clear answer.

There is a similar problem when considering the position of service providers operating user-generated content websites. If they simply allow users to post any content they wish then it is difficult to see how the service provider can be taking “editorial responsibility” for the compilation of programmes within a catalogue and thus the AVMS Directive will not apply. However, once they start to intervene, for example by removing copyright-infringing material, or by directing viewers to particular content, at what point does the service provider start to exercise “responsibility for the compilation” under the Directive? Again, there is no clear answer, and the result is that it may not be at all clear when the AVMS Directive will, and will not, apply.

Technology-neutral?

The AVMS Directive aims to be technology-neutral in fact, one of the main reasons given for introducing it is to ensure that similar services are not regulated differently simply because one happens to be provided by conventional broadcast whereas the other is provided by some other medium which falls outside the current rules.

Unfortunately though, in introducing a distinction between linear and non-linear services, just such an arbitrary distinction may be created. A conventional Personal Video Recorder, like a Sky+ box, for example, works by allowing the viewer to record and store a copy of a programme locally on their set-top box. The viewer then selects which programmes to watch as and when it suits him. This is a **linear** service because programmes are transmitted to the viewer according to a schedule set by the broadcaster. However, it is easy to imagine a service where a cable television company itself stores copies of programmes on its own servers and then provides them on demand to the viewer. This would appear to be more or less identical to the first service as far as the viewer is concerned, but yet would be regulated as a **non-linear** service simply because the

copies of the programmes are stored remotely and provided on-demand.

There seems little reason why these two services should be regulated differently simply because of their mode of delivery.

Two-tier approach to regulation

The Commission intended to regulate the on-demand sector with a “lighter touch” than the television broadcast sector. In fact, some of the differences are format-driven as opposed to being driven by a desire for more or less regulation. For example, the requirement to promote European works is tailored to the different types of services, as are the regulations aimed at protecting children. Provisions targeted solely at television broadcasting, such as those on short reporting and advertising quotas, have little or no application in the on-demand world.

Arbitrary exemption for newspapers

As explained above, electronic versions of newspapers and magazines are not covered by the AVMS Directive (*Recital 15*). However, it is not clear why newspapers merit a specific recital, and could not instead rely on the argument that their content does not constitute “programmes”. The result is to create some uncertainty. If a newspaper’s website offers audio-visual news items (such as footage of a riot) is it, or is it not, regulated? If it is exempt under Recital 15, this would discriminate against an identical website which is not associated with a printed paper. If, alternatively, it is exempt because its content is not a “programme”, there is no need for the recital at all. If it is because, in this example, the footage is in some way incidental, then it is easy to imagine scenarios where audio-visual material was more than incidental, such as a regular “comment” piece or a daily ten-minute news summary at some point, presumably, these would be classed as “programmes”, in which case the recital only serves to cause confusion.

Extension of the country-of-origin principle to on-demand services

One of the Commission’s stated aims is to provide legal certainty for on-demand audio-visual media services. The UK has been sceptical of the need to regulate this sector at a European level on the basis that, on the whole, on-demand industries have been good at self-regulation and there does not appear to have been any significant distortion of the market due to there being different regulatory regimes in different member states. Although the UK is unlikely to stop the country-of-origin principle being extended to the on-demand audio-visual media sector, it has achieved an amendment requiring member states to encourage self- and co-regulation in the areas governed by the AVMS Directive. However, while this will mean that existing self- and co-regulatory arrangements need not be disrupted, some additional legislative provision may be required at national level.

Advertising

In general, the rules on advertising will be relaxed under the AVMS Directive. The main aim of this is to give television broadcasters new opportunities to earn revenue from advertising. Organisations representing viewers are concerned that this will mean more advertising at the expense of the quality of the viewing experience. However, the theory is that increased viewer choice should naturally limit how much a broadcaster can get away with because if the advertising becomes too intrusive, viewers may stop watching.

UK television broadcasters will be happy about the relaxation of the advertising quotas and the introduction of limited product placement, although it remains to be seen how far the increased advertising revenue that this will represent will improve the fortunes of traditional commercial television broadcasters in the UK. In the digital age, it may be that television broadcasters need to increase their use of more sophisticated advertising techniques which can target adverts at particular viewers. Consumer groups will be unhappy about the loosening up of the advertising regime and in particu-

lar the introduction of product placement, but hopefully the strict guidelines imposed on the use of product placement will ensure that it is introduced in a way which is acceptable to these groups. The House of Lords select committee says in its report that it would want to revisit the issue if product placement became necessary for the viability of television companies.

Conclusion

It is highly likely that the AVMS Directive will be adopted with substantially the content outlined in this note. However, there remain arguments against its introduction:

- The Commission has said that the new media industries could suffer from a lack of harmonised regulation by having to comply with lots of local rules. However, this has not been a problem in the past: these industries have flourished in the existing regulatory environment.
- There is an argument that the main rationale for any regulation of this sector is fast disappearing. The original TVWF Directive was introduced at a time when radio frequency spectrum, a vital component in traditional television broadcasting, was in scarce supply. In the digital age, television broadcasting no longer relies so heavily on spectrum, as a range of different modes of transmission are now used. Ofcom would prefer to see regulation lightened rather than increased, believing that increased competition will provide the necessary checks and controls on audio-visual media service providers.

The House of Lords report appeals for an impact assessment to be carried out on the revised proposals, but to date, the European Commission has not announced any plans to conduct one.

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