

Media Convergence light – about the new Audiovisual Media Services Directive

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Overview

- Legislative Procedure
- The European Legal Framework for Audiovisual Media
- Demarcation between other Fields of Regulation
- The Scope of the Audiovisual Media Services Directive
- Advertising Regulation
- Implementation and Supervision
- Outlook

Legislative Procedure

Legislative Procedure

- On 13 December 2005 the European Commission adopted a **Legislative Proposal** for the revision of the “Television without Frontiers” Directive
- On 13 November 2006 **Council General Approach** on a modernised draft
- On 13 December 2006 **First Reading** of the European Parliament
- On 29.03.2007 **Amended Commission Proposal**
- On 24 May 2007 a **Political Agreement** was reached on the Audiovisual Media Services Directive (AVMSD)
- AVMS Directive should enter into force by the **end of 2007** giving the Member States time to **transpose** the provisions into national law **within 24 months**

The European Legal Framework

The European Legal Framework I – the Objectives of Regulation

“The Television Without Frontiers” Directive (TVWF, 1989):

- Removal of obstacles concerning the free movement of television broadcasts within the Community
- Ensuring free cross-border broadcasting by preventing the authorities in the country of reception from exercising a second admission control on services regarding the same issues these services had already been subject to in their respective country of origin
- Elimination of inequalities which may obstruct competition on the Common Market

The European Legal Framework III – The Necessity for a Revision of the Directive

- **The Convergence of Media** challenges the meaning of “Television” and therefore the scope of the Directive
 - e.g. IP-TV/Streaming
- The development of **new kinds of audiovisual services** make it necessary to install a regulation similar to television
- Regulatory elements of the Directive needed adjustments to cope with practical problems such as the increasing difficulties of refinancing broadcasters through advertising
 - e.g. caused by developments such as the “Personal Video Recorder”

Demarcation between other Fields of Regulation

Demarcation between other Fields of Regulation - The E-Commerce Directive

- The coordinated sector of the E-Commerce Directive includes the regulation of access, conduct and liability for information society services
- Art. 3 (4) E-Commerce Directive stipulates that Member States may derogate from these rules for reasons of common welfare
 - e.g. in the area of protecting minors the Member States could establish different standards
- Art. 1 (6) ensures the independent promotion of cultural and linguistic diversity and pluralism at Community or national level
- **Art. 3 (4) of the Agreement on AVMSD** contains explicit provisions:
The E-Commerce Directive is fully applicable except otherwise provided in the AVMSD; In the event of conflicts the provisions in the AVMSD shall prevail

The Scope of the AVMS Directive

The Scope of the AVMS Directive I – Concept of Regulation

Basic Regulations for all audiovisual media services
Art. 3a – 3f AVMSD

2nd Step: **linear** audiovisual media services
(television broadcasting)
Special provisions in art. 3i, j et seqq.

1st Step: **non-linear** audiovisual media services
(on-demand)
Special provisions in art. 3g and h

The Scope of the AVMS Directive II – Material Scope I

Definition of the “Audiovisual Media Services”:

1. Point of approach to determine the scope of the AVMSD is the existence of an “audiovisual media service”, Art. 1 (a) AVMSD
 2.
 - a) Linear services (television, Art. 1 (c) AVMSD)
 - b) Non-linear services (on-demand, Art. 1 (e) AVMSD)
- Problem: The convergence results in a differentiation of media services which makes it difficult to determine the scope of the AVMS Directive

The Scope of the AVMS Directive II – Material Scope II

Criteria laid down in Art. 1 (a) AVMSD:

- **Service**
 - In terms of Art. 49, 50 EC Treaty
 - ➔ Problem et al. “normally provided for remuneration“; commercial/non-commercial, e.g. Pod-Casts
 - ➔ Not all economic services are seen as services (ECJ, “Unborn Children”)
- **Editorial Responsibility**
 - ➔ What is meant by exercising effective control, Art. 1 (ab)?
 - ➔ What about “Platforms”, e.g. in case of Mobile-TV or cable?
- **Principle Purpose:** A set of moving images with or without sound
 - Within a schedule
 - On-demand services if comparable to television broadcasts

The Scope of the AVMS Directive II – Material Scope III

Criteria laid down in Art. 1 (a) AVMSD:

- **Purpose: Information/Entertainment/Education**
 - ➔ Further attempt to describe the “medial” of these services?
- **General Public**
 - ➔ Including pay content if accessible by public
- **Electronic Communication Networks**
 - ➔ Regardless which kind of “physical” network or protocol is used for transmission

The Scope of the AVMS Directive III – Border Cases I

- **Computer Games**
 - Principle purpose: Moving images which are transmitted by electronic communication networks?

- **Editorial press services** on the Internet containing audiovisual elements
 - Principle purpose: Providing audiovisual services?

The Scope of the AVMS Directive III – Border Cases II

- Determination of the **principle purpose** of the service is often difficult:
 - Overall- or individual view?
 - From the user's perspective?
 - ➔ Alternative: The application of the Directive to all audiovisual services, or, in case of a hybrid service, the application as far as it is an audiovisual service
- **Who is responsible for providing services?**
 - “Publisher” who is exercising editorial responsibility by means of content and organisation of the service
 - Problem: What about other members of the distribution chain?

The Scope of the AVMS Directive IV – Linear Services – Television Broadcasts

- Varying approaches of defining “Television” within the Member States
- Definition in Art. 1 (c) AVMSD on basis of **linearity**
 - Simultaneous viewing of programmes (time component)
 - On the basis of a programme schedule (structural component)
 - Near-video-on-demand stays television
 - Pod-Casts: are usually not provided with a structure, but: a programme might be formed from a bundle of single Pod-Casts

Advertising Regulation

Advertising Regulation I – General Provisions

- Includes „audiovisual commercial communication“, Art. 1f AVMSD
- The basic principle that commercial communications **must be recognisable** applies **also to non-linear services**, Art. 3d (1) (a) AVMSD
 - Covers communication “embedded” in the programme as well as “accompanying” communication
- Term of „commercial communication“ has **broader** meaning than “advertising”
 - Includes indirect merchandising, image promotion
- **Restrictions**
 - Communication content, alcohol, tobacco products, protection of minors

Advertising Regulation II – Product Placement: Basics

- **Definition:** Presentation of products, services or trade marks in audiovisual media services in return for payments, Art. 1 (k)
- **Basic Principle:** Product Placement is **prohibited**, Art. 3f (1)
- **Exceptions:** Enumerated list of admissible cases, Art. 3f (2)
 - Admissible for: cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes or where there is no payment but only provision of certain goods or services for free
 - Member States may derogate from provisions, e.g. constitute a total prohibition of product placement
- **Exclusions:** Explicitly no product placement in programmes for children and for certain goods such as tobacco or prescriptive drugs

Advertising Regulation III – Product Placement: Background

- Product placement in productions purchased (usually American movies) from European television broadcasters
 - Broadcasters are not receiving any considerations, consequently, there is no product placement
- Product placement in productions commissioned by European television broadcasters
 - Broadcasters are receiving considerations in return, consequently, product placement is at hand
 - Currently, this is an infringement of the **distinction rule** in Art. 10 (1) TVWFD

Advertising Regulation IV – Product Placement: Is the new Regulation more liberal?

This depends on the assumption whether product placement can be categorised as „advertising“ under the TVWFD:

- One opinion: “**Undue prominence**” is required (see Austrian provisions)
- Another opinion: **Any reference** to a product in notion of merchandising is advertising (arguably in Germany)
- Text of the TVWFD and agreement on the AVMSD defines television advertising as “**announcement**”
 - Promotional character of commercial communication necessary

Advertising Regulation V – Product Placement: Criticism

Criticism:

- Compromises the independence of journalistic editorial work
- Positively enumerated examples are a good approach, but may not be comprehensive enough to cover all relevant cases

Methods of solution:

- Exclusion of all kinds of television broadcasts in which the independence of journalistic editorial work is likely to be compromised
- Exceptions may not be approved by Member States (difficult in practice for economical reasons)

Advertising Regulation VI – Further Provisions

“Interrupting Advertising”

→ Increased flexibility (lags behind the expectations of industry)

Quantitative advertising rules:

- Limitation per day was dropped (not exhausted by broadcasters anyway)
- Limitation per hour stays at 20 % (corresponds to 12 min./h)
- Isolated spots will still remain the exception

Implementation and Supervision

Implementation and Supervision I – Co- and Self-Regulation

What form of regulation complies with Art. 249 (3) EC Treaty, if a Directive does not include specific provisions?

- A Survey for the European Commission: Co-regulation is basically an adequate instrument for transformation
 - Jurisdiction of the ECJ: Pure self-regulation without any state involvement is not adequate
 - AVMSD contains a reference to co- and self-regulation
- What kind of scope may the Member States apply when implementing the provisions of the AVMS Directive into national law?

Implementation and Supervision II – The Text of Article 3 AVMSD

1. [...]
2. Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers under their jurisdiction effectively comply with the provisions of this Directive.
3. Member States shall **encourage co- and/or self-regulatory regimes** at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are **broadly accepted by the main stakeholders** in the Member States concerned and provide for effective enforcement.

Implementation and Supervision III – The Specific Scope of Transformation in the MS

- Art. 3 (2): Common formulation for the obligation of transformation
 - Indicates a **common scope** for the transformation, i.e. implementation of classical regulation, co-regulation or equal systems
- Art. 3 (3) (1): „encourage“
 - No specific determination but a **recommendation** to consider a co-regulatory regime
 - Self-regulation is only a complementary method of implementing the provisions of the Directive (Agreement on AVMSD, Recital 25)
- Art. 3 (3) (2): “broadly accepted by the main stakeholders”
 - Similar to the formulation “Interinstitutional Agreement on better lawmaking”
 - The question of who are the **main stakeholders** affects the whole co-regulatory system
 - ➔ **Member States do have a scope of transformation**

Implementation and Supervision IV – Actions in the Country of Reception

- **Country of origin principle** generally prohibits a second examination of the service in the country of reception and further actions that may interfere with the freedom of retransmitting services into another Member State
- **Extension** to non-linear media services, Art. 2a (1) AVMSD
- Example: **Ban order** against access-provider
 - Only in compliance with the conditions of Art. 2a (2) AVMSD (in Germany para. 59 (3) Interstate Treaty on Broadcasting and Telemedia Services)
 - Complex regulation in order to provide Member States with opportunity to take actions against services without interfering with the freedom of reception

Outlook

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- **Media convergence** makes it difficult to determine the exact scope of media laws
- The EC and the Member States pursue **different regulatory purposes**
- The EC and the Member States lacked the courage to enact a “**Content Directive**”
- The numerous **compromises** have led to more differentiation and make the interpretation of provisions rather difficult.
- One should better not calculate the **costs of re-regulation**, least of all, compare it to the actual achievement. However, the AVMS Directive will be more able to cope with the challenges of convergence than the TVWF Directive was.