European Commission: Draft Audiovisual Media Services Directive

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On 13 December 2005, the European Commission published its proposal for an amendment to the Television Without Frontiers Directive (89/552/EEC as amended by Directive 97/36/EC).

On the grounds that new technologies in the transmission of audiovisual media services have made it necessary (1) to take into account the impact of structural change and technological developments on business models, especially the financing of commercial broadcasting, and (2) to ensure optimal conditions of competition for European companies and services in the information technology and media industries, the proposal provides for the anticipated expansion of the current regulatory framework to include new audiovisual services.

The new scope of the Directive is reflected in the change of its name from the "Television Without Frontiers Directive" to the "Audiovisual Media Services Directive".

According to Article 1 (a) of the proposal, an audiovisual media service is a service the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks. The term does not cover purely private, non-economic services, flash animations, gifs or banners, in which images and sound are merely provided as additional services. Neither does it cover electronic editions of newspapers or magazines, audio transmission or radio. However, silent films do fall under the new regulations.

Incidentally, the revised Directive follows the principle of technological neutrality with regard to the distinction between linear and non-linear services. Linear services are not defined by law. However, they include in particular television broadcasting since, as Article 1 (c) states, for this linear media service, a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule. Non-linear services include audiovisual media services where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider (Article 1 (e)).

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Linear services are subject to heavier restrictions than non-linear services, although the existing legal framework for linear services is relaxed somewhat by the new proposal. All media services are subject to a basic set of regulations. These include obligations to identify the media service provider and to promote European works, a ban on incitement to hatred and rules on the protection of minors, audiovisual commercial communication, sponsorship and product placement.

The proposal also makes provision for the following amendments:

Reflecting the broader scope of the Directive, the concepts of audiovisual media service, media service provider, non-linear service, audiovisual commercial communication and product placement are defined for the first time, while other definitions are adapted. It is particularly worth emphasising the new concept of "audiovisual commercial communication", which is defined as moving images with or without sound which accompany audiovisual media services and are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity.

The wording of provisions on responsibility for regulation is amended, but otherwise these rules remain unchanged. The country of origin principle still applies, although now to all audiovisual media services. Only the order of the criteria for the determination of the country of origin (Article 2, para. 2) is amended. The new paragraphs 7-10 of Article 2 are concerned with ECJ case-law on the problem of fraudulent conduct and how such offences should be dealt with.

Co-regulation is expressly mentioned as something which member states should encourage (Article 3, para. 3). Co-regulatory regimes should be accepted by the main stakeholders and provide for effective enforcement.

Article 3 (b) of the proposal recognises the right of broadcasters to short news reporting, but generally leaves the task of protecting it to the Member States.

Article 3 (c) - (h) of the proposal contains provisions applicable to all media services.

Article 3 (c) introduces the obligation for information to be made accessible concerning the audiovisual media service providers and, where applicable, the competent regulatory authorities. Under Article 3 (d), the Member States are required to ensure that the rules on the protection of minors are respected. The additional obligations on TV broadcasters enshrined in Article 22 remain in place. Article 3 (e) extends the ban on incitement to hatred to cover aspects of disability, age and sexual orientation and expressly states that it applies to audiovisual commercial communications. Article 3 (f), para. 1 requires media service providers to promote European audiovisual works "where practicable", but

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does not explain this obligation any further. The quotas for TV providers set out in Chapter III of the Television Without Frontiers Directive are retained.

Article 3 (g) covers the advertising rules contained in the Television Without Frontiers Directive, amending them to a greater or lesser degree so that they can be applied to audiovisual commercial communications in all audiovisual media services. The following articles of the Television Without Frontiers Directive are retained: Article 10, paras. 1 and 2 (surreptitious advertising) and para. 3 (subliminal techniques), Article 12 (content restrictions), Article 13 (tobacco products), Article 15 (a) (alcoholic beverages) and Article 16 (advertising and protection of minors).

Article 3 (h) contains the sponsorship rules enshrined in Article 17, although the wording is adapted and they are extended to include product placement. The decision to continue to allow product placement was the subject of particular debate. However, as before, news and current affairs programmes, as well as media services for children and documentaries may not contain product placement.

With regard to the provisions on television advertising, certain parts of Article 11 of the Television Without Frontiers Directive are removed. In addition, the length of transmission time between advertising breaks is reduced from 45 to 35 minutes (and this now applies also to news and children's programmes). Isolated advertising is now expressly permitted in sports programmes (although, as before, it should otherwise remain the exception), while the principle of separation still applies to advertising and teleshopping. Although there is no daily maximum level of advertising time, the hourly limit remains in place. With these measures, the European Commission's Interpretative Communication on traditional television still applies.

The provisions of Chapter III of the Television Without Frontiers Directive, which deal with the promotion of TV programme distribution and production, are unchanged apart from slight amendments to the definition of a European work.

The new Article 23 (b) is also worthy of mention. It requires the Member States to guarantee the independence of national regulatory authorities, who must provide each other and the Commission with the information necessary for the application of the Directive's provisions.

It remains to be seen whether this proposal will be sufficient on the one hand to provide the legal certainty that it was claimed was lacking and to counter unfair competition conditions and, on the other, to offer the highest possible level of protection for certain public interests. The first clues will be provided in the various opinions expressed in the next stage of the legislative process.

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Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 2005/0260 (COD)

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