

International Telecommunications Society
ITS 19th European Regional Conference
2-5 September 2007, Istanbul, Turkey

***The modernisation of the European Television without
Frontiers Directive:
unnecessary regulation and the introduction of internet
governance***

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Abstract

This paper presents a critical analysis of the proposal for the amended Television without Frontiers Directive (the draft Audiovisual Media Services Directive). The following is argued in the paper:

- a) The revision lacks consistency from a regulatory point of view by using the artificial distinction between 'linear' and 'non-linear' services. Although based on jurisprudence from the European Court of Justice, there is no need to convert this jurisprudence into regulation.*
- b) The directive introduces a wide range of new rules which are applicable to audiovisual services on the internet. It's not less regulation, but more.*
- c) The proposed harmonisation of the content regulation seriously conflicts with standard jurisprudence of the European Court of Human Rights. In its jurisprudence, the Court gives a substantial margin of appreciation to member states for the regulation of content (limiting the possibilities for fully-fledged harmonisation).*
- d) The introduction of new regulation for non-linear services cannot be based on the lack of a transfrontier market. It's an attempt to regulate the internet (aka 'non-linear' services) and will have an adverse effect on the creation of a common market.*

The paper is still a draft. Certain topics raised require additional research and are not discussed in full detail. The notes and references also need to be supplemented further.

Index

Abstract	3
Index	5
1. Introduction	7
2. <i>Some history</i>	7
2.1 The TwF-Directive	7
2.2 The Mediakabel case	8
3. Audiovisual Media Services Directive	8
3.1 Modernisation of the TwF-Directive	8
3.2 Linear versus non-linear	9
3.3 Difference questionable	10
3.4 Internet governance	11
3.5 Harmonisation ?	12
3.6 Conflict with jurisprudence of European Court of Human Rights	12
4. Conclusions	13
Appendix	15
Literature	23
Notes	24

1. Introduction

This paper first of all discusses the previous/existing regulation of transfrontier television and one of the core interpretative decisions of the European Court of Justice, the *Mediakabel* case. This brief analysis will be followed by an assessment of some of the new elements in the proposed Audiovisual Media Services Directive (AMS-directive) with a particular focus on the aspect of linear versus non-linear media services.

2. *Some history*

2.1 *The TwF-Directive*

The original Television without Frontiers Directive (TwF-Directive) dates back to quite a while ago, to be exact, to 1989. This was followed, almost eight years later, with a substantial revision that resulted especially in more scope for the commercial aspects of transfrontier television.

We should not forget that there was an important reason for the (original) TwF-Directive. Many countries had rules that hindered the (re-)transmission of programmes originating in other countries. For example, the Netherlands managed to acquire an impressive track record of attempts to keep the national market shut to outsiders. It gave the European Court of Justice in Luxembourg quite a bone to chew. The restrictions imposed by member states were mainly aimed at television, so that the directive only applied to television broadcasters. Transfrontier obstacles to radio transmission hardly existed, or were of such a level that harmonisation was not considered a significant issue.

2.2 The *Mediakabel* case

In the recent *Mediakabel* case (case no. C-89/04 of 2 June 2005), the European Court of Justice once again confirmed that the Directive only focuses on traditional television. The Court did so, first by confirming the classic form of distribution (random/multipoint distribution), and subsequently by judging that within the context of the TwF-Directive, it is the perspective of the provider that determines whether it concerns a television broadcast that is subject to the Directive: ‘A service such as Filmtime, which consists of broadcasting television programmes intended for reception by the public and which is not provided at the individual request of a recipient of services, is a television broadcasting service. The determining criterion for this concept is the broadcast of television programmes ‘intended for reception by the public’. Priority should therefore be given to the standpoint of the service provider in the analysis of this concept.’ This last sentence, in particular, ought to provoke criticism. I always thought that European law centred, in principle, on the end-user. The relevant issue is whether or not his or her interests are served. How strange, then, that here the argument is tied to the provider, rather than to how the end-user experiences the broadcast. It is not at all clear whether the end-user perceives a distinct difference between ‘near-video-on-demand’ (which is deemed to fall under the concept of television broadcast) and ‘video-on-demand’, to which the TwF-Directive does not apply. One could blame the text of the Directive for this, but it nevertheless remains something to consider.

3. Audiovisual Media Services Directive

3.1 Modernisation of the TwF-Directive

Growing pressure to modernise the TwF-Directive has resulted in a proposal for a new ‘Audiovisual Media Services Directive’ (AMS-Directive). When analysing the arguments for modernisation, at least two reasons surface frequently. First of all, it is argued that there is a need to further update the commercial regulation of the TwF-Directive in order to enhance the commercial exploitation model (the ‘market developments’). Secondly, several member states showed a clear interest in regulating

the Internet and the distribution of audiovisual content in particular (the ‘technological developments’).

3.2 Linear versus non-linear

It is most unfortunate that the earlier mentioned jurisprudence (the *Mediakabel* case) is proving decisive in the drafting of the Audiovisual Media Services Directive. The entire proposed regulatory framework is to a large extent determined by the difference between ‘linear media services’ and ‘non-linear media services’ (or the difference between ‘television broadcasts’ and ‘on-demand services’). A linear audiovisual media service is understood to be a service where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule (This is defined in the draft (article 1, sub c) as *‘television broadcasting’ or ‘television broadcast’ (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule*). A non-linear audiovisual media service, on the other hand, is a service where the user decides upon the moment in time when a specific programme is transmitted. The draft includes this in the definition of ‘on-demand service’ (article 1, sub e): *‘on-demand service’ (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider*. A technical (supply side related) criterion is made decisive, rather than how the service is experienced by the end-user.

The draft (and earlier documents from the European Commission) also details to some extent what kind of services fall outside its scope. Examples given include advertising not delivered in connection with on-demand services; video-clips inserted in websites when the sites’ main purpose is not the delivery of audiovisual content; animated images on press websites and blogs for non-commercial purposes.²

3.3 Difference questionable

Why introduce this distinction? The arguments put forward are hardly persuasive. It was argued that there would be no reason for the far-reaching regulation of ‘pull content’ (the ‘non-linear services’), except when it involves essential public interests. ‘Pull content’ is supposedly different because there is a difference in control (in the hands of the viewer) and because there is a difference in terms of ‘likely impact on society’. The latter probably derives from traditional beliefs regarding the impact of randomly distributed programme broadcasts.

There is much to contest, both in the technology and the ‘impact on society’ arguments. First, let’s consider the technology. Technological advancements are fast blurring the distinction between linear and non-linear. There is the increasing popularity of the personal video recorder (PVR), enabling viewers to record everything that they wish to watch (or, at any rate, a lot of it). These recordings, while made (and received) in an originally ‘linear’ environment, are subsequently viewed in ‘non-linear’ form. Then, there are the missed programmes that viewers can retrieve the following day in ‘non-linear’ form (via Internet, but also as a specific service on, for instance, a cable television network). A third example of the blurring of the distinction between linear and non-linear is the phenomenon of ‘scheduled streaming video’ versus ‘demand streaming video’.

That there would be a substantial difference in terms of impact, depending on whether it’s a matter of ‘pull content’ or random distribution, is also disputable. The main reason for the excessive focus on this distinction derives from the fact that regulation, until now, primarily focused on the supply-side. This has historical origins, since traditional television had a strong supply character by nature. There is moreover the previously indicated focus on the Court of Justice judgement in the *Mediakabel* case. In consequence, the demand side is severely neglected. How are services used by the end-users (is it, in their perspective, a matter of substitution)? How do end-users perceive the media service (is the same programme suddenly experienced differently because it is no longer distributed at random, but in an ‘on-demand’ form)? I personally find it hard to believe that, for example, sponsoring or product placement suddenly becomes an entirely different issue for the consumer, depending on whether the service is offered in a linear or non-linear form.

3.4 Internet governance

But there are more substantial issues that arise, not only from the distinction between linear and non-linear, but especially from the fact that ‘non-linear’/on-demand services will henceforth be made subject to a European Directive. Amongst other things, this means that several provisions of the proposed Directive will address the distribution of audiovisual media services on the Internet. This is in particular the case with Articles 3a – 3h of the draft AVMS Directive, provisions that primarily address the content or content-related aspects of the services. For example: on the grounds of Article 3a, ‘Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of the service at least the following information: (a) the name of the media service provider; (b) the geographic address at which the media service provider is established; (c) the details of the media service provider, including his electronic mail address or website, which allow him to be contacted rapidly in a direct and effective manner (...)’. And Article 3b reads as follows: ‘Member States shall ensure by appropriate means that audiovisual media services provided by providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality’. Furthermore, Article 3d stipulates that ‘(...) (c) audiovisual commercial communications must not: (-i) prejudice respect for human dignity, (i) include any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation, [..] (iii) encourage behaviour prejudicial to health or to safety; (iv) encourage behaviour grossly prejudicial to the protection of the environment’. A final example: Article 3g obliges member states to take appropriate measures to ‘ensure that audiovisual media services under their jurisdiction are not made available in such a way that might seriously impair the physical, mental or moral development of minors’.

All these provisions do apply to traditional broadcasting, IPTV, but also to the Internet. By doing so, we’re now confronted with one of the first forms of internet governance on a European level.

3.5 Harmonisation ?

In principle, the draft Directive obliges a harmonisation of the content aspects mentioned above. This is strange, given the considerable differences that exist with regard to how things are viewed at member state level. For instance, various member states recognise the right to anonymity or, where appropriate, that the distributor of the media service can take the place of the media service provider as being responsible for a publication. There also exist considerable differences of opinion as to what is and is not harmful to minors. The same goes for incitement to hatred or causing offence to religious beliefs or the protection of the environment.

How is it possible that the Directive seeks harmonisation in all of these areas (and others)? I am not aware of any European Union norms in this regard. Indeed, in the entire process that has led to the inclusion of the said articles, there has not been any relevant background study or debate on these aspects. The Preamble to the draft Directive equally fails to present any considerations that carry any weight. Of course, one could point out that the current Directive to some extent contains comparable stipulations, but that is hardly a reason to expand them and transfer them to a non-linear (Internet) environment. There is no reason to repeat an error made in the past.

3.6 Conflict with jurisprudence European Court of Human Rights

It only gets worse when we view these stipulations in the light of the jurisprudence on Article 10 of the European Convention on Human Rights (ECHR), which protects the freedom of expression. The European Court of Human Rights, supervising the Convention, in fact grants the national governments of member states a large margin of appreciation, precisely in the area of sensitive issues such as hate, protecting minors and offending religious beliefs. To quote from the famous *Handyside* judgment (Appn. No. 5493/72 of 7 December 1976): “In particular, it is not possible to find in the domestic laws of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subjects”. That these considerations are still valid, also in a modern Internet society, is demonstrated by the *Yahoo* case (TGI Paris,

Ordonnance de référé du 20 nov. 2000).³ Another nice recent incident that illustrates the fact that morals can differ substantially are the Danish cartoons.

The revised Directive (as was the case with the original directive) tries to avoid circumvention of national regulation. Remedies in this respect have been recognised by both the European Court of Justice and the European Court of Human Rights. In the *Groppera* case - about the retransmission on Swiss cable networks of radio programmes – specifically directed towards the Swiss audience - broadcast from Italy, the European Court of Human Rights concludes ‘(..) it was not a form of censorship directed the content or tendencies of the programmes concerned, but a measure taken against a station which the authorities of the respondent State could reasonably hold to be in reality a Swiss station operating from the other side of the border in order to circumvent the statutory telecommunications system in force in Switzerland’. So, for technical or economic reasons, circumvention can be allowed. However, when the content is at stake, the ECHR seems to have a different opinion.⁴

The matter is now more relevant than ever before because in the case of on-demand services, receiving states have even more rights to fight ‘circumvention’ by blocking services (see Article 2a of the draft). They can ask member states under whose jurisdiction a specific service provider falls to take measures. These member states can then come under severe pressure to comply with the request from the receiving state. It all sounds a bit like the prior consent that receiving states claimed in the late seventies/early eighties when satellite broadcasts started.⁵

4. Conclusions

Let me conclude. I hope to have demonstrated that technological advancements have made the distinction between linear and non-linear difficult to maintain. The principal focus on the supply-side moreover does not do justice to the interests of the end-user. The far-reaching interference of the European Union with matters that, according to Article 10 ECHR, are primarily the responsibility of member states, is not supported by argument and contradicts current doctrine.

The most important question is not even addressed: is there any reason why regulation should be expanded to include ‘non-linear services’? Does the transfrontier supply of these services actually constitute a problem? As far as I can tell, the European Union is inundated with transfrontier media services of every shape and form. This is happening without any - or minimal - hitches. The current situation cannot be compared to 1997, when the unhindered/unregulated (re-)distribution of television broadcasts from other countries was the exception rather than the rule. We may also add that, in most member states, the matters mentioned in Articles 3a-3h have long been regulated at a national level. My conclusion is simple: we are dealing here with a draft Directive that displays some serious design flaws, and that deals with issues which have yet to crystallise and are largely not amenable to harmonisation. It would be alright as an academic exercise, but I believe we’re better off without it (unfortunately, it’s very unlikely that the draft Directive will not become a reality...).

Appendix

Relevant provisions from the draft Audiovisual Media Services Directive (From the consolidated version after agreement on a common position. Full text can be found on the website of the European Commission: http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm)

CHAPTER I

Definitions

Article 1

For the purpose of this Directive:

(a) 'audiovisual media service' means:

- a service as defined by Articles 49 and 50 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council. Such audiovisual media services are either television broadcasts as defined in paragraph (c) of this Article or on-demand services as defined in paragraph (e) of this Article.

and/or

- audiovisual commercial communication.

(aa) 'programme' means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedy, documentary, children's programmes and original drama.

(ab) 'Editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.

(b) 'media service provider' means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;

(c) 'television broadcasting' or 'television broadcast' (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

(d) 'broadcaster' means a media service provider of television broadcasts

(e) 'on-demand service' (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider;

(f) 'audiovisual commercial communication' means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity

pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.

(g) 'television advertising' means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;

(h) 'surreptitious audiovisual commercial communication' means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration;

(i) 'sponsorship' means any contribution made by a public or private undertaking or natural person not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting its name, its trade mark, its image, its activities or its products;

(j) 'teleshopping' means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment;

(k) 'product placement' means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration.

(..)

CHAPTER II

General provisions

Article 2

Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.

2. For the purposes of this Directive the media service providers under the jurisdiction of a Member State are:

- (a) those established in that Member State in accordance with paragraph 3;
- (b) those to whom paragraph 4 applies.

3. For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:

- (a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;
- (b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates; if a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office; if a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in neither of those

Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the system of law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;

(c) if a media service provider has its head office in a Member State but decisions on audiovisual media service are taken in a third country, or vice-versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State.

4. Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:

(a) they use a satellite up-link situated in that Member State.

(b) although they do not use a satellite up-link situated in that Member State, they use a satellite capacity appertaining to that Member State;

5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the media service provider is established within the meaning of Articles 43 and following of the Treaty establishing the European Community.

6. This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard user equipment directly or indirectly by the public in one or more Member States.

(...)

Article 2a

1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of [...] audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.

2. In respect of television broadcasting, Member States may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled:

(a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22 (1) or (2) and/or Articles 3b;

(b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in (a) on at least two prior occasions;

(c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again;

(d) consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in (c), and the alleged infringement persists.

The Commission shall, within two months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Community law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.

Paragraph 2 shall be without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned. In respect of on-demand services, Member States may take measures to derogate from paragraph 1 in respect of a given service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
- the protection of public health,
- public security, including the safeguarding of national security and defence,
- the protection of consumers, including investors;

(ii) taken against an on-demand service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

Replication of Articles 3 (4), (4) and (6) of Directive 2000/31/EC.

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State under whose jurisdiction the service provider falls to take measures and the latter did not take such measures, or they were inadequate,
- notified the Commission and the Member State under whose jurisdiction the service provider falls of its intention to take such measures.

Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State under whose jurisdiction the service provider falls, indicating the reasons for which the Member State considers that there is urgency.

Without prejudice to the Member State's possibility of proceeding with the measures referred to in paragraphs 4 and 5, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

Article 3

1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive provided that such rules are in compliance with Community law.

1a. In cases where a Member State:

(a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and

(b) assesses that a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory

it may contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed. On receipt of a substantiated request by the first Member State, the Member State having jurisdiction shall request the broadcaster to comply with the rules of general public interest in question. The Member State with jurisdiction shall inform the first Member State of the results obtained following this request within two months. Either Member State may invite the Contact Committee established under Article 23a to examine the case.

1b. Where the first Member State assesses:

(a) that the results achieved through the application of paragraph 1a are not satisfactory; and

(b) that the broadcaster in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established within the first Member State, it may adopt appropriate measures against the broadcaster concerned.

Such measures shall be objectively necessary, applied in a non-discriminatory manner, be suitable for attaining the objectives which they pursue and may not go beyond what is necessary to attain them.

1c. Member States may take measures pursuant to paragraph 1b only if all of the following conditions are met:

(a)

(b)

(c) it has notified the Commission and the Member State in which the broadcaster is established of its intention to take such measures while substantiating the grounds on which it bases its assessment and

(d) the Commission decides that the measures are compatible with Community law, and in particular that assessments made by the Member State taking these measures under paragraphs 1a and 1b are correctly founded.

1d. The Commission shall decide within three months following notification under paragraph 1c(c). If the Commission decides that the measures are incompatible with Community law, the Member State in question shall refrain from taking the proposed measures.

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.

4. Directive 2000/31/EC on certain aspects of information society services, in particular electronic commerce, in the Internal Market, applies fully except as otherwise provided for in this Directive. In the event of a conflict between a provision of Directive 2000/31/EC and a provision of this Directive, the provisions of this Directive shall prevail, unless otherwise provided for in this Directive.

CHAPTER IIa **Provisions applicable to all audiovisual media services**

Article 3a (ex-Article 3c)

Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of the service at least the following information:

(a) the name of the media service provider;

(b) the geographic address at which the media service provider is established;

(c) the details of the media service provider, including his electronic mail address or website, which allow him to be contacted rapidly in a direct and effective manner;

(d) where applicable, the competent regulatory or supervisory bodies.

Article 3b (ex-Article 3e)

Member States shall ensure by appropriate means that audiovisual media services provided by providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

Article 3ba

Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.

Article 3c (ex- Article 3j)

Member States shall ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders.

Article 3d (ex- Article 3g)

1. Member States shall ensure that audiovisual commercial communications provided by providers under their jurisdiction comply with the following requirements:

- (a) audiovisual commercial communications must be readily recognizable as such. Surreptitious audiovisual commercial communication shall be prohibited.
- (b) audiovisual commercial communications must not use subliminal techniques;
- (c) audiovisual commercial communications must not:
 - (-i) prejudice respect for human dignity
 - (i) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
 - [...]
 - (iii) encourage behaviour prejudicial to health or to safety;
 - (iv) encourage behaviour grossly prejudicial to the protection of the environment;
- (d) all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited;
- (e) audiovisual commercial communications for alcoholic beverages must not be aimed specifically at minors and may not encourage immoderate consumption of such beverages;
- (ea) [ex art 14(1)] audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited.
- (f) audiovisual commercial communications must not cause moral or physical detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations

2. Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programming, of foods and beverages containing nutrients and substances with a nutritional or

physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

Article 3e (ex-Article 3h)

1. Audiovisual media services or programmes that are sponsored shall meet the following requirements:

(a) their content and, in the case of television broadcasting, their scheduling may in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider.

(b) they must not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

(c) viewers must be clearly informed of the existence of a sponsorship agreement. Sponsored programmes must be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or the end of the programmes.

2. Audiovisual media services or programmes must not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.

3. The sponsorship of audiovisual media services or programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking but may not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.

4. News and current affairs programmes shall not be sponsored. Member States may choose to prohibit the showing of a sponsorship logo during childrens' programmes, documentaries and religious programmes.

Article 3f (ex-Article 3i)

1. Product placement shall be prohibited.

2. By way of derogation from paragraph 1, product placement shall be admissible, unless a Member State decides otherwise, in -cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes; or -cases where there is no payment but only provision of certain goods or services for free, such as production props and prizes, with a view to their inclusion in a programme.

The derogation in the first indent shall not apply to programmes for children.

The programmes that contain product placement shall meet at least all of the following requirements:

(a) their content and, in the case of television broadcasting, their scheduling is in no circumstances influenced in such a way as to affect the responsibility and editorial independence of the media service provider;

(b) they do not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

(ba) they do not give undue prominence to the product in question;

(c) viewers are clearly informed of the existence of product placement. Programmes containing product placement are appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

As an exception, Member States may choose to waive the requirements set out in (c) above provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.

3. In any case programmes must not contain product placement of:
- tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products; or
 - specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls
4. The provisions of paragraphs 1, 2 and 3 apply only to programmes produced after [date: transposition deadline for the Directive].

CHAPTER IIb
Provisions applicable only to on-demand services

Article 3g (ex-Article 3d)

Member States shall take appropriate measures to ensure that on-demand services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way that ensures that minors will not normally hear or see such on-demand services.

Article 3h (ex-Article 3f)

1. Member States shall ensure that on-demand services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works . Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes proposed by the service.
3. Member State shall report to the Commission, no later than the end of the fourth year after the adoption of this Directive and every four years thereafter on the implementation of the measure set out in paragraph 1.
4. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.

(..)

Literature

(to be completed)

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Notes

¹ Nico van Eijk is professor by special appointment of Media and Telecommunications Law (Institute for Information Law (IViR), University of Amsterdam.

² The given examples are not further discussed in this paper, but there are several inconsistencies and/or sufficient clarifications is lacking.

³ See: Reidenberg 2001.

⁴ The applicability of the European Convention on Human Rights within the regulatory context of the European Union is not discussed in this paper. This is a rather complex matter. Nevertheless, there are no direct possibilities to deal with matters (also) addressing the European Convention on Human Right within the framework of the European Union.

⁵ and more less cumulate in the Unesco-debates around the so-called 'McBride'-report: Unesco 1980.