

General introduction to the new Directive

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The new European Union Directive on Audiovisual Media Services

In May 2007 a political agreement was reached on the text of the European Union's new Directive on Audiovisual Media Services, to replace the 1989 Television without Frontiers Directive. Official adoption of this new regulatory framework by the Council and the European Parliament is expected in Autumn 2007. Member States will then have two years to adapt their national legislation to the new framework. The most important innovation is the inclusion of new audiovisual on-demand services. At the same time, the advertising rules will be liberalized and a legal framework will be introduced for product placement.

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In December 2005 the European Commission submitted its proposal for the revision of the Television without Frontiers Directive. The proposal has two objectives: to modernize the rules applicable to (linear) television broadcasts and to introduce European minimum standards for (non-linear) audiovisual on-demand services. The proposal adopts a graduated regulatory approach. Whereas audiovisual on-demand services are subject only to basic requirements, linear broadcasts must meet stricter requirements. This takes into account the current state of development, as it is still unclear when and to what extent audiovisual on-demand services will have the same impact on society and on public opinion-forming as traditional television.

Political agreement on the new Directive

As the first reactions from the Member States in the Council (in November 2006) and the European Parliament (in December 2006) to the proposal by the Commission were positive despite certain disagreements on the details, the Commission, Council and Parliament started to work on a compromise in the so-called "informal trilogue". A compromise text drawn up in this trilogue gained support from all sides and was the subject of the political agreement reached by the Council at its meeting on 24 May 2007. This opened the way for rapid adoption of the Directive by the Council and Parliament following the Summer recess.

After adoption of the Directive the Member States will have two years to transpose it into national law¹.

¹ In the mid-term, Switzerland will also have to adapt to the new framework given that the Council of Europe is working on a revision of the European Convention on Transfrontier Television to bring it into line with the new Directive. (Moreover, under the bilateral agreement on participation in the MEDIA programmes, Switzerland is obliged to ensure the compatibility of the legal frameworks.)

In view of the political sensitivity and the complexity of the subject matter and the innovative nature of the new Directive, it is remarkable that political agreement was achieved within just 18 months. This is also a personal success for the Commissioner in charge, Ms Viviane Reding, and the European Parliament Rapporteur, Ms Ruth Hieronymi. The process was also supported very effectively by, in succession, Austrian, Finnish and, last but not least, German presidencies of the Council.

Inclusion of new media services

Extension of the scope of the Directive to all audiovisual media services is certainly the core of the reform. This takes account of digitalization and convergence and secures the future of the European audiovisual model. In common with the current Television without Frontiers Directive, the new Directive creates a balance between economic and cultural, democratic and social policy objectives and thus acknowledges that audiovisual media services are as much cultural as they are economic services.

The new Directive ensures the protection of important public interests also with regard to audiovisual on-demand services. This should help build up the trust of viewers, who in future will be able to switch easily and seamlessly between linear and non-linear audiovisual offers.

For the media service providers the new Directive creates legal certainty and avoids distortion of competition between television broadcasters and providers of new media services. The country-of-origin principle, combined with the harmonization of minimum requirements, strengthens the internal market; this should also reinforce the competitiveness of European providers in the global market.

"Audiovisual media services", the key notion in the new Directive, are defined as services whose principal purpose is the provision of audiovisual programmes which inform, entertain or educate the general public through electronic communication networks and which are under the editorial responsibility of a media service provider.

The separate definition of programmes refers to a set of moving images which excludes, in particular, radio programmes. As a concession to the United Kingdom, which originally had reservations about extension of scope, the definition only covers such programmes "whose form and content is comparable to the form and content of television broadcasting". This criterion can serve, for example, to exclude from the scope certain user-generated content. On the other hand, the television-like character is clarified in the Preamble to the effect that the notion of "programme" should be interpreted in a dynamic way, which means that it must not be limited to traditional programme formats.

Graduated requirements for television broadcasting and on-demand services

Owing to the differing minimum requirements, the distinction between television broadcasting and audiovisual on-demand services continues to be relevant.

Television broadcasting, a linear audiovisual media service, allows the simultaneous reception of programmes in accordance with a fixed programme schedule. As it does not matter which technology is used, this definition includes, for example, the streaming of television channels over the Internet. An on-demand service, which is a non-linear audiovisual media service, provides programmes upon individual request from a catalogue of programmes at a time chosen by the user. An example of this is television broadcasters' video portals, where television programmes are made available to viewers upon request for a certain period (e.g. one week) after they have been broadcast ("catch-up TV").

The differences in the regulation of both (linear and non-linear) forms of audiovisual media services are particularly apparent with respect to minors and the promotion of European works (where on-demand services are subject to lighter rules), as well as access to information, the right of reply and quantitative advertising rules (which apply exclusively to television broadcasting). On the other hand, the rules are practically the same for all audiovisual media services in the areas of qualitative advertising rules (advertising content) and the rules on sponsorship, product placement and the protection of human dignity.

Member States remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules, and this also allows for possible differentiations between different kinds of services.

Relaxation of rules for television advertising and product placement

The key request by commercial television broadcasters for the current rules on television advertising to be relaxed has been accommodated in some important respects.

The principle of separation of advertising and editorial content has been reformulated in a way which opens up more possibilities for the use of new advertising techniques. Split-screen advertising is now clearly authorized, provided that it is kept distinct from the editorial content through spatial means. The rule that isolated advertising spots must remain the exception has been retained in principle but no longer applies to the transmission of sports events.

The quantitative limit on advertising spots and teleshopping spots, which is most relevant in practice, is 12 minutes per hour; whereas this remains, the limit on the daily advertising time has been abolished.

The change which is probably most relevant for television broadcasters is the relaxation of the insertion rules for television advertising and, in particular, the abolition of the 20-minute rule, which required that at least 20 minutes elapse between each successive advertising break within a programme. Whereas for children's programmes the current 30-minute rule has been essentially retained, the special rules which protected some other programme categories have mostly been abolished or relaxed; a more liberal 30-minute rule will in future apply to news programmes, cinematographic works and films made for television.

The new rules on product placement will give legal certainty to new practices which have become more widespread internationally. There will be exceptions from the general prohibition of product placement with regard to:

1. Cinematographic works, films and series, sports programmes and light entertainment programmes, and
2. Production aid, i.e. when only certain goods or services are provided free of charge for a production (such as production props and prizes), and this irrespective of the programme category (e.g. also in children's programmes).

In addition, to be compatible with the Directive product placement must fulfil certain requirements. In particular, in the interests of transparency, viewers must be informed of the existence of product placement at the start and end of the programme and also when the programme resumes after an advertising break.

Other innovations

The new Directive contains a number of other interesting new features, which can be mentioned only briefly here.

- Co-regulation and self-regulation: Member States are encouraged to use, in addition to traditional legislation, co- and self-regulatory instruments for the implementation of the Directive; the advantage of these instruments is seen in the involvement of the service providers themselves and in easier adaptation to developments.
- Cases of circumvention: new rules and more effective procedures have been introduced at the request of a number of (smaller) Member States (with the exception of Luxembourg), the aim being to make it more difficult for television broadcasters to circumvent stricter national rules in the country whose public is targeted by the television broadcasts, through establishment in another Member State.
- Access to information: in addition to the current provision on listed events (of major importance for society) a general news access right has been introduced, which gives television broadcasters, in principle, the right to choose freely and use short extracts from the transmitting broadcaster's signal.

- Advertising for junk food: further to an initiative by the Parliament, media service provisions are encouraged to develop a code of conduct regarding the advertising of junk food in or around children's programmes.
 - Access for people with disabilities: also in response to a proposal by Parliament, a provision has been included whereby media service providers should make their services gradually accessible to people with a visual or hearing disability.
 - Independence of regulatory bodies: the Directive requires the regulatory body for the audiovisual sector to be functionally independent, without prejudice to the competence of the Member States to choose the organizational form.
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