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## **“Old” and “new media. Audiovisual Media Services Directive as an attempt to respond to market and technological challenges.**

**Abstract:** The revised Television without Frontiers directive adopted by the Council of European Union and European Parliament in 2007 significantly changed the EU legal framework of the audiovisual media sector. It responds to the dynamic market and technological developments which have been shaping the audiovisual media market for years.

It should be noted that regulation of the media, especially legislating activities, should take into account the legitimate interests presented by wide range of market and social actors. Taking advantage of: the openness and multistage legislative process in the EU, including the implementation of community law by Member States as its final phase, such interests could be fully expressed and have indirect impact on adopted solutions. At the same time different approaches to the directive’s implementation taken by Member States could endanger one of the main aims of this act i.e. harmonization of national laws.

This paper presents relations between aims and solutions adopted in the directive as well as interests expressed by different stakeholders which would eventually influence the internal debates on national legal frameworks in Member States. The paper refers as well to state of play resulting from the adoption of the new directive and before its implementation phase which could be regarded by stakeholders/market actors as an extra time.

**Key words:** Audiovisual Media Services Directive, lobbying, interest groups, implementation of Community law, media law, new media, product placement, advertising.

### **1. Introduction**

Taking into consideration the ongoing technological changes, competition from the United States as well as growing economic importance of audiovisual services, the European Union has decided to revise its audiovisual policy. The EU amended the “Television without Frontiers” directive, the main legal regulation for this industry, shaping the media market since 1989. One of the goals was to enable equal competition on the common audiovisual market through a unification of regulation. The directive was given a new name, to stress the principle of technological neutrality. The “Audiovisual Media Services” directive encompasses a variety of new subjects offering innovative media services, such as Internet TV or video on demand. Another goal of the directive is to increase the competitiveness of the European audiovisual sector, thanks to modified regulation of TV advertising.

The process of discussion on the directive had to take into account various, often conflicting interests of different market players as well as social consequences that may result. The discussion process, characteristic to EU, is based on the principle of openness and participation of any interested parties, despite this, it was not possible to take into account all of the articulated postulates. The new directive is not a final one probably and now it is up to member states to implement it in their countries. The process is taking place simultaneously in 27 different countries and since the directive allows certain freedoms in its interpretation we may expect some differences in the way it is implemented. We may also expect that regarding some contentious issues there will also be heated debate on the domestic level.

In Poland, most of our television regulation is based on the “Television without Frontiers” directive. The Polish regulation on radio and television implemented the directive by transferring its rules into Polish law, especially those regarding advertising (daily and hourly limits,

interruption of programmes), protection of minors, human dignity, promotion of European works and important events<sup>1</sup>, which should be made available via public TV<sup>2</sup>.

This article attempts to summarize the results of amendments made regarding European audiovisual policy, specifically the “Audiovisual Media Services” directive. We will try to show the interrelationships between the proposed solutions and the different parties conflicting interests. This is imperative since conflicting interests will continue to be of interest to the public opinion and will shape public debate domestically. The analysis below also aims to identify problems and issues regarding reaching the goals included in the directive as well as show the challenges to be faced.

## 2. The amendment process and its participants<sup>3</sup>

As far as regulation of the audiovisual sector, in 1997 the European Commission created a Green Paper on Convergence<sup>4</sup>. This document includes detailed information on the challenges lying ahead due to the process of technological change in this sector. In the following documents<sup>5</sup> the European Commission specified the issues requiring discussion in order to be able to carry out the first round of **public consultations** between April and July 2003<sup>6</sup>.

These consultations were a starting point to the Commission’s further action. It appointed four focus groups in which experts representing various fields and domains worked between September 2004 and February 2005<sup>7</sup>. After that another round of public consultations took place, in the summer of 2005. This time the discussion focused on six Issue Papers<sup>8</sup> which included the most important issues. Resulting was a preliminary proposal for a new directive presented by the Commission on December 13, 2005<sup>9</sup>. After discussions in the European Parliament, the EU Council and then again with the Commission, the amended directive project was approved in March 2007<sup>10</sup>. In May 2007, a **political agreement**<sup>11</sup> was reached in which the Council of

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<sup>1</sup> This is predominantly sport events. Cf. approved lists published on European Commission’s site ([http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events\\_list/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events_list/index_en.htm)).

<sup>2</sup> See also Wojciech Kołodziejczyk, Małgorzata Pęk, *Modyfikacja podejścia regulacyjnego do usług audiowizualnych w prawie wspólnotowym - w świetle proponowanych zmian w dyrektywie „O telewizji bez granic”*, January 2006., ([http://www.krrit.gov.pl/dokumenty/dm/dyrektywy\\_nowelizacja.pdf](http://www.krrit.gov.pl/dokumenty/dm/dyrektywy_nowelizacja.pdf))

<sup>3</sup> For more see A. Scheuer, *Traditional paradigms for new services? The Commission Proposal for a 'Audiovisual Media Services Directive'*, in: “Communications & Strategies”, no. 62, 2nd quarter 2006, p. 1-21.

<sup>4</sup> See European Commission, Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation. Towards an Information Society Approach, COM(97)62, Brussels, 3 December 1997.

<sup>5</sup> See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age, COM(1999) 657 final; Fourth report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers", COM/2002/0778 final.

<sup>6</sup> See European Commission, Public consultation on the review of the "Television without Frontiers" directive, 2003 ([http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/consultation\\_2003/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/consultation_2003/index_en.htm)).

<sup>7</sup> See: ([http://ec.europa.eu/avpolicy/docs/reg/modernisation/focus\\_groups/list\\_participants\\_fg\\_new2.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/focus_groups/list_participants_fg_new2.pdf)).

<sup>8</sup> See European Commission, Public Consultation 2005,

([http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/consultation\\_2005/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/consultation_2005/index_en.htm)).

<sup>9</sup> See the proposed by the Commission project of the EP and Council directive, amending the Council directive 89/552/EEG on the coordination of legislative, executive and administrative regulation of member states regarding broadcasting activity (COM(2005)646 final).

<sup>10</sup> See the changed project of the directive by EP and Commission, amending the Council directive 89/552/EEG regarding coordination of some legislative, executive and administrative regulation of member states regarding broadcasting activity (“Audiovisual media services without frontiers”) COM/2007/0170 final.

<sup>11</sup> The Commission approves the political agreement on the new directive on audiovisual media in Europe, EC Press Announcement, May 24, 2007, IP/07/706.

Europe and the European Parliament agreed on the main goals of the amended directive with the Commission. This was the final step to the passing of the new directive.

In the legislative process, on the union level, the decision making process was carried out according to the procedure of common decision making<sup>12</sup> in which took part European institutions as well as those from member countries. Among EU institutions there was the European Commission, or the General Management on Information and Media Society, which was responsible for the preliminary project proposal of the directive and cooperation between the interested parties. An active role was also played by the European Parliament, especially its Culture and Education Committee, and the Council of Europe, specifically its Audiovisual Working Party. Finally, there were institutions and representatives from member states, mostly government agencies (representatives of ministries) as well as representatives of regulatory bodies<sup>13</sup>. The regulatory bodies' presence was especially imperative as they are to play a key role in the implementation of the new directive<sup>14</sup>.

As can be seen from the above the amendment process was not dominated solely by EU institutions or any particular member state. The debate that took place proved that various social and economic parties' interests were taken into consideration and discussed. Looking back at this process, it is worth taking a closer look at the different parties engaged in lobbying activity in this area, to classify them and to compare their proposed postulates. First of all, there were individual companies (ie. RTL), interest groups (*European Broadcasting Union*- EBU), firm associations<sup>15</sup> (ie. *The International Communications Round Table* - ICRT) and research centres (ie. *Institute for the Management of Information Systems* – IMIS). Regarding interest groups, they can be divided into domestic (ie. *Association for Television On-Demand* - ATVOD), European (ie. EBU) and global (ie. *World Federation of Advertisers* - WFA). For the purposes of this article the most imperative interest groups seem to be: TV broadcasters (ie. *Association of Commercial Television in Europe* - ACT), on-demand service providers (ie. ATVOD), TV producers (*UK Film Council*), media houses (ie. *Association of Television and Radio sales Houses* - EGTA), consumers (ie. *The European Consumer's Organization* - BEUC), journalists (ie. *Association of European Journalists*), operators (*The European Telecommunications Network Operators' Association* - ENTO) as well as other groups indirectly tied to the audiovisual sector (ie. *The Union of European Football Associations* - UEFA). All of these interest groups presented various interests, often conflicting ones which had to be taken into consideration during work on the new directive. Additionally there was also lobbying activity by different research institutes and other parties.

An analysis of the lobbying activities that took place will allow us to indicate those parties which gained the most as well as those which were most negatively affected by the changes in the regulation. This type of analysis will shed some light on the essence of the implemented changes as well as on the areas of potential conflict which might result.

### 3. Amendment justification

We need to take a look at the goals of the amendment two ways, on the one hand the goals which the new directive attempts to achieve overall and, on the other, on the motives which

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<sup>12</sup>See more in: M. M. Kenig - Witkowska (ed.) A. Łazowski, R. Ostrihansky, *Prawo instytucjonalne Unii Europejskiej*, Warszawa 2004, 4.p. 208.

<sup>13</sup>Representatives of some regulatory bodies took part in the working group on the audiovisual directive, part of Council of Europe structures, cf. KRRiT report from 2006, Warszawa, March 2007, p. 15. Moreover, the Commission consulted some issues with regulatory bodies during meetings of *High-level Group of Executives of Regulatory Authorities in the Field of Broadcasting*.

<sup>14</sup>Role of independent regulatory bodies was confirmed by motive 64 in the preamble of the new directive.

<sup>15</sup>Company alliances or round table relationships are characterised by loose member and organization structures. Cf. J. Greenwood, *European Casebook on Business Alliances*, London 1995.

justified the change of media regulation and the challenges which the new directive faces. This way we will be able to assess whether the changes can meet the challenges that face ahead.

Basic goals of the “Television without Frontiers” directive were classified in the Regulation Results Assessment<sup>16</sup> enclosed in the proposal for the change of the directive, put forward by the Commission in December 2005:

-harmonization- facilitating the free flow of TV broadcasting services on EU’s internal market, through the use of the rule of country origin;

-guarantee – assurance of protection of basic rights that lie in the public interest, such as protection of minors and human dignity.

Regulation Results Assessment also lists supporting goals:

-cultural and social, specifically protection of national heritage and diversity;

-economic, supporting the development of strong, competitive and integrated European audiovisual industry, according to the goals of the Lisbon Agenda<sup>17</sup>.

Moreover, the Regulation Results Assessment requires the directive to protect basic human rights. In general, we can assume that the same goals also apply to the new directive on “Audiovisual Media Services”.

Following, we need to take a look at the four basic goals proposed for the new directive. These were identified based on programme documents which were created during the amendment process, what was written in the proposal presented and what was finally approved.<sup>18</sup> These are:

-**harmonization** of member state regulation regarding audiovisual media services,

-**adaptation to technological and market changes** as well as recipient/viewer preference changes,

-**making the European audiovisual sector more competitive**, especially with the American,

-**introduction of flexible regulation**, adaptable to future technological change, based on the rule of technological neutrality.

As we can see, these goals are co-dependent and complement each other. The harmonisation goal is included in art. 47 sec. 2 and art. 55 in the EU Treaty in the part on the freedom of rendering services<sup>19</sup>. The directive’s goal is to homogenise minimum standards by member states regarding audiovisual media services in order to ease the free flow of services.

The following two directive goals regard new responsibilities of media audiovisual services (adaptation to technological change) as well as a liberalisation of regulation as far as traditional TV broadcasters (making it more competitive). The wide scope of the directive was created in order to eliminate “unjustified regulation differences in treating the different forms of distribution of identical or similar media content”<sup>20</sup> which would breach the rule of technological

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<sup>16</sup> See Commission staff working document - Annex to the 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 - Impact Assessment – Draft Audiovisual Media Services Directive {COM(2005) 646 final}, SEC(2005) 1625/2.

<sup>17</sup> The need for Television without Frontiers directive amendment was mentioned by Announcement of Council of Europe, EP, European Socio-Economic Committee and Regions Committee, “i2010 – Europejskie społeczeństwo informacyjne na rzecz wzrostu i zatrudnienia” COM(2005) 229 final.

<sup>18</sup> Cf. First amendment of the directive, “new broadcasting technologies for AMS require amending legal ramifications so that they take into account the structural changes, ICT proliferation and technological development, particularly the financing of commercial broadcasts so that they are competitive and legal in European sectors of ICT and media and so that they respect cultural and language diversity”.

<sup>19</sup> Member states negatively responded to the directive’s economic justification regarding the “Green Paper on common radio and TV market via satellite and cable” [COM (84) 300 final], K. Jakubowicz, *Media Publiczne. Początek końca czy nowy początek*, WaiP, Warszawa 2007 p. 133-134.

<sup>20</sup> See directive Project justification, COM(2005) 646 final, p. 3.

neutrality<sup>21</sup>. Liberalisation ('modernization' or 'simplification' according to the Commission) of present regulation was introduced in order for traditional broadcasters to be able to compete on an even field<sup>22</sup> with more modern (on-demand) service providers<sup>23</sup> and so that the European industry could gain new sources of financing which would enable it to be more competitive with American media industry<sup>24</sup>.

Moreover, another crucial challenge for the audiovisual market is elasticity which will allow it to adapt to technological development of audiovisual services. This issue was taken into consideration by the Commission when it presented the project of the new directive, "Considering that fact that implementation of the amended directive by member states will take place in 2008/2009 at the earliest, the domestic broadcasting markets will likely be effected by it between 2009-2016. Hence, the new directive will need to be as future proof as possible."<sup>25</sup>

#### 4. Description of most important changes and vested interest games on the European level

The new directive focuses on being adaptable to technological change and convergence consequences as well as being liberal in order to decrease the trade deficit the EU has with the US in this market. The two crucial amendments in the new directive are: **widening the scope of the directive** and **liberalisation of regulation regarding TV advertising and product location**. These two amendments will be discussed in more detail as they evoked much controversy. These two points generated the greatest number of written stands which were presented during the second round of public consultations<sup>26</sup>.

##### a) widening the scope of the directive

A proposal for change of the "Television without Frontiers" directive was justified by the need to make it adaptable to technological developments on the market. This took place in 1997 and resulted in a notation made in the directive preamble 97/36/WE<sup>27</sup>. The 'old' directive applied solely to television broadcasting<sup>28</sup> or traditional broadcasting<sup>29</sup>. We should also take into consideration the dynamic interpretation of this phrase, supported by EU Court of Justice ruling in the case of *Mediakabel* which stated that the directive encompasses also *near video on demand*<sup>30</sup> services. Still, despite flexible interpretation of TV broadcasting (regardless the broadcasting method), it was not possible to apply it to services *on-demand*.

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<sup>21</sup> Technological neutrality is understood as not differentiating based on technology used for distribution, taking into account differences justified by degree of influence on public opinion.

<sup>22</sup> *Level playing field*. See motives 39 and 46 of the directive project COM(2005) 646 final.

<sup>23</sup> See motive 54 of the directive, "development of new advertising techniques and marketing innovation created new possibilities of including AMS commercial broadcasts part of traditional broadcasting services, due to which such broadcasts can better compete with innovative services on-demand".

<sup>24</sup> *Presenting the new Audiovisual Media Services without frontiers Directive: Frequently asked questions*, MEMO/07/206, Brussels, 24 May 2007, p. 3.

<sup>25</sup> Eng. *as future-proof as possible*, Cf. Commission staff working document..., op cit p. 6.

<sup>26</sup> According to EC data, 109 interested subjects send in their opinions and 108 subjects answered questions regarding liberalisation of advertising regulation.

<sup>27</sup> [http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/consultation\\_2005/contributions/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/consultation_2005/contributions/index_en.htm).

<sup>28</sup> See motive 8 of the directive preamble.

<sup>29</sup> According to art. 1 letter a) of „Television without Frontiers” directive, 'broadcasting of TV programmes' means primary wire or wireless transmission, including satellite, in coded or uncoded form, of TV programmes for the public. It also includes transmission of programmes between different broadcasters in order to widen the scope. It does not mean communication services which deliver information or other content for individual use, such as telefaxing, electronic data bases, etc.

<sup>30</sup> Preamble of the directive uses the terms 'traditional audiovisual media services', cf. motive 6 of the directive.

<sup>30</sup> See Tribunal ruling from June 2, 2005, case C-89/04 *Mediakabel BV vs. Commissariaat voor de Media*, Dz. U. WE C 182, 23/07/2005, p. 16.

The amended directive, however, does apply to the new services. The key is the new definition of audiovisual media service (AMS)<sup>31</sup>, “or service as delineated by art. 49 and 50 of the Treaty, for which responsible are the providers of the service and whose basic goal is to broadcast to the masses electronically, according to art. 2 letter a) of the directive 2002/21/WE with a goal to inform, entertain or educate. Such audiovisual media service is a TV broadcast, as delineated by letter e) of this article or an audiovisual media service on demand, as delineated in letter g) of this article or an audiovisual trade broadcast.”<sup>32</sup>

The definition which was specified in the directive preamble indicates that such a service should be a mass broadcast, that is be directed to a large audience and have an influence over it, while the directive should not include activity that is “non-commercial and not competitive with TV broadcasting, such as private websites or services that distribute or deliver audiovisual content to private users or for exchange purposes among interest groups”<sup>33</sup>. It should be noted that despite further specifications included in sec. 18 and 19 of the preamble, it is member states which decide on the final shape of the directive when they implement it. Also, radio still remains outside the scope of the directive<sup>34</sup>.

The directive introduces a classification of audiovisual media services into AMS on-demand and TV broadcasting. “TV broadcasting” (a linear audiovisual media service) is a service, rendered by a media provider, which allows a simultaneous reception of a programme with its broadcast<sup>35</sup>. “AMS on-demand” (non-linear service) is a service which allows the recipients to choose when they wish to see the programme chosen from a catalogue of the provider<sup>36</sup>.

The amended directive broadens the term “TV broadcasting” to include, besides traditional TV, other linear services. This leads to a series of changes throughout the entire directive, ie. regarding TV advertising or major events regulation (cf. art. 3j). The regulations, previously, applicable to only traditional TV, are not applicable to other linear services<sup>37</sup>. The directive’s scope was broadened due to the implementation of the so called “gradable regulation” where the level of regulation is dependent on the influence a type of service has on shaping public opinion. Such a model allows a differentiation of regulation regarding ‘old’ and ‘new’ media and to take into account the level of their development<sup>38</sup>.

The new directive is based on two levels of regulation:

- basic, including the minimum requirements applicable to all audiovisual media services,
- extended, including more restrictive regulation regarding TV broadcasting<sup>39</sup>.

The consequences of the changes mean more responsibilities of traditional TV on all linear AMS as well as the new directive requiring minimal standards of all AMS.

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<sup>31</sup> Eng. *audiovisual media service*, cf. art. 1 letter a) of the directive.

<sup>32</sup> The directive allows introduction gradual regulation on advertising, it introduces the term commercial audiovisual broadcast which includes TV advertising, sponsoring, telemarketing and product location. According to art. 1 letter h) ‘commercial audiovisual broadcasts’ includes images with or without sound which directly or indirectly promote products, services or people. Such images are part of programmes or are inserted into them for a fee or another form of compensation or for self promotion purposes.

<sup>33</sup> See motive 16 of the directive.

<sup>34</sup> Cf. motive 22 of the directive, on reservations regarding the amended directive in this sphere in: W.

Kołodziejczyk, P. Stepka „Radio internetowe - szanse i wyzwania”, *Studia Medioznawcze* NR 2 (25) 2006.

<sup>35</sup> See art. 1 letter e) of the directive.

<sup>36</sup> See art. 1 letter g) of the directive.

<sup>37</sup> See motive 20 of the directive, “TV broadcasting includes analogue and digital TV transmission via live streaming, webcasting and near-video-on-demand”.

<sup>38</sup> See motive 42 of the directive. The directive should be understood as encouraging member states to introduce new concession system, cf. motive 15.

<sup>39</sup> Cf. Table nr 1. The changes are illustrated in the change of the directive’s structure. Amended directive group regulation in Ch. IIa, “Regulation regarding all AMSs” and Ch. IIb “Regulation regarding services on-demand”.

The Table below shows the requirements, making up the model of gradable regulation, also regarding the ‘new media’, so far not included in the “Television without Frontiers” directive.

**Table 1** – Amended directive results

	Audiovisual media services (AMS)	
	TV broadcasting (including new linear services)	Audiovisual services on-demand
Basic level	-requirement to inform (art. 3a) -prohibition to incite to hatred (art. 3b) -facilitate handicapped access to services (art. 3c) -requirement to respect the rights of those who have right to broadcasting (art. 3d) -quality requirements regarding audiovisual broadcasts <sup>40</sup> (art. 3e) -requirements regarding sponsoring of programmes (art. 3f) -requirements regarding product location (art. 3g)	
	- regulation regarding protection of minors from illicit content (chapter V)	- regulation regarding protection of minors from illicit content (art. 3h)
Extended level	-regulation regarding broadcasting of major events for society (art. 3j) -regulation of short broadcasts (art. 3) -regulation regarding promotion of European works and independent productions in services on-demand (art. 4 and 5) -regulation of TV advertising and tele-marketing (Chapter IV) -right to answer (Chapter VI)	-regulation regarding promotion of European works in services on-demand (art. 3i)

Source: by authors

Regarding the discussion on the amendments, the parties which were particularly interested in either maintaining the *status quo* or implementing changes were representatives of: traditional media (TV, radio, press), new media services, infrastructure operators and consumer organizations. As mentioned earlier, the two issues discussed in particular detail were broadening the definition of TV broadcasting and the issue of including services on-demand in the scope of the new directive. For broadening of the definition were most parties representing traditional media (ie. EBU<sup>41</sup>) as well as consumer interests (ie. EURALVA<sup>42</sup>). Against broadening the definition were new media organizations (ie. EuroISPA<sup>43</sup>) which were also against including

<sup>40</sup> Requirements correspond to quality requirements on TV advertising in the “Television without Frontiers” directive.

<sup>41</sup> EBU, EBU Position on Issues Papers for the Liverpool Audiovisual Conference, p.2,

([http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip1to6-ebu-en.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip1to6-ebu-en.pdf)).

<sup>42</sup> EURALVA, Response by The European Alliance of Listeners’ & Viewers’ Associations, EURALVA, p.1, ([http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip1to6-euralva.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip1to6-euralva.pdf)).

<sup>43</sup> EuroISPA, Response from EuroISPA, p.2,

([http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip1-3-4-5-euroispa.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip1-3-4-5-euroispa.pdf)).

services on-demand in the scope of the amended directive (ie. *Association of Online Publishers*<sup>44</sup>). Their argument was that non-linear services are already regulated by the directive on electronic trade<sup>45</sup>. They were supported by many other participants of public consultations. For broadening the scope of the directive in this aspect was EBU<sup>46</sup> as well as organizations representing consumers (ie. BEUC<sup>47</sup>).

In conclusion, as far as amendment of the directive the least happy were representatives of new media whose services will now have to meet the minimum standards as defined in the directive. Another one of their arguments was that the market of new technologies is still in its early development phase. The ‘winners’ in this battle were definitely representatives of consumer organizations and public broadcasters associated in the EBU. Commercial broadcasters were somewhat less enthusiastic regarding the changes which may indicate their plans to expand into the market of these new media services.

## b) liberalisation of regulation regarding TV advertising and product location

The other crucial amendment in the directive was liberalisation of regulation regarding TV advertising (modified regulation will include all linear services) as well as the possibility of using product location. The change is justified by the need to increase competitiveness of the audiovisual sector and to adapt to technological and market change<sup>48</sup>. The proposed liberalisation changes regarding advertising<sup>49</sup> can be divided into two groups:

- **obligatory liberalisation**, includes changes which must be implemented by member states. These are quantity requirements regarding TV advertising, doing away with daily limits, doing away with obligatory 20 min between commercial breaks, introduction of changes enabling introduction of new advertising techniques<sup>50</sup>,
- **non-obligatory liberalisation**, includes changes which can but do not have to be implemented by member states<sup>51</sup>. This is regarding solutions permitting the use of product location, under certain conditions.

As mentioned above, liberalisation can take place various ways. Firstly, the changes allow the introduction of new advertising techniques<sup>52</sup>, especially regarding advertising marking and separation (cf. art. 10 of the directive). Secondly, there is quantity liberalisation which was more restricted in the old directive, “Television without Frontiers”. There are no more daily limits (cf. art. 18 of the directive) and the upper old limit of 20% or 12 min/hour for advertising or telemarketing has remained as was before.

The most important modification is the change of the model of interrupting programmes with advertising<sup>53</sup>. The new regulation allows advertisers to broadcast more commercials and

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<sup>44</sup> AOP, AOP response to the European Commission Issues Paper on Rules Applicable to Audiovisual Content Services, p.2-3, ([http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip1-aop.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip1-aop.pdf)).

<sup>45</sup> Directive 2000/31/WE by EP and Council from June 8, 2000, on some legal aspects of information society services, especially regarding domestic electronic trade.

<sup>46</sup> EBU, EBU Position..., p.2.

<sup>47</sup> BEUC, “Television without Frontiers” Directive - BEUC submission on issue papers, p.11 ([http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip1to6-beuc.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip1to6-beuc.pdf)).

<sup>48</sup> See motives 54 and 55 in the preamble.

<sup>49</sup> On liberalisation of advertising regulation delineated by the “Television without Frontiers” directive.

<sup>50</sup> See motive 54 in the preamble which focuses on this element, also stressing competition in this sphere between traditional TV broadcasting and services on-demand.

<sup>51</sup> According to motive 62, member states can use the opt-out clause.

<sup>52</sup> Especially advertising on split screen, interactive adverts and virtual ads included in: Commission interpretative communication on certain aspects of the provisions on televised advertising in the “Television without frontiers” Directive (2004/C 102/02).

<sup>53</sup> The “Television without Frontiers” resolutions included in art. 11, introduced the rule that there should be minimum 20 min between commercial breaks. Additionally protected were special types of programmes: feature and

more frequently (with the limit of up to 12 min/hour). There is less protection of certain types of programmes such as films for TV (excluding TV shows, series and documentaries), cinematographic works and information programmes which can now be interrupted once every 30 minutes. The same is with children's programmes if they are longer than 30 minutes. These changes mean doing away with the "European model" of TV advertising<sup>54</sup> and lead to much greater elasticity. Regarding services on-demand, there are only quality requirements which need to be met by audiovisual broadcasts.

As far as product location, it was not regulated by the "Television without Frontiers" directive. Product location means covert advertising as delineated in art. 1 of the old directive<sup>55</sup>. The new directive does introduce legal ramifications as far as product location, in art. 1, letter h) regarding is as a type of commercial, audiovisual broadcast and in letter m) 'product location' means any form of commercial, audiovisual broadcast presenting or mentioning a product, service or trademark as a element of a programme, in exchange for a fee or another form of compensation. Of course, defining the phenomenon does not mean that product location is allowed. It is included in the non-obligatory liberalisation classification which means that it is up to member states to decide whether to allow it or not. The directive puts it this way, according to art. 3g act 1, product location is prohibited. However, unless a state decides otherwise, according to art. 3g act 1, it is admissible under the following two conditions:

- in cinematographic works, films and series produced for AMS, in sport and entertainment programmes, or
- when it is free of charge and regards the delivery of certain products or services for free, ie. if it is a prize or a prop to be used as part of a programme.

Also, as mentioned above, the final decision as far as product location is within the hands of member states.

It should also be mentioned that product location, as a form of commercial, audiovisual broadcast, must meet quality requirements regarding broadcasts included in art. 3e of the directive as well as a series of specific requirements for product location included in art. 3g of the directive<sup>56</sup>.

Generally, it is difficult to say which interest groups gained most or least regarding these amendments. This is partly because of regulation of product location which is up the member states, transferring responsibility of making the final decision over to individual countries. We can only mention those interest groups which, from the beginning, were entirely against product location. These were consumer organizations (ie. BEUC<sup>57</sup> and Mediawatch-UK<sup>58</sup>), and representatives of press publishers (ENPA<sup>59</sup>). The latter were most probably attempting to show the negative results of product location for the advertising press market. Sceptical were also public broadcasters (EBU<sup>60</sup>) while in favour were large media corporations (ie. EGTA<sup>61</sup>). These

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TV films (excluding TV shows, series and documentaries) over 45 min. long which could be interrupted only once every 45 min.

<sup>54</sup> Cf. motive 58 in the preamble.

<sup>55</sup> The change is illustrated in motive 60 of the directive, "Prohibition of covert commercial audiovisual broadcasts does not apply if product location is otherwise permitted legally by the directive, when the viewers have been informed of product location taking place".

<sup>56</sup> There are the requirements of informing viewers of product location taking place, guarantee of editing independence, prohibition of product location of tobacco products and medication on prescription and prohibition of product location in children's programmes as well as excessive product promotion.

<sup>57</sup> See BEUC, Television without ..., p.2.

<sup>58</sup> See Mediawatch-UK, Revision of the 'Television Without Frontiers' Directive ([http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip4-mediawatch.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip4-mediawatch.pdf)).

<sup>59</sup> See ENPA, ENPA response to the Television without Frontiers Issues Paper on Commercial Communications, p. 6 ([http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip4-enpa.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip4-enpa.pdf)).

<sup>60</sup> See EBU, EBU Position..., p.12-13.

<sup>61</sup> See EGTA, Comments to the TVWF Issues Papers of the European Commission, p.3,

will still have to convince the authorities in their countries to allow it. So, the final ‘winners’ and ‘losers’ are yet to be determined. Finally, there is also the issue of interpretation of the old regulation as there are some (ie. ACT<sup>62</sup>) which are convinced the “Television without Frontiers” directive did not ban product location practises.

The obligatory liberalisation and greater advertising quantity elasticity included in the new directive are a result of the deliberations which took place during work on the document. The resolutions are in accordance with expectations of TV broadcasters (ie. ACT<sup>63</sup>), advertisers associations (ie. International Advertising Association –IAA<sup>64</sup>) and media houses (EGTA<sup>65</sup>). On the other hand, consumer organizations (np. BEUC<sup>66</sup>) were against the amendments and for maintaining the *status quo*. All in all, although media corporations and advertisers are happy as they reached their goals of gaining greater quantity elasticity, the final decisions are up to the member countries regarding non-obligatory liberalisation.

Aside from the above discussed and, in our opinion, most imperative changes the new directive also introduces several other modifications. These are: broadening of jurisdiction to all AMS, introduction of regulation anti delocalisation of broadcasters, regulation of short broadcasts and emphasis on the role of independent regulatory bodies in implementation of the directive.

## Conclusion

The amended directive has got four basic goals: harmonisation, adaptation to market and technological change, increasing the competitiveness of the European audiovisual sector and introduction of flexible regulation. The aim now is to assess the realisation of each of these goals.

The goal of harmonisation, a legal base for the entire directive, was to standardise the regulation so as to ease the flow of services within the EU and to create equal competition, also including new AMS. Positive aspects of the amendments were: the inclusion of new AMS in the regulation as well as resolution of controversial issues, previously regulated independently by different member states, such as product location or new forms of advertising. On the other hand, the new directive still leaves member states a lot of freedom as far as implementation, which is a threat to harmonisation. Moreover, regarding equal competition, it can be said that it should have been attempted to find more of an equilibrium between ‘old’ and ‘new’ media regulation. However, there remain the questions of where to find the boundary for responsibilities and whether it is at all possible to have equal competition.

The second goal, adaptation to technological and market changes, was achieved by broadening the scope of the directive to include new AMS and by allowing new advertising techniques. Technical characteristics of services were done away with based on the rule of technological neutrality. At the same time, differentiating the level of regulation depending on public opinion influence enables taking into consideration the specificity of a given service. The new directive does take into account market and technological changes but it remains to be seen how long it will be able to do so.

Imperative within this context was also establishment of a directive flexible to change in regulation. The key was creation of a general AMS definition, one that would withstand future change. We have to take into consideration how difficult it is to predict the direction of future

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[http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip4-egta.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip4-egta.pdf).

<sup>62</sup> See ACT, Issue Paper 4: Commercial Communications, p.5-6,

[http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip4-act.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip4-act.pdf).

<sup>63</sup> Ibidem, p.7

<sup>64</sup> IAA, Position paper, p.2-3. ([http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue\\_papers/contributions/ip4-iaa.pdf](http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip4-iaa.pdf)).

<sup>65</sup> EGTA, ...p.3-4.

<sup>66</sup> BEUC, ..., p.10.

development of AMS. A general AMS definition, combined with the model of gradable regulation and the rule of technological neutrality seem to give the new directive the necessary elasticity. In addition, there are self- and co-regulation factors as methods of new directive implementation. All of the above, it seems, result in the amended directive being dynamic and adaptable to future change.

The criticism is that the directive regards only the edited mass media and does not take into account the growing number of broadcasts created by individual users. It regulates services and concentrates on the phrase ‘television’<sup>67</sup> but it seems that in the future such will be less and less popular in comparison to new media. Also, a general definition of AMS may be considered threatening to the harmonisation goal as it may lead to different countries adopting various definitions of AMS.

The last goal of the new directive was to make the European AMS market more competitive. We can conclude that this goal was partially achieved. On the one hand, it introduces liberalisation of advertising regulation regarding traditional TV, with the possibility to allow product location, depending on member state’s final decision. On the other, it establishes new responsibilities on a large group of new AMS’s. A result of this may be a probable ‘escape’ of such service providers from under European jurisdiction<sup>68</sup>. It can be said that the Commission’s actions were inconsistent in this aspect as they indicate that traditional TV is losing its influence but, at the same time, it focuses on liberalisation of TV advertising to increase competitiveness.

A more comprehensive assessment of the new directive will be possible in the future when it is implemented by member states. It should be noted that this is a complex process and it may result in various implementation in different countries. We will be very interested in observing those state activities which will carry it out in the project and regulation implementation process<sup>69</sup>.

According to Cezary Mik, “The directive is an act which binds each country as to the result which needs to be achieved. However, it leaves it up to each state to choose the form and way of implementation”<sup>70</sup>. There are various goals to be met which allow the countries some room in defining the final result they wish to achieve<sup>71</sup>, especially since there are various implementation methods listed within the text of the new directive<sup>72</sup>.

As outlined above, there are certain points upon which member states need to make their own decisions. These are: admissibility of product location, regulation methods, specifically regulation of short broadcasts as well as the promotion of European works part of non-linear services<sup>73</sup>.

The implementation of the new directive does not mean the end of lobbying activity carried out by various interest groups, it will still take place on the domestic level, influencing discussion and decisions. The new directive allows member states two years to finalise the implementation process. It will be the legislators who will have to make final decisions fundamental for the audiovisual market. They will also have to decide whether the new regulation will be part of legal regulation transposing the “Television without Frontiers” directive

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<sup>67</sup>The AMS definition understood as traditional programmes can lead to narrowing down the directive’s scope to only quasi-TV services. (Eng. *television like*, See motive 17 of the directive).

<sup>68</sup> For more on this see N D. Mac Síthigh, *Web Media: Without Frontiers, Without Borders or Without Law?* p. 12.

<sup>69</sup> “The implementation of the directive does not have to be exact and formal in its transfer into domestic law, in: C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, Wydawnictwo C.H. BECK, Warszawa 2000p. 667.

<sup>70</sup>Ibidem, p. 498.

<sup>71</sup> Cezary Mik, Ibidem, p. 499.

<sup>72</sup> See motive 65 of the directive, Cf. classification of implementation procedures, art 4 and 5 in “Impact Study of Measures (Community and National) Concerning the Promotion of Distribution and Production of TV Programmes Provided for Under Article 25(a) of the TV Without Frontiers Directive”, tab. 12 and 23, p. 97-98.

<sup>73</sup> It should also be noted the phrase “for proper domestic authorities” included in motive 30 of the directive.

and whether its implementation will be in the hands of the present market regulator. It will be especially interesting to see its influence on various regulatory bodies in different EU countries.

The question is whether the introduction of technologically neutral regulation will result in the creation of integrated regulatory bodies (encompassing telecommunications and electronic media)<sup>74</sup>. It seems that the legal changes introduced may result in the establishment of more integrated regulatory bodies and building of horizontal structures based on the rule of technological neutrality, ie. the British Ofcom. Alternatively, there could be dual regulatory bodies with one responsible for media content (regardless distribution methods) and the other – for infrastructure. Moreover, the domestic legislators will be responsible for the choice of implementation method of the new directive.

New regulation will obviously effect the functioning of regulatory bodies. Aside from the above mentioned change of shape of regulatory bodies, it will be necessary to establish new ways of regulation of new media services, previously outside regulatory scope. The regulators will need to come up with new forms of cooperation with these. Another challenge will be that of transborder regulation breach, including reaction to complaints from people or organizations from different countries and establishing new forms of cooperation between regulators from various member states, especially regarding the issue of delocalisation.

The two year period for implementation will also be marked by increased lobbying activity in order to convince domestic authorities to pass regulation in favour of a given interest group. This is particularly regarding subjects which are simultaneously active on several domestic markets and where there is no regulatory coherence (ie. regarding product location). This may be considered a barrier in development. International media groups, active on different markets, will additionally be required to carry out transborder lobbying activity.

There also remains the issue of the division of ‘old’ and ‘new’ media. The ‘new’ media are audiovisual media services on-demand and new linear services previously not considered TV broadcasting. As mentioned above, the text of the new directive is a compromise whose goal was to create equal competition between ‘new’ and ‘old’ media.

It seems that within a short period of time it will be the providers of new AMS’s which will have to bear the greatest financial costs, particularly those specialising in linear services ie. IPTV. They will have to adjust their activity to new legal regulation, previously only regarding traditional TV. As far as providers of on-demand services, their costs should be proportionally lower due to the implemented minimal legal regulation

Traditional broadcasters will theoretically not endure any additional costs but will rather benefit from new, more liberal regulation, especially regarding advertising. This should aid them in preparation for increasing competition and general market changes.

The consequences of the new directive should be viewed in a more long term perspective, assuming a continuation of the present market and social trends which have resulted in the popularisation of ‘new’ media. It seems that the new level of regulatory responsibilities will, with time, be suitable to the shaping market equilibrium between new and old media, illustrating the transfer from sector to technologically neutral regulation.

At the same time, it should be noted that the division into new and traditional AMS is gradually disappearing since, in practise, many companies are active on both markets simultaneously. This trend will only be strengthened with the process of increasing convergence.

The implementation of the amended directive, created to meet market and technological change, will be a challenging and a very interesting process. The up coming years will show whether the proposed directive was the answer to the various challenges facing this particular market.

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<sup>74</sup> For more on this see : P. Stępką, *Zintegrowane ciała regulacyjne dp. komunikacji elektronicznej*, March 2007, ([http://www.krrit.gov.pl/dokumenty/dm/dm\\_komunikacja\\_elektroniczna.pdf](http://www.krrit.gov.pl/dokumenty/dm/dm_komunikacja_elektroniczna.pdf)).