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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE
COMMITTEE OF THE REGIONS**

**First Report from the Commission to the European Parliament, the Council, the
European Economic and Social Committee and the Committee of the Regions on the
application of Directive 2010/13/EU "Audiovisual Media Service Directive"**

Audiovisual Media Services and Connected Devices: Past and Future Perspectives
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1. INTRODUCTION — BACKGROUND TO THIS REPORT

Article 33 of the Audiovisual Media Services Directive, ‘the AVMSD’, invites the Commission to submit regularly a report on the application of the Directive to the European Parliament, the Council and the European Economic and Social Committee. This is the first application report on the AVMSD and covers the period 2009-2010¹.

The first part of the report looks retrospectively at the implementation of the Directive, including questions about the effectiveness of qualitative advertising rules in a sector where the offer and individuals' response to advertising are changing. Where the assessment identifies room for improvement, this does not weaken the intervention logic of the AVMSD but calls for more effective means. The report thus serves as a building block to strengthen the evidence base towards that end.

The second part addresses in a prospective way the influence of important technological changes on the regulatory framework as traditional broadcasting and internet rapidly converge.

The AVMSD aims to ensure the free circulation of audiovisual media services as an internal market instrument reflecting the right to freedom of expression and information enshrined in Article 11 of the Charter of Fundamental Rights of the European Union while at the same time ensuring the protection of important public policy objectives.

The AVMSD defines a set of minimum requirements to ensure a level playing field and allows audiovisual media services to circulate freely throughout Europe. In some cases, the AVMSD harmonises concepts (e.g. advertising spot) whereas in other cases, it does not affect the competence of Member States to define specific requirements in the light of national circumstances and traditions (e.g. content harmful for minors).

Altogether the European regulatory framework for audiovisual media services has served citizens and businesses well.

For business, it has provided the stable legal framework media service providers need to make business decisions. Since its creation, the regulatory framework has allowed the market to grow from a small number of service providers to more than 7,500 broadcasters today. It has also enabled the development and growth of video-on-demand services. An estimation of on-demand services in the EU by the competent regulatory authorities would be at least 650 as of January 2012.

In February 2012² the number of online video-on-demand services³ (excluding catch-up TV services, news-only services, adult programmes, film trailers, home shopping programmes and branded services such as YouTube, Dailymotion and iTunes) is estimated at 251 in the EU.

¹ Developments in 2011 have been covered where appropriate.

² European Audiovisual Observatory.

³ Feature or short films, TV catalogue programmes, animation, documentaries, training, music and archives.

From a citizen's perspective, access to channels and choice of audiovisual services has increased significantly. In 2009, television viewing time increased in almost all Member States, with the daily average ranging from 145 minutes in Austria to 265 in Hungary.

The last revision of the Directive (2005-2007) was in response to the convergence of all audiovisual media and brought on-demand services within the regulatory framework. The challenge is now to monitor market developments and new business models to ensure that the regulatory framework continues to provide the right conditions for growth and the achievement of public policy goals.

In response to the call from the European Council to develop a roadmap for a true digital single market in Europe by 2015 and as part of the Union's Europe 2020 strategy for growth and jobs and the Digital Agenda for Europe as its flagship initiative, the European Commission will launch a debate on the challenges and opportunities of convergence.

2. APPLICATION OF THE DIRECTIVE

The AVMSD is an internal market instrument that combines the right to provide audiovisual services with the right to freedom of expression and information and the protection of important public interest objectives.

As regards the transposition of the AVMSD, by the end of 2011 notifications had been received from a total of 23 Member States, twenty of which amounted to full transpositions. Three Member States still need to make some changes to their legislation in order to comply with the Directive. Measures communicated by two Member States are still being examined. At the end of 2011, seven infringement proceedings for non-communication of transposition measures were still pending.

In 2011 the Commission wrote on various issues to 24 Member States seeking information about their implementation of the AVMS Directive. This exercise was followed up by meetings with the Member States concerned.

2.1. Country of origin, free circulation and freedom of expression (Articles 2, 3 and 4)

Internal market rules in conjunction with the right to freedom of expression and information find practical application in the country of origin principle of Article 2 of the AVMSD. Services that comply with the law of the Member State in which their providers are established may circulate freely within Europe without a second control by the receiving Member State.

However, this freedom of circulation of services is not limitless. The Directive provides for safeguard clauses for the receiving country to protect societal interests of paramount importance, such as the protection of minors and bans on incitement to hatred. In practice, Member States may take safeguard measures where a television broadcast originating in another Member State manifestly, seriously and gravely infringes the Directive's rules on protection of minors or incitement to hatred. A similar provision exists with respect to on-demand services.

Media freedom and pluralism are essential features of democratic societies and explicitly recognised by the Charter of Fundamental Rights of the European Union as an element of the

right to freedom of expression and information. Notably when using the possibility of Article 4(1) AVMSD to apply stricter rules to the providers under their jurisdiction, Member States have to comply with these fundamental principles. These considerations also formed the basis of the discussions between the Commission and the Hungarian authorities on the new media legislation as regards the obligation of balanced coverage and the rules on offensive content. Some modifications were also agreed between the Commission and the Hungarian authorities on other provisions which could constitute an infringement of the AVMSD and/or the rules on free circulation of services and establishment.⁴

2.2. Public policy objectives: protection of minors and incitement to hatred (Articles 6, 12 and 27)

Prohibition of incitement to hatred based on race, sex, religion or nationality is a key public policy objective pursued by the AVMSD. During the reference period, this provision was applied in relation to the repeated broadcasting by the satellite channel Al Aqsa under French jurisdiction of material inciting to anti-Semitic hatred.

The Commission intervened and the French regulator ordered the French satellite capacity provider Eutelsat to stop the retransmission of Al Aqsa TV, who ceased transmitting such programmes in Europe.

2.3. Audiovisual media services for all: accessibility (Article 7)

Accessibility of audiovisual media services for all EU citizens is a further key objective that the AVMSD pursues by requiring access for hearing and visually impaired people to improve over time. All Member States have introduced rules to that effect. The implementation of these rules, however, reflects the diversity of market conditions. While some Member States have very detailed statutory or self-regulatory rules, others have only very general provisions or limit the accessibility obligation to the services of public service broadcasters.

2.4. Freedom of expression: right to information (Articles 14 and 15)

In order to ensure the public's right to information on events of major importance, Member States may draw up a list of events that they deem to be of major importance for their society. The list of events and the measures must be approved by the Commission.

FIFA and UEFA introduced a complaint before the General Court against the decisions taken by the Commission with respect to the Belgian and UK lists of major events. This concerned the inclusion of the entire final tournament of the FIFA World Cup and the UEFA European Championship in these lists.

The General Court has recognised the possibility of restricting fundamental freedoms for overriding reasons of public interest, which in this case is the public's right to information as an element of freedom of expression and information⁵.

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<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/6&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁵

Cases T-385/07, T-55/08 and T-68/08, FIFA/ UEFA/ Commission, 17.2.2011.

The General Court closely scrutinised the elements put before it and recognised the validity of the Commission's decision on the Belgian and UK lists of events of major importance regarding the inclusion of the entire final tournament of the FIFA World Cup and UEFA European Championship.

2.5. Cultural diversity: promotion of European and independent works (Articles 13, 16 and 17)

In order to promote cultural diversity, broadcasters must reserve a majority of their transmission time for European works. They must also reserve at least 10% of their broadcasting time or programming budget for European works created by independent producers. A similar obligation exists regarding video-on-demand services. The Commission reports periodically on the implementation of these obligations.

The last report⁶ shows that throughout the EU the average broadcasting time for European works increased from 62.6% in 2007 to 63.2% in 2008. Between 2005 and 2008 it remained stable at a satisfactory level. The average share of independent works broadcast by all European channels dropped slightly in 2008 (34.9%) compared to 2007 (35.3%). The overall trend in the medium term (2005-2008) also shows a slight downward trend for independent works. Nevertheless, the results achieved testify to satisfactory implementation of Article 17.

Some Member States have included stricter or additional rules in their national legislation by requiring a higher proportion of European works, independent works or productions in an official language of the country⁷. Spanish legislation, for instance, requires broadcasters to earmark a percentage of their operating revenues for the pre-funding of European cinematographic films and films made for television; 60% of that funding is reserved for the production of works in one of Spain's official languages. This obligation was challenged before the European Court of Justice⁸. The Court confirmed that Member States may adopt measures to defend and promote one or several official languages as part of their cultural policy.

2.6. Commercial communications (Articles 10, 11 and 19 to 25)

The proportion of advertising and teleshopping spots on television may not exceed 12 minutes per hour. The application of this rule gave rise to discussions on the concept of advertising spots. Monitoring of advertising practices in Spain highlighted the use of special commercial formats, clearly promotional, called 'anuncios publicitarios de patrocinio', 'microespacios', 'merchandising spots', 'telepromotion spots' and 'morphing spots' which, according to the Spanish authorities, did not amount to advertising spots and hence did not fall under the 12 minute rule.

In line with the Commission's position, the Court found that an advertising spot is any type of advertising broadcast between programmes or during breaks, unless it is covered by another form of advertising expressly governed by the AVMSD or unless it requires, because of the way it is presented, a duration greater than that of advertising spots, on condition that an application of the restrictions prescribed for advertising spots would, without valid

⁶ COM(2010) 450.

⁷ See Contact Committee document

http://ec.europa.eu/comm/avpolicy/reg/tvwf/contact_comm/index_en.htm.

⁸ Case C-222/07, UTECA, 5.3.2009.

justification, amount to disadvantaging the form of advertising concerned⁹. In other words, the Court adopted a wide and uniform interpretation of the notion of ‘advertising spot’ in line with the purpose of Article 23 AVMSD, which is to protect the viewer from an excessive amount of advertising.

The Commission monitored advertising practices in eight Member States during the reference period. In a number of Member States the 12-minute limitation of advertising spots is regularly breached. On the basis of these findings, administrative letters were sent to the Member States concerned and discussions are still ongoing. The Commission intends to continue monitoring Member States' compliance with the 12-minute rule and, if necessary, initiate infringement procedures.¹⁰

The monitoring of advertising practices also revealed a number of issues in the area of commercial communications concerning sponsorship, self-promotion and product placement. This shows a need to clarify the rules governing the various forms of commercial communications.

For the first time, the implementation of the *qualitative provisions* on advertising was monitored separately during the reference period. The relevant provisions concern alcohol advertising, gender discrimination and advertising targeting minors. Content analysis was considered to be the most appropriate methodology¹¹.

In the monitored Member States alcohol advertising represents between 0.8% and 3% of overall advertising activity on audiovisual media services based on the total number of spots broadcast over the monitored period. As regards the application of the relevant provision of the AVMSD, very few cases of clear infringements have been found. However, a significant proportion, more than 50%, of the advertising spots contained elements which might be linked to some of the characteristics banned by the AVMSD, although in view of the detailed requirements of the AVMSD they fell short of constituting a clear cut infringement.

In implementing the AVMSD requirements on alcohol advertising, 22 Member States have put in place somewhat stricter rules for alcohol advertising¹² involving channels, advertised products or time slots.

The AVMSD also regulates advertising targeting children. Audiovisual commercial communications must not cause physical or moral harm to minors. This means that they must not: directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity; directly encourage minors 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.

Content analysis of the 100 most frequently broadcast advertising spots showed that the Directive's provisions on the protection of minors in advertising were seldom contravened. As

⁹ Case C-281/09, Commission/Spain, 24.11.2011.

¹⁰ For results of previous monitoring activity, see the application reports available at: http://ec.europa.eu/avpolicy/reg/tvwf/implementation/reports/index_en.htm. All Member States will have been monitored by the end of 2012.

¹¹ Content analysis is a research technique for the objective, systematic and quantitative description of the manifest content of communication. For more details see staff working paper.

¹² See Contact Committee document http://ec.europa.eu/comm/avpolicy/reg/tvwf/contact_comm/index_en.htm.

with alcohol advertising, because of the detailed wording of the relevant provisions, there are few infringements of the AVMSD. Nevertheless, it does appear that advertising techniques geared towards minors are frequently used in television advertising.

Five Member States prohibit advertising in children's programmes. Four Member States impose a partial ban or other restrictions on advertising in children's programmes, either during specific time slots or for specific products, and seven Member States prohibit the showing of sponsorship logos in children's programmes¹³.

In view of the above, it seems appropriate to update in 2013 the Commission's interpretative communication on certain aspects of the provisions on televised advertising in the 'Television Without Frontiers' Directive¹⁴. The experience gained around the EU Platform on Nutrition and the Alcohol Health Forum as well as the work carried out on behavioural advertising will be taken into account in this update. Further investigations are required to assess the impact of commercial communications, especially for alcoholic beverages, on minors as regards exposure and consumption behaviour, and the effectiveness of the Directive's restrictions in achieving requisite protection, while taking account of the benefit/cost ratio of monitoring activities. The Commission will initiate necessary research in 2013.

Another issue addressed by the AVMSD in the field of commercial communications is discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation. Such discrimination is prohibited. Another aspect of discrimination is the systematic association of a certain category of the population with specific roles or attitudes. An analysis of sex discrimination and gender stereotypes in the 100 most frequently broadcast advertising spots in eight Member States was made. Stereotyped representation of gender roles was found in 21% to 36% of the spots analysed. However, in some Member States a number of positions, professions or products are more systematically associated with a specific gender than in other Member States. None of the countries surveyed is immune to such stereotyped representations.

Member States and stakeholders raised the question whether cross-border broadcasts of gambling advertising fall within the areas coordinated by the AVMSD. Article 1(1)(h) is intended to cover all forms of audiovisual commercial communication defined as 'images with or without which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity'. However, the AVMSD does not apply to gambling services as such.

2.7. Self-regulatory initiatives (Article 4(7))

Another important feature of the AVMSD is the reference to alternative means of regulation by way of self-/co-regulatory initiatives, particularly in the field of advertising. These regimes must be broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement. In all but two Member States self- or co-regulatory schemes exist, or encouragement provisions have been directly included in the media legislation¹⁵.

¹³ See Contact Committee document
http://ec.europa.eu/comm/avpolicy/reg/tvwf/contact_comm/index_en.htm.

¹⁴ OJ C 102, 28/4/2004, p. 2, see Annex.

¹⁵ See Contact Committee document
http://ec.europa.eu/comm/avpolicy/reg/tvwf/contact_comm/index_en.htm.

For the advertising and marketing of food to children, self-regulatory practices have also been promoted at EU level through the EU Platform for Action on Diet, Physical Activity and Health. The Platform has obtained a total of more than 300 stakeholder commitments.¹⁶ Responsible commercial communication for alcoholic beverages also accounts for 25% of more than 200 commitments undertaken by members of the European Alcohol and Health Forum. Self-regulation of marketing and advertising of alcoholic beverages has thus substantially improved in terms of media services and Member States covered. Further work will have to establish the contribution that these initiatives make to attaining the level of protection required and whether common definitions need to be introduced to reinforce their effectiveness. An evaluation of the Platform for Action on Diet, Physical Activity and Health¹⁷ concluded that stakeholders' initiatives in the field of marketing and advertising showed good progress, but that their impact could be further strengthened. In the context of these platforms, the Commission will support the development of a definition of stricter age and audience thresholds for advertising and marketing and more consistent nutritional benchmarks across companies. Member States have a key role to play in framing industry-led self-regulatory approaches, in particular with regard to the efficient and well-resourced administration of codes and the handling of complaints.

In the more specific area of audiovisual commercial communications in children's programmes for sweet, fatty or salty foods or drinks, Member States must encourage audiovisual media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communications in children's programmes.

3. RECENT TECHNOLOGICAL DEVELOPMENTS AND EXPANSION OF THE AUDIOVISUAL MEDIA SERVICES MARKET IN EUROPE

The emergence of Connected or Hybrid TV integrating Internet and Web 2.0 features into modern television receivers marks a new stage in the convergence of Internet and TV. While some providers offer a limited number of applications with no real Internet access, others offer open access to audiovisual content on the Internet.

Several major US operators are in the process of launching their services in the EU and the emergence of those new platforms will undoubtedly increase competitive pressure on the creation, financing and retail of EU works.

Connected TV services are currently operational in Germany and Italy and about to be introduced in France and the UK. The use of Connected TV remains limited at present. Although many of the TV sets sold now are connectable, only 20% to 30% are actually online. With more citizens having access to higher Internet speeds, and the increase of connected devices and available content, it can be expected that Connected TV will grow relatively fast over the next few years.

In addition to traditional broadcast TV, connected devices including tablets, smart phones and consoles also provide consumers with access to video-on-demand services through apps and catch-up TV services from broadcasters' own hybrid broadcast/broadband platforms. Estimates predict 47 million active connected in-home devices in Europe including connected

¹⁶ http://ec.europa.eu/health/nutrition_physical_activity/platform/platform_db_en.htm

¹⁷ http://ec.europa.eu/health/nutrition_physical_activity/docs/evaluation_frep_en.pdf

TV sets, games consoles, standalone TV set-top boxes, Blu-ray disc players and pay-TV set-top boxes by the end of 2011¹⁸.

The opportunities opening up and the challenges posed by the transition to Connected TV are substantial: achieving a level playing field, standardisation issues, access to underlying platforms, switching costs and 'lock-in', control over advertising and content, impact on the effectiveness of measures promoting European works, intellectual property rights issues¹⁹, protection of minors, data protection and media literacy of vulnerable groups.

This technological evolution might have as consequence that boundaries between broadcasting and over the top delivery of audiovisual content become blurred. The regulatory framework set by the AVMSD will have to be tested against evolving viewing and delivery patterns. There is a need to maintain a consistent level of protection across different audiovisual media environments while taking into account their respective specificities. Recent studies indicate that consumers suffer substantial detriment when using digital content, including audiovisual media, especially due to problems with accessing the content, unclear or missing information, and low quality content²⁰. Viewers also have high expectations of content regulation of broadcast television and associated VOD and catch-up services.²¹ For on-demand delivery, the Directive already provides the same high levels of protection on a number of issues including service provider identification, a complete ban on incitement to hatred and qualitative standards for audiovisual commercial communication.

An important element going forward is the level of media literacy. Media literacy is the ability to access, understand and critically evaluate different aspects of the media and media content and to establish communications in a variety of contexts. A monitoring for the Commission during the reference period²² found 28 % of the EU's population to have a basic level of critical understanding, 41 % a medium level and 31 % an advanced level.

A significant part of the population (75%-80%) seems to have a rather critical view of audiovisual media services and is aware of the existence of regulation in that area. Nevertheless, there are parts of the population (offline, young people, low income) where the level of media literacy and regulatory awareness is clearly much lower. As regards younger age groups and their perception of advertising, the study concluded that age is one factor involved in the identification of advertising, but not the only one. Advertising literacy helps younger people recognise the selling intent, but the identification of more subtle techniques is more complex and generally not within the reach of the majority of children.

In view of the above, technological developments need to be followed closely. Preliminary discussions have already taken place with the Working Group of EU Regulatory Authorities in the field of Audiovisual Media Services and the Contact Committee. A further debate with stakeholders should help formulate a European policy response to maximise opportunities for

¹⁸ IHS Source Digest.

¹⁹ See also Green Paper on the online distribution of audiovisual works, COM(2011) 427 fin.

²⁰ Europe Economics: Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers (2011):

http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf;

Detailed Survey Results:

http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_appendix_9_2011-06-15.pdf

²¹ Ipsos MORI, *Protecting Audiences in a Converged World*, January 2012.

²² Danish Technological Institute and European Association for Viewers' Interests, *Testing and Refining Criteria to assess Media Literacy levels in Europe*, April 2011.

citizens and for the European audiovisual sector and to address the policy challenges which Connected TV raises.

The Commission will deepen its analysis in the coming months and launch a wider consultation process in view of a policy document on Connected TV.

4. CONCLUSIONS

All in all, the European regulatory framework for audiovisual media services has struck the right balance and served citizens and businesses well.

Nevertheless, some points need attention, particularly in the field of audiovisual commercial communications, where several of the issues involved should be further monitored and assessed in order to strengthen the effectiveness of the rules having regard to their objective, in particular with regard to the protection of minors across different audiovisual media environments. The envisaged update of the Interpretative Communication on certain aspects of the provisions on televised advertising in the 'Television Without Frontiers' Directive will provide clarification on specific issues in this field.

More effort needs to be made to create scale, support and best practice for codes of conduct on inappropriate commercial communications for food high in fat, salt or sugar targeting children. The effectiveness of such codes of conduct must be further assessed.

Foreseeable technological developments might blur the boundaries between broadcasting and over the top delivery of audiovisual content. As a result, the current regulatory framework set by the AVMSD may have to be tested against evolving viewing and delivery patterns taking into account related policy goals such as consumers' protection and the level of media literacy.

As the possible impact on the market and the regulatory framework are not totally clear yet, a full assessment of the current and future situation should be made. The Commission launched an open debate with stakeholders about "over-the-top" delivery of audiovisual content and will deepen this analysis in the coming months in view of a policy document on Connected TV.