

Working Document by Ruth Hieronymi to the "Directive for Audiovisual Media Services"

- The Scope-
- Co- and Self-Regulation-

State: June, 2, 2006

1. The purpose of the revision of the "Television Without Frontiers" Directive

The purpose of the EU - directive "Television without Frontiers" is to create the best possible premises for the development of already existing and new audiovisual media services in Europe.

A „Level-Playing-Field“ should strengthen and guarantee in the EU

- **Legal security and competitiveness** for audiovisual media services provider;
- **The freedom of information and opinion** through audiovisual media services for the EU-citizens also for the future.

The critical position of a significant part of the industry towards the Commission proposal for the revision of the EU - Television Directive shows misunderstandings about the **scope** and the **denseness of regulations** of the new directive.

On the side of the industry there exists a fear of:

- **The expansion of the scope of the EU - TV Directive towards all audiovisual services and**
- **The expansion of the present TV - regulation towards the new audiovisual media services.**

Both is wrong as

- The **scope** of the directive does not generally comprise the **audiovisual services** but only **the audiovisual media services**.
- The **denseness of regulations for new audiovisual media services** does not correspond to the existing TV rules as it is **significantly reduced**.

Need for changes / amendments

These misunderstandings must be swept away by the amendments and complementary proposals of the European Parliament in regard to the Commission draft.

2. The definition of electronic services in the valid EU law.

It must be differentiated between

2.1 Television services

According to art. 1 par. a) of the Directive 89/552/EEC "Television without Frontiers":

"For the purpose of this Directive:

- (a) **'television broadcasting'** means **the initial transmission** by wire or over the air, including that by satellite, in unencoded or encoded form, **of television programmes intended for reception by the public. It does not include** communication services providing items of information or other messages **on individual demand** such as telecopying, electronic data banks and other similar services;

2.2 Services of the information society

*"2. Service: any **Information Society service**, that is to say, any service normally provided **for remuneration**, at a distance, **by electronic means and at the individual request** of a recipient of services....*

This Directive shall not apply to:

- Radio broadcasting services,***
- Television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC".***

According to article 1; letter a; par. 2 of the Directive 98/48/EC (Directive amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations) and according to art. 2 a of the Directive 2000/31/EC (E-Commerce Directive)

2.3 Television services on demand

and

Television-like internet based audiovisual media services

These services have no clear legal framework till today.

As a point of departure we must adhere that the European Court of Justice has defined the term "**television broadcasting**" of the EU-TV-Directive **independently from the technique of the transmission of the image.**

*„2. A service comes within the concept of **'television broadcasting'** referred to in Article 1(a) of Directive 89/552, as amended by Directive 97/36, if it consists of the initial transmission of television programmes intended for reception by the public, that is, **an indeterminate number of potential television viewers**, to whom the same images are transmitted **simultaneously**. **The manner in which the images are transmitted is not a determining element in that assessment.**" (C-89/04 Mediakabel BV)*

Need for change/Amendments

- **It is necessary to clarify which European legal framework should be valid for the electronic services, which have been covered until now neither by the E-Commerce Directive nor by the "Television without Frontiers" Directive.**
- **The EU-Commission has therefore presented a Proposal for a Directive for "Audiovisual Media Services" - following the permanent demand of the European Parliament - on December, 13, 2005.**
- **Your rapporteur recommends you thus to follow the Proposal of the EU-Commission in principle but to include several important amendments and clarifications.**
- **It must be clarified in advance that we are not dealing with a Proposal for a Directive for audiovisual services, but in particular with a Proposal for an "Audiovisual MEDIA-Services Directive".**

3. Demarcation between "services of the information society" and "audiovisual media services"

The draft for the revision of the EU-TV-Directive COM (2005) 646 for the first time gives a proposal for a definition of audiovisual media services.

The decisive criterion for the demarcation between "**services of the information society**" (according to the directive 2000/31/EC, Directive for e-commerce) and "**audiovisual media services**" (According to Art. 1 b) of the 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 COM(2005)646)) **is the main purpose of the service:**

"audiovisual media service' means a service as defined by Articles 49 and 50 of the Treaty the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council."

(According to Art. 1 b) of the 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 COM(2005)646))

That means that following **six requirements** must be fulfilled **simultaneously** for an audiovisual media service:

- **Services according to Art. 48 and 49 of the EC Treaty,**
- **which comprise as their principal purpose**
- **the transmission of moving images with or without sound**
- **in order to inform, entertain or educate,**
- **the general public**
- **distributed by electronic communication networks.**

In case those 6 requirements are not fulfilled simultaneously, we are not dealing with an audiovisual media service but with an audiovisual service, which does not fall in the scope of the Proposal of the Commission for a "Directive for audiovisual media services" COM (2005)646

! To those **audiovisual services that do not fall into the scope** of the Commission Proposal for a "Directive for audiovisual media services" COM (2005) 646 belong:

- private and partly public electronic communication;
- press in printed and electronic form;
- news and information services, in which the audiovisual part is not primary;
- radio services;
- online games as long as the main purpose of the audiovisual media services is not reached.

Need for change of the definition of audiovisual media services

- The demarcation between the scope of E-Commerce Directive (Directive 2000/31/EC) and "The Audiovisual Media Services Directive" (Commission Proposal for a "Directive for audiovisual media services" COM (2005) 646) must become clearer and should be therefore explicitly formulated and included in the text of the "Audiovisual media services Directive" to exclude a double regulation in terms of legal security.
- As the term of the editorial responsibility is fundamental for the definition of the role of the media services' provider (art. 1 b) (Commission Proposal for a "Directive for audiovisual media services" COM (2005) 646), the term of the editorial responsibility should be included into the definition of the audiovisual media service of the art. 1a. (Commission Proposal for a "Directive for audiovisual media services" COM (2005) 646).

4. Demarcation between linear and non-linear audiovisual media services

The proposal for revision differentiates between linear and non-linear audiovisual media services depending on whether a solid programme is planned for the user (linear) or whether the user can define the moment of transmission (non-linear).

This proposal is also orientated on a verdict of the European Court of Justice where the Court has postulated a fundamental meaning: the freedom of decision of the user:

*"A service such as Filmtime, which consists of broadcasting television programmes intended for reception by the public and **which is not provided at the individual request** of a recipient of services, is a television broadcasting service in the sense of art. 1 a) of the Directive 89/552/EEC". (ECJ C-89/04 Mediakabel)*

Need for change / Amendments

- The **prior regulation** is to be clarified for the **new hybrid audiovisual platforms**, which comprise linear as well as non-linear services.
No further regulation is needed for the already regulated linear services in case of the transmission in a frame of non-linear services.
- The suggestion in art. 1 e) (Commission Proposal for a "Directive for audiovisual media services" COM (2005) 646) based solely on the freedom of the spectator to choose the moment of the transmission must be proved for its security in the future and amended.

5. Co- and Self-regulation in the Directive for audiovisual media services

It is highly welcome that the Commission recommends to the Member States to facilitate the provisions for co- and self-regulation in the sectors regulated by the Directive for a legal transformation of the revised Directive.

As the Member States have very different traditions of co- and self-regulation it is necessary

- to show a clearer differentiation between co- and self-regulation and
- to stipulate the minimal requirements to the provisions of co- and self-regulations.

According to the **art. 249 of the EC Treaty** a directive

*"... shall be **binding**, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the **choice of form and methods**."*

The point 22 of the „**Inter-institutional Agreement on better law-making**“ (according to 2003/2131(ACI)) states:

*"**Self-regulation** is defined as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves **common guidelines** at European level (particularly codes of practice or sectoral agreements). As a general rule, this type of **voluntary initiative** does not imply that the **Institutions have adopted any particular stance**."*

The self-regulation is hence an alternative method to fulfil the existing legal provisions. Self-regulation still can not completely substitute the obligation of the legislator.

The minimal form of co-regulation is therefore a „legal link“ between the self-regulation and the national legislator. This can happen in form of a state order, which must satisfy the minimal requirements of the effective fulfilment of tasks required by the harmonized sectors.

Need of changes / amendments

The so defined form of co- and self-regulation needs to be explained clearer in the Directive to enable the highest level of self-regulation possible for the implementation of the Directive.