

# EUROPEAN PARLIAMENT

2004



2009

---

*Committee on Culture and Education*

6.6.2006

## **WORKING DOCUMENT**

on the ‘Directive on audiovisual media services’

Committee on Culture and Education

Rapporteur: Ruth Hieronymi

## 1. Purpose of the revision of the EU Directive on 'television without frontiers'

The purpose of the revision of the EU Directive on television without frontiers is to create the best possible conditions for the development of existing and new audiovisual media services in Europe.

A **Level-Playing-Field** across the EU is intended to:

- enhance **legal certainty** and **competitiveness** of audiovisual undertakings;
- continue to guarantee **freedom of information and expression** for EU citizens through the audiovisual media.

The **criticisms expressed by certain sectors of the industry** with regard to the Commission proposal for revision of the EU Television directive highlight misunderstandings as regards the **scope** and the **level of regulation** of the new Directive.

The industry fears:

- **the extension of the scope of the EU television directive to cover all audiovisual services** and
- **the extension of existing provisions governing television to cover new audiovisual media services.**

**Both fears are unfounded, since**

- the **scope** of the Directive does **not** cover **audiovisual services** in general, but **only audiovisual media services**.
- the **level of regulation for the new audiovisual media services** does not correspond to existing provisions governing television but is **significantly lower**.

**Amendments/additions necessary:**

**These misunderstandings must be eliminated through amendments by the European Parliament to the Commission proposal.**

## 2. Definition of electronic services in current EU law

A distinction is to be drawn between

### 2.1 Television services

Pursuant to Article 1(a) of Directive 89/552/EEC on '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 'Information Society Services'

Pursuant to Article 1(a)2 of Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and pursuant to Article 2(a) of directive 2000/31/EC (Directive on electronic commerce)

*"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".*

### 2.3 Television broadcasts on demand

and

**Internet based audiovisual media services similar to television.**

There is not as yet a clear European legal framework for such services.

As a starting point, it is worth noting that the ECJ (in case C-89/04 Mediakabel BV) defined the term **"television broadcasting" independently of the manner of transmission.**

*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.**

ECJ judgment in case C-89/04 (Mediakabel BV)

**Amendments/additions necessary:**

- It is now necessary to clarify which European legal framework is to apply to audiovisual services which have hitherto not been covered by either the Directive on electronic commerce nor the Directive on 'television without frontiers'.
- To this end, and in line with the demands made by Parliament for several years, on 13 December 2005 the Commission put forward a proposal for a 'Directive on audiovisual media services' (COM(2005)646).
- Your rapporteur therefore recommends that the Commission proposal be adopted but that certain important clarifications and additions be made.
- To start with, it must be made clear that it is not a proposal for a directive on audiovisual services in general but for a 'Directive on audiovisual MEDIA services'.

**3. Distinction between 'information society services' and 'audiovisual media services'.**

The proposal for a revision of the EU television directive for the first time provides a proposal for the definition of audiovisual media services.

The contents and hence the **principal purpose** is the decisive factor for the distinction between '**information society services**' (within the meaning of Directive 2001/31/EC on electronic commerce) and '**audiovisual media services**' (within the meaning of the Commission proposal for a Directive on 'AUDIOVISUAL media services').

**The principal purpose of an audiovisual media service 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'*** subject

to editorial responsibility

(pursuant to Article 1(a) of the Commission proposal for a Directive on audiovisual services' COM (2005) 646)

This means that an **audiovisual media service** must meet the following **six conditions simultaneously**:

- **Services within the meaning of Articles 48 and 49 of the EC Treaty**
- **the principal purpose of which is**
- **the provision of moving images with or without sound**
- **in order to inform, entertain or educate**
- **intended for the general public and**
- **provided by means of electronic networks**

If a service does not meet these six conditions at the same time, then it is not an audiovisual media service but an audiovisual service falling outside the scope of the Commission proposal for a Directive on audiovisual media services (COM (2005) 646).



Such **Audiovisual services** falling outside the scope of the Commission proposal for a Directive on audiovisual media services (COM (2005) 646) include:

- private and semi-public electronic communications (private and commercial websites, chat, podcasts);
- press in printed and electronic form;
- news and information services in which the audiovisual portion is not the most important part;
- radio services;
- online games where the primary purpose requirement is not met.

#### **Need for amendment of definition of audiovisual media services**

- The demarcation between the scope of Directive 2000/31/EC on electronic commerce and the Directive on audiovisual media services (Commission proposal for a directive COM (2005) 646) must be clearer, for which reason it should be set out explicitly in the text of the Directive on 'audiovisual media services', in order to provide legal certainty while avoiding 'double regulation'.
- Since the concept of 'editorial responsibility' is fundamental to the definition of media service provider (Article 1(b) of the Commission

proposal for a directive on audiovisual media services (COM (2005) 646)), that same concept should also be incorporated in the definition of audiovisual media services under Article 1a of that proposal.

#### 4. Distinction between linear and non-linear audiovisual media services.

The proposed revision draws a distinction between linear and non-linear audiovisual media services according to whether there is a **set schedule** for a user (**linear**) or whether the user can choose the time of transmission (**non-linear**).

This proposal is based on the ECJ judgment which attached fundamental importance to the user's freedom of choice.

*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 within the meaning of Article 1(a) of Directive 89/552, as amended by Directive 97/36.*

(ECJ judgment in case C-89/04 (Mediakabel BV))

#### Amendments/additions necessary:

- There is a need to clearly establish which **regulation has primacy** with regard to new **hybrid audiovisual platforms** offering both linear and non-linear media services.  
Linear media services which are already regulated do not require any further regulation when transmitted through non-linear media services
- There is a need to see how 'future proof' the distinction drawn under Article 1(e) of the Commission proposal for a Directive on audiovisual services' (COM (2005) 646), based entirely on the freedom of the user to decide on the time of transmission, is and to amend it accordingly.

#### 5. Co- and self-regulation in the 'Directive for audiovisual media services'

It is to be welcomed that the Commission recommends that, in seeking to **transpose** the 'Directive on audiovisual media services', the Member States encourage **co-regulation and self-regulation** in the areas co-ordinated by the Directive.

Since there are significant differences in the various Member States' traditional practice as regards co-regulation and self-regulation, there is a need to:

- more clearly establish the differences between **co-regulation** and **self-regulation** and
- establish **minimum requirements** for co-regulation and self-regulation.

Under **Article 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**.*

Paragraph 22 of the '**Inter-institutional Agreement on better lawmaking**'  
(pursuant to 2003/2131(ACI)) reads:

*'**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.'*

*'As a general rule, this type of **voluntary initiative** does not imply that the **Institutions have adopted any particular stance ...**'*

**Self-regulation** therefore constitutes an **alternative method for complying with existing legal provisions**. Self-regulation cannot, however, wholly replace the responsibility of the legislator.

The **most minimalist form of co-regulation** is therefore a 'legal link' between self-regulation and the national legislator. This can be in the form of **delegation by the state**, which must do justice to the minimum requirements of effective implementation in the areas coordinated by the Directive.

**Amendments/additions necessary:**

- the **conditions** set out for **self-regulation and co-regulation** should be defined more clearly in the **Directive** in order to allow the **greatest possible degree of self-regulation** in the transposition of the Directive.