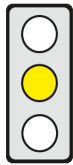


KEY ISSUES

Objective of the Directive: In view of the changing media landscape, the Commission wants to revise the rules on the provision of audiovisual media services and video-sharing platforms.

Affected parties: Television broadcasters, video-on-demand providers and video-sharing platforms.



Pro: (1) Harmonisation of the competition rules applicable to television programmes and video-on-demand services is appropriate because both media services are in competition with one another.

(2) Harmonising the rules on the protection of minors for all audiovisual media services is appropriate.

Contra: (1) The proposals for relaxing the restrictions on advertising time do not go far enough. The existing advertising restrictions should be completely abolished.

(2) Minimum quotas for the provision of European works constitute major intervention in consumer sovereignty. They are not acceptable in a market-based economic system.

CONTENT

Title

Proposal COM(2016) 287 of 25 May 2016 for a **Directive** of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the **provision of audiovisual media services** in view of changing market realities.

Brief Summary

► Context and objectives

- The existing Directive on audiovisual media services (2010/13/EU) lays down the framework for the provision of such services in the whole of the EU.
- According to the Commission, the media landscape is changing at a rapid pace. Although traditional television broadcasting remains strong, there has been increasing development in (Recital 1)
 - new types of content, such as short videos or user-generated videos and
 - new providers of video-on-demand services and video-sharing platforms.
- The Commission therefore wants to revise the Directive to take account, in particular, of the changes in the market environment and in consumer habits (p. 2). This Directive - like the existing one - provides for minimum harmonisation (p. 12).

► Definitions

- "Audiovisual media services" are (Art. 1 (1) (a) (i))
 - television broadcasts and
 - on-demand audiovisual media services ("video-on-demand").
- Their providers make programmes available to the public for which they bear "editorial responsibility". This responsibility arises, in the case of television, from the provision of a broadcasting schedule, and in the case of video-on-demand, from the provision of a catalogue of programmes. (Art. 1 (1) (a) (i))
- "Video-sharing platforms" are services where the provider stores programmes or user-generated videos and is also responsible for the organisation of the content. The provider does not have "editorial responsibility" for the content. (Art. 1 (1) (aa))

► Legal sovereignty over the providers of audiovisual media services and video-sharing platforms

- The providers of audiovisual media services are subject to the legal sovereignty of the Member State where their head office is located and in which editorial decisions are made. (Art. 2 (1), (2) and (3) (a)). Where the head office and the place where editorial decisions are made are located in different Member States, the State where the "majority" of the workforce operates is authoritative (Art. 2 (3) (b)).
- Providers of video-sharing platforms are subject to the legal sovereignty of the Member State in which they are established (Art. 3 (1), 2000/31/EC). They are also subject to its legal sovereignty if a parent, subsidiary or other part of the group to which they belong, is established there. Where the parent, subsidiary or group are each established in different Member States, it is firstly the location of the parent, then that of the subsidiary and lastly that of the other part of the group which is authoritative. (Art. 28b)

► **Restrictions on the EU-wide transmission of audiovisual media services**

- Member States can only restrict the reception and retransmission of audiovisual media services from other EU countries temporarily. The requirement is that these (Art. 3 (1) and (2))
 - "manifestly, seriously and gravely" incite violence or hatred directed against certain persons or groups, for example due to racial origin, or may impair the "physical, mental or moral development" of minors, or
 - present a serious and grave risk of prejudice to public security and to the safeguarding of national security and defence.

► **Rules on advertising time and product placement in audiovisual media services**

- On television
 - total advertising time between 7am and 11pm must not exceed 20%, i.e. 3.2 hours, although product placement, sponsorship announcements and references to the television broadcaster's own-programmes or those of other broadcasters within the same media group are not included (Art. 23),
 - films made for television, cinematographic works and news programmes may only be interrupted every 20 minutes by advertising (Art. 20 (2)).
- On television and in the case of video-on-demand services, product placement is permitted except in news and current affairs programmes, consumer affairs programmes, religious programmes and programmes with a "significant children's audience" (Art. 11).

► **Promoting the production and transmission of European works by audiovisual media services**

- Television broadcasters must fill the "majority proportion of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping", with European works (Art. 16 (1)).
- Providers of video-on-demand services must keep at least a 20% share of European works in their catalogue. In addition, they must ensure the "prominence" of these works. (Art. 13 (1))
- Member States can oblige providers of video-on-demand services to contribute financially to the production of European works. They can stipulate this not only for providers established in their own jurisdiction but also for providers from other EU countries targeting audiences in their territories. In this case, they must "take into account" any "financial contributions imposed" by other Member States. (Art. 13 (2))

► **Consumer protection and the protection of minors**

- Neither audiovisual media services nor video-sharing platforms are permitted to incite "violence or hatred" against individual people or groups on the basis, for example, of their racial origin, sex, age or religion (Art. 6 and Art. 28a (1)).
- In the case of programmes which "may impair the physical, mental or moral development of minors", it is stipulated that:
 - audiovisual media services with such content will not "normally" be heard or seen by minors. In the case of "gratuitous violence" and pornography, the "strictest" security measures, such as encryption and effective parental controls, must be taken. (Art. 12)
 - Minors must be protected from video-sharing platforms with such content; that means "as appropriate", age verification systems and parental control systems (Art. 28a).
- In the case of video-sharing platforms, the measures are aimed at the "organisation of the content" rather than the content itself (Recital 29).

► **Special rules for providers of video-sharing platforms**

- Providers of video-sharing platforms are also subject to the E-Commerce Directive (2000/31/EC). This provides, in particular, that providers are not liable for storing unlawful content and that they are exempt from the duty to actively seek this content. These rules remain in place. (Recital 29, Art. 28a (1))
- The Member States cannot impose stricter rules on video-sharing platforms than those contained in this Directive, except in relation to illegal content (Recital 30 Art. 28a (7)).

► **Independent national regulatory authorities**

- Member States will appoint regulatory authorities for audiovisual media services and video-sharing platforms which are "legally distinct" and "functionally independent" of any other "public or private body". They are bound by the objectives of "media pluralism", "cultural diversity", "consumer protection", "internal market" and "fair competition" (Art. 30 (1) and (2)).
- The regulatory authorities monitor whether the measures taken by video-sharing platforms are "appropriate" for consumer protection and for the protection of minors (Art. 28a (4)).

Main Changes to the Status Quo

- Until now, video-sharing platforms were not covered by the Directive.
- Until now, television programmes and video-on-demand services were subject to separate rules on the protection of minors. In future, the rules will be identical. Separate rules apply to video-sharing platforms.
- Until now, different rules applied to television programmes and video-on-demand services as regards the restriction of transmission. In future, the rules will be identical.

- ▶ Until now, advertising time could not exceed 20% per hour. In future, total advertising time between 7am and 11pm cannot exceed 20%. Until now, references to programmes by other broadcasters within a media group counted as advertising time; this is no longer the case. Until now, the minimum time between commercial breaks was 30 minutes; in future it will be 20.
- ▶ Until now, product placement was prohibited in principle and only permitted in exceptional cases. In future, it will be permitted in principle and only prohibited in certain cases.
- ▶ Until now, Member States could impose financing obligations and rules about quotas and prominence on national providers of video-on-demand services in order to promote European works. In future, there will be one EU rule on quotas and prominence. Providers from other EU countries can also be called upon to contribute financially.
- ▶ It is already the case that television broadcasters must fill the majority proportion of their transmission time with European works.
- ▶ Until now, national responsibility was determined, inter alia, according to the Member State in which a "significant part" of the workforce operated. In future, it will be the "majority" of the workforce.
- ▶ New: concrete rules on the independence of the national regulatory authorities.

Statement on Subsidiarity by the Commission

According to the Commission, in 2013, 38% of television channels targeted foreign markets and in 2015, 31% of video-on-demand services were available in several Member States. This justifies EU action. The principle of minimum harmonisation also allows the Member States scope to consider national peculiarities.

Policy Context

The Commission announced a revision of the Directive in the Digital Single Market Strategy [COM(2015) 192, see [cepPolicyBrief](#)].

Legislative Procedure

25 May 2016	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Communications Networks, Content & Technology (DG Connect)
Leading Committee of the EP:	Cultural Affairs, Rapporteurs: Petra Kammerevert (S&D, DE) and Sabine Verheyen (EPP, DE)
Leading Federal Ministry:	TBA
Leading Committee of the BT:	Culture and Media
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 53 (1), in conjunction with Art. 62 TFEU.
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Harmonising the competition rules applicable to television programmes and video-on-demand services is appropriate because both media services are increasingly becoming substitutes for one another and are therefore in competition with one another.

The planned proposals for relaxing the restrictions on advertising time and product placement do not go far enough. Advertising restrictions in television are generally unjustifiable. In particular, they distort competition between television broadcasters and video-on-demand providers. Advertising revenue is a core source of income for many especially private television broadcasters which allows them to avoid charging fees. Video-on-demand providers, on the other hand, largely refrain from advertising and finance themselves by way of fees from their customers. Both are legitimate methods of financing; the legislator should not therefore give either of them preferential treatment. The advertising restrictions in the Directive, however, restrict the revenue possibilities of many television broadcasters. **The existing statutory advertising restrictions should therefore be completely abolished.** After all, any user who is overly bothered by advertising is free to change to another media services provider at any time.

Minimum quotas for the provision of European works on television – "majority proportion of transmission time" – and for video-on-demand – 20% – **constitute major intervention in the consumer's sovereignty. They are not acceptable in a market-based economic system.** The quota is either ineffective, if it falls below the actual level of consumer demand, or overbearing if it exceeds it. In the latter case, providers will be forced

to spend money on services that their customers do not want. In the case of video-on-demand in particular, the quota fails to recognise the fact that many of these services have gained their popularity from the very fact that they offer non-European works which are not available to the same extent on television. Instead of seeing this as evidence for the unreasonableness of quotas, the Commission now wants to impose them on video-on-demand providers too.

The right of Member States to force video-on-demand services to co-finance European works is also out of line with a liberal system. The rule that any "financial contributions imposed" by other Member States must be "taken into account", is much too vague to constitute a restriction.

The envisaged harmonisation of the protection of minors is appropriate. The Directive, however, allows Member States considerable scope for deciding on its specific design. In the competition to attract providers of such services, particularly in the case of video-on-demand, this cannot prevent a race to the bottom in terms of the protective provisions as long as the requirements are primarily regarded as a cost factor. By contrast with television broadcasters – with editorial ties to a specific Member State and staff-intensive production – the business model used by providers of video-on-demand services allows them to move their domicile relatively easily to the Member State with the most favourable requirements on the protection of minors. The resulting risk of a race for deregulation can be prevented by way of precise EU provisions.

The proposed provisions on the protection of minors applicable to video-sharing platforms are less far-reaching than the rules applicable providers of audiovisual media services. Although this is justified by the fact that providers of video-sharing platforms do not have editorial responsibility for the content made available, it does not change the fact that the protection of minors suffers as a result. In addition, it is unclear how the providers of video-sharing platforms are to protect minors from specific content under this Directive whilst, at the same time, being released from the duty to actively seek such content under the E-Commerce Directive. This gives rise to legal uncertainty.

Legal Assessment

Legislative Competency

The Directive is correctly based on the competence to coordinate national provisions concerning the taking-up and pursuit of self-employed activities (Art. 53 (1) and Art. 62 TFEU).

Subsidiarity

The principle of subsidiarity is complied with because audiovisual media services are increasingly becoming available across borders.

Proportionality with respect to Member States

Proportionality is ensured because this Directive aims to achieve the minimum harmonisation of national provisions.

Compatibility with EU Law in other respects

Quotas for "European works" in audiovisual media services, in conjunction with the obligation to give them prominence, restricts freedom of the media [Art. 11 (2) Charter of Fundamental Rights (CFR)]. Its aim is to promote the production and distribution of European works (Recital 21). Media services are of great importance for a democracy by ensuring freedom of information, diversity of opinion and media pluralism [Recital 5 Directive (2010/13/EU)]. One justification for restriction recognised by the ECJ (Art. 52 (3) CFR in conjunction with Art. 10 (2) European Convention on Human Rights) is media pluralism. Subject to the proviso that this justification for restriction also applies to the Directive, the rule on quotas is arguably proportionate irrespective of the ordoliberal criticism because it is at least not obviously unsuitable for promoting the production and distribution of European works. Direct funding is more suitable than a quota for promoting production, and is therefore a more benign method; however a quota appears more suitable for promoting distribution.

Impact on German Law

In Germany, the *Länder* will have to revise both the State Media Treaty and the State Treaty on the Protection of Minors in the Media and the provisions on the independence of regulatory bodies. A central point in this regard is the fact that the regulatory bodies, consisting of the broadcasting councils of the ARD consortium of public broadcasters and the television council of ZDF, are not currently "legally separate" from the broadcasting companies but are their organs.

Conclusion

Harmonisation of the competition rules applicable to television programmes and video-on-demand services is appropriate because both media services are in competition with one another. Proposals for relaxing the restrictions on advertising time do not go far enough; the existing advertising restrictions should be completely abolished. Minimum quotas on the provision of European works constitute major intervention in consumer sovereignty; they are not acceptable in a market-based economic system. Harmonising the rules on the protection of minors for all providers of media services is appropriate.