

## **Proposed changes to the Audiovisual Media Services Directive – see EU later?**

In May 2016 the European Commission published a proposal for a revised Audiovisual Media Services Directive. Its main aims are to promote European cultural diversity, to ensure the independence of audiovisual regulators, to offer broadcasters more flexibility over advertising and to protect consumers. The scope of the Directive would also extend to video-sharing platforms in relation to protecting minors from harmful material and prohibiting incitement to violence and hatred.

This reflects the Commission's overall aim to provide a "better balance" between the rules that currently apply to traditional broadcasters, video-on-demand providers and video-sharing platforms. The changes are lighter-touch than expected, although the Brexit vote makes it uncertain how far they would be implemented in the UK.

### **Background**

In 2015 the European Commission consulted on the Audiovisual Media Services Directive (2010/13/EU). The consultation had two main purposes: (a) to check which parts of the Directive were fit for purpose as part of the Commission's Regulatory Fitness and Performance Programme and (b) to collect evidence and views on future media services policy. On 25 May 2016 the Commission introduced its new legislative proposal to amend the Directive.

The Commission identified the following issues to be considered in the evaluation and review of the Directive:

- (a) promoting European audiovisual content;
- (b) ensuring a level playing field for audiovisual media services;
- (c) strengthening the single market;
- (d) providing for an optimal level of consumer protection;
- (e) protecting minors and prohibiting hate speech and discrimination; and
- (f) strengthening media freedom and pluralism, access to information and accessibility to content for people with disabilities.

### **European Commission proposal**

Viewers, and particularly minors, have been moving from traditional television to online platforms, and yet the regulatory burden is still much higher for television programming than for other audiovisual platforms. Given the changes in viewing patterns and the market developments since the Directive was first adopted in 2007, the Commission's proposed revisions are intended to introduce what the Commission describes as "flexibility when restrictions only applicable to TV are no longer justified".

At the same time, the Commission aims to ensure that consumers will be "sufficiently protected" in the on-demand and internet world, while trying to ensure that innovation will not be stifled. In other words, the Commission says, the aim is "to achieve a balance between competitiveness and consumer protection".

### **Promoting European works**

The Commission aims to create a more level playing field in the promotion of European works by introducing an obligation on on-demand services to reserve at least 20% of their catalogues for European works and to ensure adequate prominence of such works. This would encourage on-demand services such as Netflix to move away from their currently heavy reliance on US-produced content.

Further, the revised Directive would require on-demand service providers to contribute financially to European works (based on the turnover generated in the imposing Member State), either through direct investment or through the payment of levies to national film funds. But to avoid undermining market development and stifling the entry of new players into the market, these quotas and other rules would not apply to services with low turnover or a small market presence, or to small or micro enterprises.

#### Reinforcing the country-of-origin principle

The country-of-origin principle is, in the Commission's opinion, a "cornerstone of the Directive". Under the principle, content providers are required to comply with the broadcasting rules of the Member States under whose jurisdiction they fall, as opposed to the rules of each country in which the content is transmitted. The European Commission states that the principle "has enabled the development and free circulation of audiovisual media services across the EU, with legal certainty and has resulted in lower compliance costs for providers and more choice for consumers", and so should be maintained and reinforced. This will be achieved by simplifying the rules determining which country has jurisdiction over a provider and improving the derogation mechanisms in cases of exceptions. The revised Directive would contain an obligation on Member States to inform each other about which providers fall under their jurisdiction and to maintain a database to ensure transparency. Further, it would clarify the co-operation procedures between Member States regarding permissible limitations to the country-of-origin principle.

#### Independence of audiovisual regulators

The revised Directive aims to reinforce the independence of national regulatory authorities from governments and industry and to ensure that audiovisual media service providers act in the interest of viewers. The role of the European Regulators Group for Audiovisual Media Services, which consists of all 28 national audiovisual regulators, would be enshrined in EU legislation. The role of that group would be to assess co-regulatory codes of conduct at EU level and to advise the Commission on achieving consistent implementation of the Directive across all Member States.

#### Media pluralism and accessibility of content

In the view of the Commission, the reinforcement of regulators' independence is "highly relevant for guaranteeing the pluralism of the media". As for accessibility, the Commission proposes to delete Article 7 of the current Directive, "given that the proposed European Accessibility Act already sets stricter common accessibility requirements for media service providers".

#### Advertising flexibility

The audiovisual market has changed significantly over the last decade, offering a much greater choice to viewers, including, for example, services where viewers can opt out of advertising. The Commission's proposal would introduce greater flexibility for broadcasters over when adverts can be shown. A daily limit of 20% of advertising between 7.00 a.m. and 11.00 p.m. would replace the current limit of 12 minutes per hour for television advertising slots, and broadcasters would be able to choose more freely when to show adverts during the designated times. Additionally, films made for television, cinematographic works and news could be interrupted more often (i.e. every 20 minutes

rather than every 30 minutes), and isolated spots would be admissible. The revised Directive would also introduce more flexibility for broadcasters and on-demand providers in using product placement and sponsorship announcements, which are excluded from the proposed 20% daily limit. Further, in line with the aim to protect consumers, the revised Directive would strengthen provisions to protect minors from inappropriate audiovisual advertising, such as commercial communications relating to alcoholic beverages and foods that are high in fat, salt/sodium and sugars.

#### Protecting minors and prohibiting hate speech

The Commission proposes to align the standards for protecting minors for broadcasters and on-demand service providers. This would require that programmes that may impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them. The most harmful content would be subject to the strictest measures, such as PIN codes and encryption. This would apply regardless of whether such programmes are transmitted by broadcasters or provided by on-demand service providers.

Further, the grounds for prohibiting hate speech will be aligned to those of the Framework Decision (2008/913/JHA), which concerns criminal expressions of racial hatred and prohibits incitement to violence and hatred directed against a group or members of a group defined by reference to sex, race, colour, national or ethnic origin or religion.

#### Regulating video-sharing platforms

The current Directive does not apply to user-generated content offered on video-sharing platforms, such as YouTube, since the platform providers do not have editorial responsibility for the content stored on these platforms. Those services constitute information society services and are instead subject to the rules set out in the E-commerce Directive (2000/31/EC).

Probably one of the most significant changes is the Commission's proposal to extend the scope of the Directive to video-sharing platforms, but only in relation to the protection of minors from harmful content (such as pornography and violence) and the protection of all citizens from incitement to violence and hatred. The revised Directive would introduce a definition of "video-sharing platform service" as a service that meets the following requirements:

- (a) the service consists of the storage of a large amount of programmes or user-generated videos, for which the provider does not have editorial responsibility;
- (b) the organisation of the stored content is determined by the provider, including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing;
- (c) the principal purpose of the service (or a dissociable section of it) is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate; and
- (d) the service is made available by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC.

The revised Directive would introduce an obligation on Member States to ensure that, within their field of responsibility, video-sharing platform providers put appropriate measures in place to achieve this, preferably through co-regulation.

Further, in accordance with the E-commerce Directive, Member States would not be allowed to impose on providers any general obligation to monitor content, nor to require video-sharing

platform providers to apply stricter measures than those set out in the revised Directive. This would not affect any measures that Member States can apply under the E-commerce Directive for illegal content stored on platforms. Nor would it affect Article 25 of the E-commerce Directive, which requires Member States to take action against sites containing or disseminating child pornography.

## **Comment**

### Light-touch regulation

The European Commission's proposal is not as radical as some might have been expecting or fearing. As Commissioner Ansip (Vice-President for the Digital Single Market) commented when the proposal was published: "I want online platforms and the audiovisual and creative sectors to be powerhouses in the digital economy, not weigh them down with unnecessary rules."

The Commission has therefore decided not to change existing rules that work, such as those relating to the liability of online service providers, while to a certain extent de-regulating traditional broadcasting (for example, in relation to advertising). Whether the Commission has in fact achieved its intended "level-playing field" is open to debate. In particular, exactly what falls under the new definition of "video-sharing platform service" will no doubt be open to different interpretations. Here, it is worth noting that "social media services" will not be included, except if they provide a "service that falls under the definition of a video-sharing platform" (recital 3 of the revised Directive).

So the revised Directive is set to continue on the principle of minimum harmonisation, meaning that Member States can take their individual needs into account when implementing the Directive. In the past Member States have generally adopted stricter rules than those set out within the Directive.

### UK implementation

In its response to the consultation last year, with the exception of the protection of minors, the UK government essentially saw no significant problems with the Directive in its current form and believed it still to be relevant, effective and fair. The UK government viewed the Digital Single Market as a key priority for the UK, as having a key role to play in safeguarding Europe's future competitiveness.

But, with the UK's recent vote to leave the EU, it is uncertain whether UK can remain in the single market and equally uncertain how far audiovisual services would continue to benefit from free movement. Many service providers operate from the UK under the Ofcom regime and, if the UK were to leave the single market, principles such as the country-of-origin principle would have huge implications for any audiovisual service providers currently regulated under UK laws who want to continue to benefit from the free movement of services.

Further, the Brexit vote creates uncertainty over the 20% minimum quota obligation for European works, and it remains to be seen whether the UK could retain the status of European works for UK-produced content. If UK programmes were to cease to qualify as European works, their sale value to other EU broadcasters could well be affected, meaning that financing such programmes could be harder in the first place.

It could still take some time until the revised Directive is adopted. The proposed Directive will now be reviewed by the directly elected European Parliament and the EU Council of Ministers, which represents the Member States' governments. But after the Brexit vote, the UK government could well have lost any influence over how or whether these proposed changes will be introduced.

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