AUDIOVISUAL MEDIA SERVICES DIRECTIVE: EUROPE'S MODERNIZATION OF BROADCAST SERVICES REGULATIONS

Vance Little[*]

I. INTRODUCTION

The single market for television broadcasting in Europe was initiated in 1989 with the Television Without Frontiers Directive ("TVWF Directive").[1] Since that time, the fundamental nature of the media broadcast industry has undergone significant changes, requiring various updates in the legislation.[2] The most recent amendment to the TVWF Directive is the Audiovisual Media Services Directive ("AVMS Directive"), which became effective on December 19, 2007.[3] This amendment incorporates much needed adaptations to help embrace modern technological developments, yet at the same time upholds many of the previous regulations.

The television broadcasting sector has experienced major innovations in digitalization, resulting in the convergence of electronic communications, which are reshaping the fundamental means by which society receives and imparts information.[4] A particular area of development is television "on-

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[*] J.D., University of Illinois College of Law, 2008; M.A. Economics, University of Oklahoma, 2003; B.S. Aeronautical and Astronautical Engineering, University of Illinois, 2000. The author would like to thank Professor Peggy Valcke, Assistant Professor at K.U. Leuven, Belgium, for her insight into the area of communications law in the European Union.

1. PATRICE AUBRY, THE "TELEVISION WITHOUT FRONTIERS" DIRECTIVE, CORNERSTONE OF THE EUROPEAN BROADCASTING POLICY 4 (2000) *available at* http://www.obs.coe.int/online_publication/reports/TWF.pdf.en.

2. *Id.*

3. Council Directive 2007/65, Audiovisual Media Services Directive, 2007 O.J. (L 332) 27 (EC) [hereinafter AVMS]. The title, "Directive of the European Parliament and of the Council amending 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," was replaced in Article 1 with the title, "Directive 89/552/EEC of 3 October 1989 of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)," demonstrating the broadened scope of the new amendments. *Id.* at 35. Member States are now given a two year period in which to transpose the framework into national law. European Commission, Audiovisual Media Services Policy, http://ec.europa.eu/avpolicy/ reg/avms/index_en.htm (last visited May 16, 2008).

4. Peggy Valcke, *European Approaches to Future Content Regulation, the New European Directive*

demand," where consumers are now able to, through interactive technology, personalize media content and services.[5] Unlike the TVWF Directive, the AVMS Directive has not only identified new audiovisual services for regulation, but has also embraced this development and endeavored to create a level playing field for both traditional television broadcasting and newer "on-demand" audiovisual media services.[6]

The AVMS Directive holds fast to many established controls laid down by previous versions of the legislation and also introduces changes that have significant effects on the audiovisual media service sector.[7] Regulation in areas such as jurisdiction, protection of minors, and the protection of European media content have been maintained.[8] The AVMS Directive has greatly broadened the scope to account for new technological developments; instead of regulating only television broadcasts, the directive now regulates all audiovisual media services.[9] To deal with the variations between the two types of media services, the AVMS Directive introduces a unique two-tiered method of regulation.[10]

This Recent Development will first give a limited introduction to the objectives sought by the European Union ("EU")—objectives that have particular importance in the regulatory framework of broadcast media law. Next, this Recent Development will look at the background of the AVMS legislation beginning with the TVWF Directive along with its first major amendment in 1997, which addressed some of the market changes at the time, but failed to adequately address the developing technology of online audiovisual services.[11] Finally, the AVMS Directive will be explored in detail in an effort to see what impact it will have on audiovisual media service providers today.

II. BACKGROUND

The EU was created in an effort to eliminate all barriers to trade and to create a single economic market among Member States in the Union.[12] The purpose of these principles is to establish a

> closer union among the peoples of Europe . . . ensuring the economic and social progress of its countries by common action to eliminate the barriers which divide Europe, encouraging the constant improvement of the living conditions of its peoples as well as ensuring the

for Audiovisual Media Services: A "Next Generation Framework" or "Old Wine in New Barrels"? 1 INTERDISC. CENTRE FOR L. & ICT (Belg.) (Mar. 27, 2007).

5. *Id.*

6. *Commission Proposal for a Directive of the European Parliament and of the Council Amending Council Directive*, at 18, COM (2005) 646 final (Dec. 13, 2005) [hereinafter *Commission Proposal*].

7. *See generally* AVMS, *supra* note 3.

8. *See generally id.*

9. *Id.* at 37.

10. *Commission Proposal*, *supra* note 6, at 5; *see also* Valcke, *supra* note 4, at 2.

11. DAVID GOLDBERG, ET AL., EC MEDIA LAW AND POLICY 60 (1998).

12. LAURENT GARZANITI, TELECOMMUNICATIONS, BROADCASTING AND THE INTERNET 1-002 (2d ed. 2003).

preservation and strengthening of peace and liberty . . . .[13]

There are two main objectives of media regulation in the EU: (1) the right of establishment, and (2) the free movement of services.[14] The right of establishment guarantees the right to set up agencies, branches, and subsidiaries of businesses in other Member States; and the right to receive the same national treatment as that enjoyed by nationals of those states.[15] The Treaty Establishing the European Community ("EC Treaty") guarantees the right of establishment under Article 43.[16] Cross-border establishment is particularly applicable to the audiovisual broadcasting industry because broadcast audiovisual signals do not stop at political borders.[17]

The second objective—the free movement of services—is found in Article 49. This article prohibits restrictions of the freedom to provide services across borders within the EU.[18] The path toward abolishing barriers to free trade in services has been a difficult journey. Member States have traditionally held strong policies of protectionism regarding their workforce, and laws discriminating against foreign workers were common in the early years of European integration.[19] Initial suggestions of media harmonization were met with controversy. Early critics argued that broadcast media was inherently tied to culture and that the regulation of culture was not included in the EC Treaty. Therefore, it was argued that media regulation fell outside the purview of the Community.[20] The European Court of Justice ("ECJ") found that the broadcast of television programs was a service as described in Article 49.[21] In line with this decision, the TVWF Directive was introduced to harmonize key issues relating to the free movement of broadcasting services within the Community[22] and to ensure free movement of these services among the Member States of the EU.[23] While reducing barriers, the directive preserved certain public interest objectives, including protection of minors, consumers, cultural diversity, and the European audiovisual content industry.[24]

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13. Council Directive 89/552, Television Without Frontiers Directive, Recital, 1989 O.J. (L 298) 23, 23 (EC) [hereinafter TVWF Directive].

14. *See id.* ("[T]he Treaty provides for the establishment of a common market, including abolition . . . of obstacles to freedom of movement for services . . . .").

15. GEORGE BERMANN, ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 654 (2d ed. 2002).

16. Treaty Establishing the European Community, Nov. 10, 1997, art. 43, 1997 O.J. (C 340) 195 [hereinafter EC Treaty].

17. *See Commission Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable*, at 333, COM (1984) 300 final (Jun. 14, 1984) [hereinafter *Commission Green Paper on Broadcasting*] (listing the European countries that receive overspill of television signals from other neighboring countries).

18. EC Treaty, *supra* note 16, art. 49.

19. *Id.*

20. GOLDBERG, ET AL., *supra* note 11, at 12.

21. Case C-155/73, Italian State v. Guiseppe Sacchi, 1974 E.C.R. 409.

22. TVWF Directive, *supra* note 13, at 23-24.

23. *Id.*

24. *Id.* at 24-25.

III. THE TELEVISION WITHOUT FRONTIERS DIRECTIVE

Though in large part amended by successive directives,[25] the TVWF Directive provides a foundation for EU-wide television broadcast regulation and provides a base with which to understand the successive revisions and amendments leading up to the AVMS Directive. The TVWF Directive was created in a technological landscape of a different era. At the time, television broadcast was primarily "linear" in nature.[26] Linear services consist of simultaneous viewing of programs, where a broadcaster transmits a signal containing a scheduled set of audiovisual programs to anyone in the public who owns a television to receive the signal.[27] In this manner, the television broadcasting service has control over the scheduling and transmission of the content provided to the consumers. In a time when there was no competition from other audiovisual media service providers, television broadcasters had a relative monopoly of the citizens' attention and access to content.[28] Because of this monopoly, it was deemed to be in the best interests of the nation to protect the citizens from issues such as "surreptitious advertising,"[29] advertising of alcohol,[30] tobacco,[31] medical drugs,[32] offensive content,[33] and content that may negatively influence minors.[34]

Previously, Member States were able to regulate the content of broadcast programs because the locally established broadcasting companies were generally the only ones whose transmissions reached local citizens.[35] Broadcasting services established within the boundaries of the Member State were clearly within the jurisdiction of the national authorities.[36] Hence, governments easily regulated the content and scheduling of television that reached the citizenry. However, as transmission capabilities developed with the use of satellite and cable transmission technology, companies were able to reach more and more households. This expansion allowed broadcast companies to easily reach consumers across Member State borders and on the other side of the continent.[37] Local governments no longer had the ability to

25. The Television Without Frontiers Directive was amended in 1997 by Council Directive 97/36, 1997 O.J. (L 202) 60, and most recently in 2007 by Council Directive 2007/65, Audiovisual Media Services Directive, 2007 O.J. (L 332) 27.

26. *Commission Green Paper on Broadcasting*, *supra* note 17, at 332.

27. Valcke, *supra* note 4, at 6.

28. *See id.* (describing how linear service providers "push" content to viewers).

29. TVWF Directive, *supra* note 13, at 23.

30. *Id.* at 28.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 28-29.

35. Case C-222/94, Comm'n v. United Kingdom, 1996 E.C.R. I-4025; Case C-11/95 Comm'n v. Belgium, 1995 E.C.R. I-4115 (recognizing new concerns regarding the state's ability to regulate broadcasts reaching domestic citizens).

36. *Commission Interim Report Realities and Tendencies in European Television: Perspectives and Opinions*, at 21, COM (1983) 229 final (May 25, 1983) [hereinafter *Commission Interim Report*]; *see also* TVWF Directive, *supra* note 13, at 26 (stating that all Member States shall ensure compliance with applicable jurisdictional law).

37. *Commission Interim Report*, *supra* note 36, at 151-60 (demonstrating the pan-continental coverage of the first series of European broadcast satellites).

regulate signals that were flooding into their countries with modern satellite transmission.[38]

Movement toward a unified Europe began to have real traction, and the formation of EU structures and frameworks began to coalesce.[39] Television thus gained crucial significance because it was seen as an important tool—a political means of solidifying the European identity and citizenship.[40] Europe was already on its way to a single market in other economic sectors.[41] As protections were slowly phased out, the benefits of efficiency, competition, and greater choice for consumers outweighed the negative effects of increased foreign competition and the decline of traditional national markets.[42] However, there were still serious concerns regarding the potential damage that the new glut of foreign (outside the EU) broadcasting would have on national culture and community morals and values.[43] Embracing the new cable and satellite audiovisual services in a responsible manner, along with the recognition of the value inherent in instituting a minimum level of harmonization of broadcasting regulations across all Member States, prompted the push for the EU to regulate television broadcasting.[44] As will be seen, the objective of a single market has been pursued aggressively, but successive directives addressed national concerns by including extensive national protections, such as quotas for "European works" and lengthy advertising rules, to ease the negative impact of the transition.[45]

A. Jurisdiction

The TVWF Directive was the first step in the creation of the single European market in this sector. The directive declared that television broadcasters need only comply with the regulations of the Member State under whose jurisdiction they operate.[46] However, the manner in which the directive defined jurisdiction was unclear:[47] Article 2 of the directive stated that "[e]ach Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the law. . . . "[48] The vagueness of this clause was in desperate need of clarification.[49] The ECJ responded to this call in *Commission v. United Kingdom*, where the court analyzed the

38. *Id.* at 13-14.

39. *See* Europa, The History of the European Union, http://europa.eu/abc/history/1990-1999/index_en.htm (last visited May 16, 2008) (providing a timeline of EU development).

40. *Commission Green Paper on the Development of a Common Market for Telecommunications Services and Equipment*, at 2, COM (1987) 290 final (Jun. 30, 1987).

41. *See* Single European Act 1987 O.J. (L 169) 1 (representing the Member States' formal commitment to creating a common style market).

42. The Impact and Effectiveness of the Single Market, COM (1996) 520 final (Oct. 30, 1996).

43. Monroe E. Price, *The Market for Loyalties*, 104 YALE L.J. 667, 670-72 (1994).

44. TVWF Directive, *supra* note 13, at 26-27.

45. *Id.*

46. *Id.* at 26.

47. Case C-222/94, Comm'n v. United Kingdom, 1996 E.C.R I-4025 (noting dispute over the application of jurisdiction).

48. TVWF Directive, *supra* note 13, at 26

49. *Id.*

jurisdiction question as it applied to television broadcasters.[50] Lacking direction from the text of the directive, but recognizing that some type of connection must exist with the Member State's legal system, the court inferred that Article 2(1) was intended to be construed such that television broadcasters come under the jurisdiction of the Member State in which they were established.[51] The court pointed to Article 59 of the EC Treaty (detailing the right to establishment) as grounds for concluding that, if the directive were to use any other definition of jurisdiction, television broadcasters might be subject to an unwanted "double check" when transmission occurred across state boundaries.[52] The decision reflects the court's attempt to provide a measure of legal certainty to television broadcasters and to uphold the application of free movement of services within the EU.

In light of the court's clarification of jurisdiction, detailed guidelines were incorporated into the directive when it was amended in 1997.[53] The updated Article 2 creates the "country of origin principle" and stipulates that jurisdiction applies in the Member State where "the broadcaster ha[s] its head office . . . and the editorial decision about programme schedules are taken."[54] Broadcast companies established outside the EU do not fall under the jurisdiction of the directive unless they benefit from use of a satellite or particular frequency granted by a Member State.[55]

These amendments added greatly to procedural certainty, both clarifying the intent of the Community legislators and attempting to ensure that a single Member State ultimately has control over the operations of a given broadcaster. Moreover, the clarification of jurisdiction simplified regulations for television broadcasters because they could easily determine which Member State's rules they were required to comply with.

B. Minimum Harmonization

The TVWF Directive specifically allows for supplemental, but not contradictory, Member State rules.[56] It provides strict rules for broadcasters while protecting the minimum standards of harmonization as the goal of the directive.[57] Thus, Member States enjoy the flexibility to exercise locally relevant consumer and cultural protections, while the Community ensures protection of the free movement of services in the market.[58]

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50. *Comm'n v. United Kingdom*, 1996 E.C.R. I-4025.

51. *Id.* (applying jurisdiction *ratione personae* over television broadcasters).

52. EC Treaty, *supra* note 16, art. 59 (as in effect 1985) (now article 49).

53. Council Directive 97/36, Television Without Frontiers First Revision, art. 2, 1997 O.J. (L 202) 60, 64-65 (EC).

54. *Id.* at 64.

55. *Id.* at 65.

56. *Id.* at 26.

57. *Id.*

58. This authorization is particularly useful when building consensus among Member States with the objective of harmonizing cultural protection, environmental protection, labor, and consumer protection. *See e.g.*, Case 382/87, Buet v. Ministere Public, 1989 E.C.R. 1235 (allowing France to supplement Directive 85/577 prohibiting door-to-door canvassing of neighborhoods to sell private educational courses).

The directive also provides protections to Member States.[59] It reserves the right of Member States to take provisional actions to suspend retransmission in their territory if a broadcaster "manifestly, seriously and gravely infringes" on the prohibitions relating to minors and incitement of hatred under Article 22, or if a broadcaster has been established in another state for the sole purpose of evading Member State legislation.[60]

C. Promotion of Distribution and Production of Television Programs

The TVWF Directive sets a very aggressive course in pursuit of its objective of protecting the European audiovisual sector and stimulating diversity in television content. Programs considered to be "European works" are guaranteed with a specific quota of at least 51% of the broadcast time.[61] The majority of a broadcaster's transmission time[62] is reserved for works originating from Member States of the Community.[63] Plurality of the European media market is enhanced by the additional protection of "European works by producers who are independent of broadcasters."[64] A full 10% of the transmission market is carved out for independently produced European programs.[65]

The 1997 amendment of the TVWF Directive further strengthened the policy of plurality.[66] The amendment recognized that exclusive broadcast rights purchased by private broadcasters created a monopoly in the transmission of important cultural events and raised concerns that such monopolies might exclude citizens from major cultural events by requiring them to pay for access.[67] Article 3(a) of the amended directive requires Members States to take measures to ensure that events that are considered to be of "major importance for society" are available to a "substantial proportion" of the public on free television.[68] The amendment implemented a check on the power of Member States to override private contracts by requiring a transparent process whereby states publish a list of designated events considered to be of "major importance for society."[69]

D. Regulation of Advertising and Sponsorship

Restrictions on advertising under the TVWF Directive consist of two

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59. TVWF Directive, *supra* note 13, at 26.

60. *Id.*

61. *Id.* at 26. This excludes the time appointed to news, sports events, games, advertising, teletext services, and teleshopping. *Id.*

62. *Id.*

63. *Id.* at 27 (including works originating from states which are party to the European Convention on Transfrontier Television of the Council of Europe).

64. *Id.* at 27.

65. *Id.*

66. Television Without Frontiers First Revision, *supra* note 53, at 66.

67. *Id.*

68. *Id.*

69. *Id.*; *see also* Case T-33/01, Infront WM AG v. Comm'n of the European Cmtys., 2005 E.C.R. II-5897.

types: qualitative and quantitative.[70] The qualitative aspects deal primarily with the content and presentation of advertising.[71] The directive introduces the principle of separation in which advertising is required to be recognizable and separate from the other parts of the television programming.[72] The concept of separation is a consumer protection measure designed to assist viewers in identifying commercial messages by divorcing them from regular program content.[73] In a similar vein, Article 10 forbids subliminal and surreptitious advertising techniques.[74]

Another qualitative restriction addresses public health concerns. The TVWF Directive sets out an absolute ban on advertising of cigarettes, tobacco, and medication.[75] Although this absolute prohibition does not apply to alcohol, commercial messages promoting alcohol face stringent restrictions under Article 15.[76]

The directive also sets out basic standards regarding the content of advertising messages. Article 12 dictates an absolute ban on advertising that prejudices respect for human dignity, discriminates based on race, sex, or nationality, is offensive to religious or political beliefs, and that encourages behavior prejudicial to health, safety, or the protection of the environment.[77] These prohibitions indicate harmonized measures and are therefore not subject to variation by Member States.[78] As explored below, the directive pays special attention to the protection of children.

In addition to qualitative restrictions, the directive includes quantitative restrictions on advertising in Europe.[79] Article 18 restricts the amount of advertising allowed as a percentage of the total broadcast time in a day.[80] Advertising time is not permitted to exceed 15% per day or 20% per day in some situations.[81] Article 19 allows Member States to set more restrictive daily advertising percentages, taking into account television's public interest role in "providing information, education, culture and entertainment."[82] Further, Members States are allowed to restrict regulation of overall

70. TVWF Directive, *supra* note 13, at 29-30.

71. *Id.*

72. *Id.* at 28.

73. *Id.*

74. *Id*;. *see also* Council Directive 84/450, Directive on Misleading Advertising, 1984 O.J. (L 250) 17 (relating to misleading advertising, modified by Council Directive 97/55, Directive on Misleading Advertising So As to Include Comparative Advertising, 1997 O.J. (L 290) 18 (relating to comparative advertising)); Case C-34/95, De Agostini v Konsumentombudsmannen, 1997 E.C.R. I-3843.

75. TVWF Directive, *supra* note 13, at 28; *see also* Council Directive 98/43, Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products, 1998 O.J. (L 213) 9 (EC) (relating to the advertising and sponsorship of tobacco products); Council Directive 92/28, Directive on the Advertising of Medicinal Products for Human Use, 1992 O.J. (L 113) 13 (EC) (regarding advertising for medicine).

76. TVWF Directive, *supra* note 13, at 28.

77. *Id.*

78. *Id.*

79. *Id.* at 29.

80. *Id.*

81. *Id.* ("[T]his percentage may be increased [for] direct offers to the public for the sale, purchase or rental of products . . . .").

82. *Id.*

advertising in order to protect pluralism in the media.[83]

The directive prescribes guidelines for the timing and frequency of advertising messages that may air during a given period of time.[84] Article 11 prohibits the interruption of a religious service with advertisements, and dictates specific requirements relating to advertising during current affairs programs, documentaries, religious programs, and children's programs.[85]

The TVWF Directive addresses not only the broadcast of traditional commercial announcements, but also stipulates rules for sponsorship of television programs.[86] The directive prohibits sponsors from exerting any influence on scheduling and content of programs, protecting the independence of editorial decision-making.[87] In this vein, "[n]ews and current affairs programmes may not be sponsored."[88] Finally, sponsorship of any given program is required to be clearly identified at the beginning or end of every program.[89]

E. Protection of Minors

Within its regulatory framework on advertising, the TVWF Directive addressed the particular vulnerability of minors and their susceptibility to commercial announcements. Under Article 16, the content of broadcast advertising may not cause "moral or physical detriment to minors . . . ."[90] Commercial announcements may neither encourage minors to buy products nor "encourage minors to persuade their parents or others to purchase goods or services."[91] Article 16 also prohibits advertising that exploits the "special trust minors place in parents, teachers or other persons."[92] Further, the directive sets out a ban on advertising that depicts children in dangerous situations.[93]

Beyond these specific requirements protecting children from dangerous and manipulative content in commercial advertisements, the directive dedicates a specific chapter to the general protection of minors.[94] Article 22 requires Member States to take appropriate measures to ensure that broadcasters do not transmit content that "might seriously impair the physical, mental or moral development of minors . . . ."[95] Similarly, the directive requires Member States to prohibit programs that are "likely to impair the physical, mental or moral development of minors," except where the time of broadcast or the use of a technical measure ensures that minors will not normally see or hear the

83. *Id.*
84. *E.g. Id.* at 28.
85. *Id.*
86. *Id.* at 29.
87. *Id.*
88. *Id.*
89. *Id.* (indicating that the name and/or logo of the sponsor must be presented).
90. *Id.* at 28-29.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 29.
95. *Id.* (including "pornography or gratuitous violence" shown in general broadcasting as content that could impair the development of minors).

broadcast.[96] This allows a relatively unrestricted license to broadcasters during late night time slots when it is reasonably expected that children would not be watching television.[97] For programs that are likely to impair the physical, mental or moral development of minors, the 1997 amendment to the TVWF Directive requires that such programs be preceded by acoustical warnings or be identified by visual symbols throughout their duration.[98] Outside of these exceptions, a general ban exists on programs containing "incitement to hatred on grounds of race, sex, religion, or nationality."[99]

IV. MODERNIZATION AND THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

The audiovisual media services sector has changed dramatically since the inception of the TVWF Directive. The primary change has come in the form of the expansion of the market of non-linear services.[100] Non-linear services—also referred to by the directive as "on-demand audiovisual media services"—are services that provide on-demand sports and entertainment programs and web-casting, where a viewer may choose from a catalogue of programs and other content to be downloaded and viewed at a time convenient to the subscriber.[101] Viewers of on-demand services receive much of the same content as do viewers of television broadcasts, but because they are not technically television broadcasters, do not fall under the scope of regulation.[102] This caused unfair competition between certain broadcasters and served as a primary impetus for the latest audiovisual regulatory overhaul.[103]

The primary purpose of the AVMS Directive is to expand the scope of broadcast regulation to account for new media services, covering all audiovisual services, thereby creating a level playing field across the entire sector.[104] The new rules now cover both television broadcasts as well as on-demand audiovisual media services.[105] However, the directive is careful to carve out specific limits in its scope.[106] That is, the directive covers "any form of economic activity . . . but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest."[107] Examples of non-economic activity falling outside the scope of the AVMS Directive are Web sites that

96. *Id.*
97. *Id.* (noting that the time of broadcasts may constitute a sufficient safeguard against child exposure).
98. Television Without Frontiers First Revision, *supra* note 53, at 68.
99. TVWF Directive, *supra* note 13, at 24.
100. RAND EURPOE, CAN INTERNET TV HAVE FRONTIERS? 1-2 (2006), *available at* http://www.rand.org/pubs/research_briefs/2007/RAND_RB9201.pdf.
101. Valcke, *supra* note 4, at 6.
102. *Id.*
103. *Commission Proposal*, *supra* note 6, at 3.
104. European Commission, *supra* note 3.
105. AVMS, *supra* note 3, at 29.
106. European Commission, *Supra* note 3.
107. AVMS, *supra* note 3, at 29.

promote the sharing of short non-commercial video clips (e.g., YouTube and private blogs containing no advertising).[108] When analyzing a Web site, care must be taken to determine its principal purpose.[109] If the audiovisual content is only ancillary to the Web site, it is not covered by the directive.[110] Thus, animated graphics and token banner advertisements do not reach the threshold for applicability of the directive.[111] Along the same lines, the directive covers mass media and therefore excludes private correspondence such as "e-mails sent to a limited number of recipients."[112] Online newspapers and magazines are specifically excluded from the scope of the AVMS Directive.[113] Further, because the term "audiovisual" applies to "moving images with or without sound," it does not cover radio broadcasts.[114]

A. Graduated Two-Tier Regulatory Structure.

The new regulation reflects the objectives of the "three pillars," which include cultural diversity, protection of minors, consumer protection, media pluralism, and the fight against racial and religious hatred.[115] Though the new regulatory framework now blankets the entire audiovisual media services sector, the directive differentiates between television broadcasters and on-demand service providers, setting out a graduated, or two-tier, regulatory structure in its application. In contrast to the relatively heavy regulatory burden on traditional television broadcasters, the regulatory scheme covering new on-demand services only lays out certain basic rules to be followed.

The basic rules, referred to at the first tier regulations, apply to all audiovisual media services, regardless of the platform, and include the following: clear identification of the service provider to recipients,[116] rules prohibiting incitement of hatred,[117] access to visually and audibly disabled persons,[118] requirements to respect copyrights,[119] and certain advertising rules.[120] The first four of the basic rules are very straightforward. However, the requirements dealing with advertising can be somewhat convoluted. The new directive contains the same rules as previously included in the TVWF Directive, such as prohibitions on surreptitious and subliminal advertising techniques[121] and on advertisements promoting discrimination.[122] Additionally, strict requirements on advertising of alcohol, tobacco, and drugs

108. *Id.*
109. *Id.* at 29.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 29-30.
114. *Id.* at 30.
115. European Commission, *supra* note 3.
116. AVMS, *supra* note 3, at 40.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 40-41.
121. *Id.* at 40.
122. *Id.*

and medicine have not changed.[123]

The general protection of minors in the TVWF Directive was maintained in the new AVMS Directive, thus giving added scope through application to the on-demand service sector.[124] The same regulations remain regarding advertisements that encourage minors to purchase items for sale on television.[125] The directive also retains the rules from the TVWF Directive relating to the protection of editorial content from influence from commercial sponsorship.[126] Finally, the AVMS Directive creates unique rules for the advertising technique of product placement in audiovisual content. Under the TVWF Directive, advertising was required to remain separate from television programs.[127] However, under the AVMS Directive, regulations relating to product placement have opened up an exception for television broadcasters to insert messages into programs in return for financial compensation.[128] Although product placement is generally prohibited, Member States have the discretion to create exceptions for cinematographic works, films and series, sports and light entertainment programs.[129] Product placement in children's programs, news, and current affairs programs is, however, still prohibited.[130] Finally, viewers must be informed of the product placement at the beginning and end of each program.[131]

The second set of rules are the "second tier" of rules, which apply only to the television broadcasting sector of the industry. Many of these regulations have been carried over from the TVWF Directive, yet additional rules have been added. The AVMS Directive continues the protection of events of social importance,[132] and also protects access by broadcasters to the broadcast of events of high interest to the public that have been secured through exclusive contracts.[133] This access comes in the form of "short-news reports,"[134] where broadcasters are free to choose short extracts of the event to use in general news programs.[135]

The promotion and distribution quotas on European media content, specifically the majority requirement, remain the same in the AVMS Directive.[136] Also unchanged are the percentages required to be allocated for content produced by independent European sources.[137]

Some areas of advertising have been relaxed in the AVMS Directive.

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123. *Id.*
124. *Id.* at 41.
125. *Id.* at 40.
126. *Id.* at 41.
127. *Id.* at 28.
128. *Id.* at 41.
129. *Id.*
130. *Id.*
131. *Id.* at 41. The directive also bans the placement of tobacco or medicinal products into programs for any reason. *Id.*
132. *Id.* at 42.
133. *Id.* at 42-43.
134. *Id.* at 42.
135. *Id.* at 43.
136. *Id.*; TVWF Directive, *supra* note 13, at 26-27.
137. AVMS, *supra* note 3, at 43; TVWF Directive, *supra* note 13, at 27.

Whereas previously programs were not allowed to be interrupted more frequently than once every 45 minutes, the new directive only requires that interruptions not be more frequent than once every 30 minutes.[138] Further, though the television advertising percentage per hour has not changed, the requirement for a certain maximum percentage of overall daily advertising time no longer exists.[139]

In dealing with the protection of minors, television broadcasting services bear a higher burden than on-demand services. Providers of on-demand service are only required to ensure that services that "might seriously 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 such services."[140] Television broadcasters, on the other hand, are required to ensure television programs do not contain anything that might "seriously impair the physical, mental or moral development of minors," particularly pornography and gratuitous violence.[141]

B. Jurisdiction and Derogation.

The AVMS Directive has carried over the rules on determining jurisdiction over the broadcaster from the previous directive. The country of origin principle is the same as that which was clarified in the 1997 amendments to the TVWF Directive. Broadcasters can continue to rely on these guidelines to determine with which Member State's rules to comply.

Ever since the TVWF Directive, the objective of EU broadcasting legislation has been minimum harmonization. Member States are allowed to enact stricter regulations than what is required by the directive.[142] Since directives set minimum standards, regulations falling below those standards are prohibited.[143]

One of the ways that the new directive applies a different burden on television broadcasters as compared to on-demand services is in the Member States' right of derogation. Member States are only allowed to temporarily block broadcasts of television services in the event of hate speech or an infringement of rules protecting minors.[144] On the other hand, on-demand audiovisual services are allowed to be blocked only for a serious and grave risk of infringing on one of the given protections in Article 2a, and must be blocked with proportionate measures.[145]

Finally, the AVMS Directive provides more leverage to Member States affected by offending transmissions based in neighboring jurisdictions.[146]

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138. AVMS, *supra* note 3, at 43; TVWF Directive, *supra* note 13, at 28.
139. AVMS, *supra* note 3, at 43; TVWF Directive, *supra* note 13, at 29.
140. Television Without Frontiers First Revision, *supra* note 53, at 68.
141. *Id.*
142. *Id.* at 64 (stipulating the jurisdiction of Member States).
143. *Id.* at 66.
144. AVMS, *supra* note 3, at 38.
145. *Id.* at 38-39.
146. *Id.* at 39.

Member States receiving the offending signals may contact the Member State in which the broadcaster is established and request that the broadcaster conform with the regulations of the receiving Member State.[147]

V. CONCLUSION

The AVMS Directive demonstrates the significance that the EU has placed on the recent technological developments in the audiovisual broadcast sector. Sweeping changes were required for the update of the existing directive, and the EU responded in a substantial way. The new directive represents a major step forward in regulating the world of electronic communications.

The AVMS Directive is not without potential holes. For example, it will take some time before it is known how the revisions to the rules on advertising will play out in the marketplace. The new regulations on product placement may actually have the opposite effect on the market than that intended by the drafters. Requiring that the viewer be informed of the existence of the product placement provides the advertiser with additional free exposure to the audience and might actually provide additional incentive to purchase product placement in programs.

Further, the jurisdiction rules are laudable in their clarity, allowing service providers to easily determine what national rules with which to comply. However, the glaring question for international audiovisual service providers is this: why be established within the EU at all? The directive allows companies to avoid regulation simply by being located outside Europe. Particularly with respect to web-based on-demand services, the incentives to establish jurisdictional connections within the EU appear to be few to none. Given the apparent importance that the EU has placed on keeping up with technology, such a policy is counterproductive if Europe desires to capture even part of the future growth of this bourgeoning industry.

147. *Id.*