

The new Audiovisual Media Services Directive as a missed opportunity in view of the protection of children and young people against harmful influences of advertisement in nowadays' media

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I. Introduction

In comparison to former generations, the everyday life of today's young people is outstandingly influenced by electronic media. When it was only the television that influenced young people circa 10-20 years ago, we noticeably have to realize now that the focus has changed. If we only consider the spread of the internet in the last decade, it gets clear that young people face a new dimension of debatable influences that they should be protected from.

II. European Television Directive (“Television Without Frontiers”)

Looking back at the time of about 20 years ago, the enactment of the Television Directive of 1989 (Television Without Frontiers = TWFD)¹ was a landmark event in the European harmonisation of laws. The Directive is based on the idea of minimum harmonisation that establishes at least the same minimum standards of television rules. The existence of common minimum standards of course does not prevent member states from establishing higher standards in their national media laws. However, to guarantee freedom of TV transmission within Europe, it is necessary that receiving states with a higher level of standards do not restrict the reception of broadcasts from another EC member states with lower standards. Article 2 (2) of the TWFD thus contains the principle of origin that forbids the restriction of cross-border broadcasts and consequently amounts a reciprocal acceptance by all member states. This is possible because all of them pursue the same interests concerning the broadcasting and reception of television programs². This system of mutual confidence is the necessary tool that impedes receiving member states to exercise a secondary control.³

The European Court of Justice accordingly has ruled in the cases ‘De Agostini’⁴, ‘Commission v. UK’⁵ and ‘Barcardi’⁶ that receiving member states are only allowed to take measures if the cross-border transmission is not hindered “as such”. This particularly became obvious in the ‘De Agostini’ case: Sweden has a law that generally forbids advertisements aimed at children under 12 and consequently is more strict than most other

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¹ Directive 89/552/EEC of 3 October 1989, amended by Directive 97/36 EC.

² Amandine Garde, ‘Television Advertising and the Protection of Children in the European Union – The Television Without Frontiers Directive’, In: *Defence for Children International*.

³ Stephen Weatherill, ‘EU Consumer Law and Policy’, (Edward Elgar Publishing, Cheltenham, 2005), 189.

⁴ *Konsumentombudsmannen v. De Agostini F.* Joined cases C-34/95, C-35/95 and C-36/95. (1997) ECR I-3843.

⁵ *Commission v. UK*, Case C-222/94 (1996), ECR I-4025.

⁶ *Bacardi v. TFI*. Case C-429/02. Judgement of 13 July 2004.

national laws in Europe.⁷ TV broadcasts that can be received in Sweden are therefore not subjected to the Swedish law but to the origin state's law (British law in the current case). The Swedish authorities thus were impeded to sanction the transmission of the British broadcast in Sweden.

This case shows that laws which exceed the European minimum standards (of minors' and young people's protection) have to come second to the freedom of transmission. The TWFD thus should be understood primarily as an economical Directive rather than a cultural one.⁸ The TV Directive came under severe criticism because of the circumstance that the protection of young people and minors only is low on the list of priorities. The Independent Television Commission of the UK (ITC) even considered to deviate from the principle of origin.⁹ However, the riposte to the ITC's opinion should recall that such ideas misjudge the purpose of harmonised European statutory regulations that are the foundation of whole the European broadcast system.

Nevertheless, the criticism of the British ITC is not completely wrong because the TV-Directive has been out-dated for a long time as regards contents. The desire of the ITC to tackle the root of the problems is honourable in a way.

III. Deficiencies of the Television Directive

The Directive contains only very general and imprecise rules on the protection of young people and minors which in addition only have a narrow scope. Article 12 (d) speaks about "health or safety", Article 15 (a) prohibits the advertisement of alcohol and Article 16 only contains general rules as to "not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity"¹⁰ or to "not directly encourage minors to persuade their parents or others to purchase the goods or services"¹¹. Such loose rules merely are able to handle relatively slight cases. Serious problems caused by the TV advertisement, however, cannot be removed by means of the TWFD. It thus would have been a pleasure if the EC had not only thought about quantitative restrictions of advertisements, but also about qualitative restrictions. The qualitative restrictions *de lege lata* concern tobacco¹², alcohol¹³ and medical products¹⁴. These goals have to be pursued in the future of course, too. They nevertheless can be called "out of date", as the British ITC hold.¹⁵ It stated that it still would be worth supporting these goals, but one would realize that concepts as "sexual and social success" missed the reality of nowadays' young people.¹⁶ The main focus instead should be set on the 'under age drinking', for example.¹⁷

⁷ Howard Johnson, 'Advertisers beware! The impact of the Unfair Commercial Practices Directive', *Communications Law* 2005, 164 (165).

⁸ Clifford A. Jones, 'Television Without Frontiers', 19 *Yearbook of European Law* (1999/2000), 299.

⁹ ITC, in: *European Union Documents: ITC Response to the TWF Directive Review*, 2003.

¹⁰ Article 16 (a) of the TWFD.

¹¹ Article 16 (b) of the TWFD.

¹² Article 13 of the TWFD. The tobacco directive 2003/33/EC furthermore refers explicitly to the television directive.

¹³ Article 15 of the TWFD.

¹⁴ Article 14 of the TWFD.

¹⁵ ITC. See already above.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

This opinion should be met with general approval because putting the main emphasis on qualitative restrictions of advertisement is to be in keeping with the times as well as to reach larger effects. Up to now the TV Directive as a so called 'European framework directive' is not far-reaching enough. The need for more qualitative restrictions can impressively be shown by the circumstance that in 2003, eleven out of the fifteen member states (at that time) had enacted more strict national laws than prescribed by Article 16 of the TWFD.¹⁸

IV. 'Audiovisual Media Services' Directive as answer to the digital age

There were a lot of hopes when the revision of the TWFD was discussed. It was aimed to keep abreast of the technology that had developed since 1989 and also since the first amendment in 1997. The new directive is called "Audiovisual Services Media" Directive¹⁹ (AVMSD) and – as the new name shows – its scope does not cover only television anymore. Its neutrality towards technology became necessary because more and more money is invested in advertisement in new forms of media. Advertisement on the internet, for example, particularly endangers young people and children because they are deemed as the ideal target group concerning advertisement.²⁰

The new directive thus aims at extending the Internal Market to audiovisual non-linear services ('pull' contents) and modernising the rules on linear services ('push' contents) – and simultaneously to promote the protection of minors.²¹ As the result, the directive now can be applied to the traditional TV as well as to new services, as e.g. video-on-demand (VoD), internet TV (IPTV) and commercial live webcasts – independent from the underlying technology.²²

Whilst creating the new AVMSD, the European Community has relaxed the rules on quantitative advertisement rules on the whole, what is without any problems because the rigid rules of the previous TV Directive were not especially favouring the protection of young people and children anyway. Unfortunately, the European Community did not venture to introduce more strict rules relating qualitative advertisement restrictions as for example to forbid advertisement and sponsoring aimed at children under 12 years completely.²³ Such measures were originally considered in the preparation materials. Only the 'product placement' - that is permissible in the meantime - was not extended to children's programs.²⁴

The reason not to introduce new qualitative restrictions could be situated in the inclination of the EC member states towards a minimum harmonisation approach of which the member states have hopes that it would avoid competitive disadvantages of the companies in their

¹⁸ Corinna Hawkes, 'Marketing Food to Children: the Global Regulatory Environment', *World Health Organisation* 2004, 19. Online at <http://whqlibdoc.who.int/publications/2004/9241591579.pdf>.

¹⁹ Directive 2007/65/EC.

²⁰ Study of the *Media Awareness Group*, How marketers target kids online (Ottawa, 2003), Online at <http://www.mediaawareness.ca>.

²¹ Audiovisual Media Services Directive (2007/65/EC).

²² Natasha Good and Stuart Goldberg, 'European reaction to the proposed new Audiovisual Services Directive', *Communication Law* 2006, 183.

²³ Oliver Castendyk and Kathrin Bottcher, 'The Commission's proposal for a new Directive on audiovisual content – a feasible solution?', *Entertainment Law Review* 2006, 174, 180.

²⁴ Article 3 i (2) of the Audiovisual Media Services Directive.

respective countries.²⁵ This reason strongly reminds of the ‘Delaware effect’ - as discussed in the American and the European company law - which has the consequence of a rules’ downwards trend due to differently strict regulations (“race to the bottom”²⁶). The Audiovisual Media Services Directive should better have avoided such a “forum shopping”²⁷ in implementing a higher standard by means of more qualitative advertisement restriction – what was failed to do, unfortunately.

V. Interaction between the new AVMSD and other measures of the European Community

In spite of the missed opportunity of the AVMSD to enact stricter qualitative restrictions, protection of young people and children also is possible by means of the European consumer law and competition law. This especially concerns the application of the e-commerce Directive²⁸, the directive against unfair commercial practices²⁹ and the directive against misleading advertising³⁰. A complete different issue concerns the question of how intensively the effect of these directives’ protection of minors really is.

The Directive against unfair commercial practices intends to protect particularly vulnerable groups – expressly children³¹ – in ordering to assess commercial practices from the point of view of the concrete target group. The annexes of the directive distinguish between unfair and aggressive commercial practices and list practices which are absolutely inadmissible to children.³² These bans however only concern such advertisements that mislead or irritate children about the real value of the offer and thereby endanger their financial interests. The directive does not give any substantial further reaching qualitative restrictions on advertisements than the TWFD or the AVMSD do.

The consequences of the absence of stricter qualitative restrictions on advertisements will be shown in the following.

VI. Correlation between advertisement and obesity

1. General situation

Successful lobbyism in the European Community managed to hold back the issue of how advertisements influence the state of health of young people and particularly of children.

The World Health Organisation worries about non-communicable diseases since years, as e.g. heart condition, certain types of cancer, diabetes and obesity. The latter possibly could develop to the largest health problem of developed countries in this century. A newer study

²⁵ Oliver Castendyk and Kathrin Bottcher, ‘The Commission’s proposal for a new Directive on audiovisual content – a feasible solution?’, *Entertainment Law Review* 2006, 174, 180, Fn. 61.

²⁶ D. Charny, ‘Competition among Jurisdictions in Formulating Corporate Law Rules. An American Perspective on the ‘Race to the Bottom’ in the European Communities’, *Harvard International Law Journal* 32 (1991), 423, 428.

²⁷ Stephan Le Goueff, ‘The proposed Audiovisual Media Services Directive: challenges to the country of origin principle’, *Computer and Telecommunications Law Review* 2007, 232, 233.

²⁸ Directive 2000/31/EC (e-commerce).

²⁹ Directive 2005/29/EC (unfair commercial practices).

³⁰ Directive 84/450/EEC (misleading advertising).

³¹ Recital 18 and Art.5 (3) of the Directive 2005/29/EC.

³² Particularly Annex I Nr. 7, 16, 20 and 31 are relevant with regard to advertisement directed at children.

of the Robert-Koch-Institute showed that already 15 per cent out of the 18.000 examined young people and children in Germany are held overweight.³³ The research scientists furthermore found that young people and children consume a lot of sugar and that their consume of fruits and vegetables sinks with advancing age. World wide, even a quarter of the minors living in the western world are deemed to be overweight or obese.³⁴

This is actually not surprising because the expenses for food have considerably increased, the television consume has immensely risen and because many children do less than 30 minutes activity every day.³⁵ The technological progress made it possible at the same time to manufacture cheap mass-produced foodstuff that is energy-dense.³⁶ We probably should call it a tremendously “snack culture” in which young people and children grow up.

Advertisement and marketing of food and non-alcoholic beverages directed at children thus is under particular observation³⁷ and thereby has the key position in the fight against overweight³⁸.

2. AVMSD as a ‘missed opportunity’

The provisions of the TWFD and the AVMSD which forbid advertisement of unhealthy or unsafe products unfortunately are not specific enough to prohibit advertisements for unhealthy food because a chocolate bar alone does not contribute to overweight but only its regular consume does. The new AVMSD could have integrated qualitative restrictions for typical unhealthy foods perfectly well, as e.g. high-calorie fast-food, soft-drinks, high-sugar breakfast cereals or snacks that are high in fat, salt and sugar. These foods would also correspond to the new EC Regulation on Nutrition and Health Claims made on Foods.³⁹

The Office of Communications of the United Kingdom of Great Britain (OFCOM) even thinks that it is worth going beyond those qualitative restrictions: It thus proposes to cut back advertisements with celebrities and sportsmen because such advertisements especially encourage children to buy these products.⁴⁰

However: To restrict advertisements with celebrities and sportsmen is also a matter of proportionality. It maybe would be more proportional to restrict them until a certain time in the evening. Another issue of criticism is that is not proven if the correlation between the consumption of TV and children’s overweight depends on the increased eating of snacks whilst watching TV or on the circumstance that children have a more sedentary lifestyle.⁴¹

³³ The study is published in *VersMed* 2007, 152.

³⁴ Margaret Griffiths, ‘TV Advertising of food to children’, *Communications Law* 2006, 11(6), 201-205.

³⁵ Amandine Garde, ‘The Regulation of Food Advertising and Obesity Prevention in Europe: What Role for the European Union?’, *EUI Working Papers*, Law No. 2006/16, 2.

³⁶ Amandine Garde, ‘The Regulation of Food Advertising and Obesity Prevention in Europe: What Role for the European Union?’, *EUI Working Papers*, Law No. 2006/16, 3.

³⁷ Corinna Hawkes, ‘Marketing Food to Children: the Global Regulatory Environment’, *World Health Organisation* 2004, p. iii.

³⁸ Amandine Garde, ‘The Regulation of Food Advertising and Obesity Prevention in Europe: What Role for the European Union?’, *EUI Working Papers*, Law No. 2006/16, 13.

³⁹ EC Regulation 1924/2006/EC.

⁴⁰ *OFCOM*, Television advertising of food and drink products to children. Options for new restrictions, (March 2006), 42. Online at <http://www.ofcom.org.uk/consult/condocs/foodads/>.

⁴¹ James Grant and Caroline Chatterton, ‘Making a meal of it: new restrictions on advertising HFSS products to children’, *Entertainment Law Review* 2007, 192, 193.

It is comprehensible due to this uncertainty that the advertising industry has severe misgivings against.⁴²

Another particularly sensitive issue are multimedia systems in which comic heroes are commercialised so that the respective media and products within this system permanently refer to each other and thus achieve a large effect of recognition.⁴³ The strategy of McDonald's 'Junior Meal' works in this way. Under the view of the Directive against Unfair Commercial Practices (UCPD), it maybe would be possible to sanction this method as misleading children about the real purpose of the advertisement if one considers the toy as the true 'message'. Under the aspect of the prevention of overweight, however, the UCPD is not applicable at issue because it only aims at the protection of consumers' financial interests and explicitly not of the protection of health and safety aspects.

It gets particularly obvious at this point that the implementation of qualitative restrictions in the new Audiovisual Media Services Directive would have the positive effect of the protection of the children's health – an effect that is not provided by the other directives.

3. The British system standing model for the European Community

The British self-regulation authority CAP (Committee of Advertising Practice) with its different advertising codes already provides today an exemplary level of children's and young people's protection. The CAP prescribes broadcasters especially targeting at children to reduce the HFSS⁴⁴ advertisements (until the end of 2008) to 50 per cent of the volume of 2005. An absolute prohibition of HFSS advertisements has existed since February 2008 concerning broadcasts which have a special incentive to children between four and fifteen years.

Section 7.2.1 of the Television Advertising Standards Code furthermore prescribes the following:

- (1) ...
- (2) In particular, advertisements should not encourage excessive consumption of any food or drink, frequent eating between meals or eating immediately before going to bed.
- (3) It is important to avoid encouraging or condoning attitudes associated with poor diets, for example, a dislike of green vegetables.
- (4) ...

Not only this paragraph of the Code, but whole the detailed and comprehensive regulation system of the British self-regulation body easily could have served as model *de lege ferenda* when the European media landscape was renewed. CAP's section 7.2.1. is only a kind of general clause of a precise system.

VII. Quintessence

The television directive has been the main attention of the European legislation for about 20 years. It was never a pure instrument for the protection of consumers but it should have ensured a free European television market. The protection of children and young people

⁴² Ibid.

⁴³ Claudia Benz, 'Werbung vor Kindern unter Lauterkeitsgesichtspunkten. Zum Entwurf eines Gesetzes gegen den unlauteren Wettbewerb, § 4 Nr. 2', *Wettbewerb in Recht und Praxis* (WRP) 2003, 1160, 1173.

⁴⁴ HFSS = High Fat, Salt and Sugar (content).

against harmful influences of the television had to be regulated as a logical annex whilst harmonising the national broadcast laws. At this time the EEC/EC chose the approach of minimum harmonisation.

In the course of the following two decades, the technological and the social environment have developed and the television directive thus had to be revised. The new Audiovisual Media Services Directive gave answers to many problems, e.g. whilst extending the scope of the directive to more than only conventional television. This is why the rules on advertisement have to be applied in a broader context.

Despite this broadening of the scope and despite the fact that consumer protection is also provided by other directives, as e.g. by the Directive against Unfair Commercial Practices, the European legislation has not found an answer to the problem of the overweight and the obesity of children and young people. This insight is particularly regrettable because overweight and obesity will probably be the largest health problem of developed countries in this (new) century.

This is why we should understand the new Audiovisual Media Services Directive as a 'missed opportunity'.