AVMS Directive & Its Implementation: When Regulation Meets Reality…

Prof. Dr. Peggy Valcke
Research Professor – Faculty of Law
Director Interdisciplinary Centre of Law & ICT
ICRI K.U. Leuven - IBBT
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= The directive formerly known as “Television without Frontiers”

- Objectives
  - Free movement of broadcasting / audiovisual media services within the internal market;
  - Preservation of certain public interest objectives (cultural diversity, consumer protection, protection of minors);
  - Promotion of the distribution and production of European audiovisual programmes

- Minimum harmonisation!
From TVWF to AVMS: Key Issues

- **Technological / platform neutrality**: common rules for all audiovisual media services, irrespective of transmission platform / technology used; expansion of scope to on-demand media  
  [N.B. UK strongly opposed to extension of Directive to AVMS: “over-regulation”, “risk of being ineffective because or re-location outside EU”, “hamper EU’s competitiveness”]

- **Graduated (or two-tiered) regulation**:  
  - on-demand AVMS: basic rules  
  - linear AVMS: stricter rules

- **Country of origin principle**: more exceptions?  
  [N.B. “Group of 13” called for stronger tools in fight against delocalisation]

- **Modernisation of advertising rules**: e.g. product placement  
  [N.B. Germany strongly opposed to introduction of product placement]

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**Theme 1: Scope of Application**

**WHO IS IN & WHO IS OUT?**
Scope of Application

Art. 1 (a) “Audiovisual media service”: 7 cumulative criteria

- **Service as defined by Art. 56-57 TFEU**
  - economic service; hence: no private websites, sharing of UGC content

- **Under editorial responsibility of a media service provider**
  - exercise of effective control over selection of programmes & organisation in chronological schedule (linear) or catalogue (on-demand); hence: no online platforms for UGC

- **The principal purpose of which is**
  - No services where video content is only ancillary – e.g. online versions of newspapers and magazines, travel sites and online games

- **The provision of programmes**
  - Moving images with or without sound constituting individual item in a schedule or catalogue; hence: no services based on audio (radio), text (online newspapers), pictures

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Scope of Application

Art. 1 (a) “Audiovisual media service”: 7 cumulative criteria

- **In order to inform, entertain or educate**
  - Impact on the way people form their opinions

- **To the general public**
  - Mass media character; hence: no narrowcasting (forum, blog, mailing list, newsletter...)

- **By electronic communications networks**
  - No cinema and DVD

- **Either television broadcast or on-demand AVMS (“ODS“ or “ODPS“)**

- **Also: Audiovisual commercial communication**
Scope of Application - Examples

COVERED

Scope of Application – Examples (ctd.)

NOT COVERED
Scope of Application – Examples (ctd.)

BUT WHAT ABOUT...

National Implementation: ODS

Notification or authorisation?

- ODS not subject to licensing, only registration/notification system, in vast majority of MS
  - Reason: do not use a scarce resource
  - Exceptions:
    - licence required in RO, IT (but in practice close to registration procedure), FR (in case on-demand AVMS wish to use terrestrial frequencies)
    - No registration/notification in DE, DK, FI, FR (except for DTT), GR, PL
- Notification applies to all ODS (VOD, catch-up service…) across all means of delivery
  - Exception: CY (not for ODS delivered via Internet)
- Notification/registration usually with media authority
  - Exceptions: LU (Ministry of Communication); UK (ATVOD); IR (Ministry/ODAS)
- Fee?
  - Only limited number of MS (CY, ES (CAC), HR, IT, LT, NL, SI); varying greatly
- Enforcement
  - Sanctions in case of non-compliance (UK, NL, SE, CZ, HR…)
  - Tracing via web crawlers/spiders (UK, CZ, UK)
National Implementation: ODS

### Guidance/Interpretation

#### Guidance documents by RA, e.g.:

- **Table 5: An overview of the main guidance documents produced by RAs**

<table>
<thead>
<tr>
<th>Country</th>
<th>Document Link</th>
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<tbody>
<tr>
<td>DK</td>
<td><a href="http://www.biblioteksguiden.dk/medieomraadet/tvinternet/mv-om">http://www.biblioteksguiden.dk/medieomraadet/tvinternet/mv-om</a></td>
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<tr>
<td>SK</td>
<td><a href="http://www.epra.org">http://www.epra.org</a></td>
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Source: E. MACHET, Background document Plenary session “Content Regulation and new Media: Exploring Regulatory Boundaries between Traditional and new Media”, 33rd EPRA meeting, Ohrid, 26-27 May 2011; www.epra.org
National Implementation: ODS

Guidance/Interpretation

• “Principal Purpose”: what if video is part of broader consumer offering?
  – 3 approaches: quantitative – qualitative – mix
  – Example (1): UK (ATVOD Guidance):
    • AVMS if: programmes grouped together in distinct area and presented as a catalogue of viewing options which could exist as a coherent consumer offering if removed from the broader service
    • No AVMS if: programmes included as integral and ancillary element of broader offering, e.g. video used to provide additional material relevant to text-based news story, or video part of content service predominantly featuring a range of non-video material.
  – Example (2): NL:
    • Relevant criteria: is video service organised in catalogue in which videos are searchable and can be consumed as “stand alone” without being purely supplementary to other content (e.g. articles); how is service promoted in marketing strategy; how is service perceived by audience.
    • Not relevant: is service provided by a company historically involved in broadcasting or in written press.

National Implementation: ODS

Guidance/Interpretation

• “Economic service”
  – Example (1): Italy
    • Monetary threshold as presumption for economic activity able to compete with broadcasting activities: 100,000 EUR on annual basis (revenues from advertising, sponsorship, contracts and conventions with public and private subjects, public funding, pay-TV offers, but NOT: revenues from services other than TV-like service, e.g. hosting)
  – Example (2): NL:
    • Relevant criteria: does it contain ads, sponsoring; does it promote a brand, product or service; is it offered in return for payment – may also include self-promotion, even in case of non-profit organisations.
    • Excluded: services by private persons or public enterprises unless offered for payment or of a clearly commercial nature.
National Implementation: ODS

Guidance/Interpretation

• “TV-like character”
  – Example (1): UK (ATVOD Guidance)
    • “Only ODS that provide programmes that compete for the same audience as TV broadcasts, and are comparable to the form and content of programmes included in broadcast TV services”
    • NOT: informational videos directed at a particular group of people, e.g. undertaking’s employee training videos available online; competition compliance films on law firms or NCA’s websites
  – Example (2): UK (Ofcom Decisions on scope appeals by Playboy):
    • Adult content on demand: Climax 3 and Demand Adult -> considered by ATVOD as ODPS under s.368A Communications Act 2003
    • Playboy argued: VOD services consisted of explicit works of sexual material prohibited on linear TV services; hence, no ODPS because content “not normally included in TV programmes services”
    • Ofcom disagreed because: legislation requires content of ODPS to be ‘comparable’, not ‘identical’ to TV programmes; content comparable to ‘soft’ pornography which can be broadcast on UK linear channels with restrictions.
  – Example (3): NL
    • No raw video material which lacks a professional editing process (e.g. additional features like introduction, subtitling, voice over, etc.)

National Implementation: ODS

Guidance/Interpretation

• “To the general public”
  – Example (1): NL
    • Mass media character if receivable with standard consumer equipment; potentially available to everybody on the Internet…
    • …even if in practice only used by very few people.
    • BUT: media with very small audience and provided by non-commercial institutions (churches, town halls, hospitals) should be excluded (usually no economic activity).
  – Example (2): DE (Interstate Treaty)
    • Service which cannot be simultaneously used by more than 500 persons excluded.
  – Example (3): IT
    • Linear(!) services: excluded if provided on the Internet (WebTV, IPTV, mobile TV) with a schedule of less than 24 weekly hours and services not intended for the wide public, such as company TV services, and cable TV services in restricted areas, such as railway stations, airports, etc.
National Implementation: ODS

Guidance/Interpretation

- **“Editorial responsibility”**
  - Relevance: decisive criterion for determination of services on basis of UGC
  - Example (1): BE (CSA)
    - Effective control ≠ control exercised at any moment, but implies that there is no general renunciation to the exercise of the control.
    - Selection of programmes = decision making process re: insertion of programmes (or not), profile of service, value judgments.
    - Organisation of programmes = how is programme integrated in schedule or catalogue.
    - Non-exhaustive list of services with no editorial responsibility: UGC platforms (e.g. YouTube or DailyMotion); on-demand video databases based on search engine (Google Videos); services consisting in simultaneous retransmission of images without any editorial intervention (cameras on ski slopes or road traffic).
  - Example (2): UK (ATVOD Guidance)
    - No editorial responsibility: catalogue of programmes consisting of UGC posted to a public website for sharing and exchange, without prior moderation or restriction as to what can be posted.

National Implementation: ODS

Major Borderline Cases

- Services on UGC platforms
  - Distinction between content created by users and professional content offered on UGC platforms.
- AV services offered by electronic/online versions of newspapers or magazines: blurring boundaries AVMS - newspapers
  - Sports newspapers online vs sports channels websites
  - Newspapers online vs all news portals vs all news channels websites
  - Fashion magazines online vs fashion videos online
  - Cooking magazines online vs cooking videos online
  - Example (1): UK
    - ATVOD: Where video content appears as integral part of online version of newspaper, e.g. alongside a text based story, service falls outside ATVOD’s remit. However, where audiovisual content on website constitutes a consumer destination in its own right, the content of which can be viewed and enjoyed without reference to the publication offering, the website will fall within scope.
    - Currently pending: 5 appeals from 4 newspapers and 1 magazine (Sun Video; News of the World Video; Sunday Times Video Library; Telegraph TV; Elle TV) against ATVOD determinations qualifying video services as ODPS.
Theme 2: Commercial Communication

LIFE AFTER THE 30-SECOND SPOT...

ACC in AVMS Directive

1. Extended scope: “audiovisual commercial communication”
   - covers traditional advertising, sponsorship, but also emerging advertising techniques, like product placement, virtual advertising...
2. Minimum rules for all audiovisual commercials
3. Relaxation of Traditional Advertising Rules
4. Newly regulated form: product placement
ACC in AVMS Directive

Minimum rules for all ACC (TV and on-demand):

- **General**
  - be readily recognisable
  - not use subliminal techniques
  - not use surreptitious techniques
  - respect human dignity
  - not include/promote discrimination (e.g. based on sex, nationality, religion)
  - not encourage behaviour harmful to health (codes of conduct on fatty food), safety or the environment
  - not promote tobacco or prescription medication

- **Protection of minors:**
  - must not cause physical or moral harm to minors
  - must not directly exploit minors’ inexperience or credulity
  - must not encourage minors to pressurise parents to make a purchase.
  - ACC for alcohol must not be aimed at minors or encourage excessive alcohol consumption

ACC in AVMS Directive

Relaxation of Traditional Advertising Rules (linear TV):

- **Rules on duration:**
  - Several quantitative restrictions removed (e.g. the daily limit)
  - Others relaxed (e.g. hourly limit: 15 -> 20%)

- **Rules on insertion:**
  - 20 minute rule relaxed
  - News, children’s programmes and feature films: 45 -> 30 minute rule
  - Sports programmes: even isolated spots (before: only during intervals)
  - Teleshopping: maximum limit of 3 hours removed

- **Interactive advertising, split screen, banners:** allowed
  (Art. 19: “readily recognizable”, “kept quite distinct from other parts of the programme by optical and/or acoustic means”) – cf. Interpretative Communication 2004
ACC in AVMS Directive

Rules on Product Placement (Art. 11)

WHAT: any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration. (Art. 1 (1) (m))

- The reference to product is built into the action of a programme
  - **sponsorship**: sponsor references may be shown during the programme but are not part of the plot

CONDITIONS to include PP:

- Allowed in certain programmes (no news or children programs!) or if no payment (production props, prizes... of significant value; rec. 91)
- Does not affect the responsibility and editorial independence of the media service provider
- Not directly encourage the purchase or rental of goods or services
- No undue prominence (!)
- Clearly inform viewers - identification at start & end of programme; after advertising breaks
- Not for tobacco products or cigarettes; nor for medicinal products or medical treatments available only on prescription
National Implementation: PP

• **Most MS allow PP**
  – Exceptions: DK, IE prohibit paid PP

• **Identification**
  – viewers shall be clearly informed of the existence of product placement

* surreptitious commercial communication

  - representation in words or pictures of goods, services, name, trade mark or activities of producer of goods or provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature.
  - Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration.
  - The fact that no payment is made does not mean that the intentional nature of surreptitious advertising can be ruled out (ECJ: Eleftheri tileorasi AE ‘ALTER CHANNEL’, Konstantinos Giannikos v Ipourgos Tipou kai Meson Mazikis Enimerosis, Ethniko Symvoulio Radiotileorasis (Case C-52/10, 9 June 2011))

National Implementation: PP

• **Significant value**
  – Example (1): DE
    • Quantifiable amount: 1% of production cost with minimum value of 1.000 EUR
  – Example (2): UK
    • Qualitative description: A residual value that is more than trivial

• **Does not affect the responsibility and editorial independence of the media service provider**
  → Thematic placement?
National Implementation: PP

• ‘Undue prominence’
  – BE-CSA (Guidelines): not met when presentation of product or brand is easily identifiable by a viewer not aware and normally careful, and not warranted on editorial grounds – relevant criteria:
    • Obliging complacency towards product, service or brand;
    • Lack of pluralism in presentation of product, service or brand;
    • Recurring presence of product, service or brand; manner in which it is presented and appears;
    • Indication of address or/and telephone number of the advertiser
  – BE-VRM: Kwint & Marie Jo (VRT); Sissy Boy (VMMa) decisions

Thank you for your attention
Peggy Valcke
[peggy.valcke@law.kuleuven.be]


Postgraduate Studies in ICT & Media Law