



## The future of public service obligations after the AVMS Directive

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### Introduction

The European Union policy in the audiovisual sector is guided by the alleged existence of a “European audiovisual model”. At the heart of this model lies the recognition that the production and distribution of audiovisual media services are not only economic, but also cultural activities calling for the protection of a range of objectives of general interest: cultural diversity, protection of minors, consumer protection, particularly in the field of advertising, media pluralism, and the fight against racial and religious hatred. It is considered essential, in the interests of the maintenance of these values, that the “European audiovisual model” be founded on “a balance between a strong and independent public service sector and a dynamic commercial sector”. Cultural values to some extent also inform the latter. The prevailing tendency is, however, for public broadcasters to carry the lion’s share of public service obligations. Even though public service broadcasting can also be delivered by private enterprises, the reality is that most countries have entrusted public companies with the delivery of the public service mission (Nicolitchev 2007: 7-10)<sup>1</sup>.

The emphasis of this article is therefore on public broadcasting and on the values that have informed it since its inception<sup>2</sup>.

This article will address the question whether the presumed “European audiovisual model” really exists, whether cultural values still matter in national broadcasting policy despite the fact that technological progress and a general ideological shift across Europe towards private and market-based answers have put regulation for the public interest under strain. If so, the next question to be asked is whether these values are converging and whether they have been furthered or jeopardized by the involvement of the European Union in this area, mainly the Audiovisual Media Services (AVMS) (previously Television without Frontiers (TWF)) Directive<sup>3</sup>. This article will draw examples from the broadcasting orders of three Member States: France, Germany and the United Kingdom. By focusing on public broadcasters’ cultural obligations, the principle of separation of adverti-

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- [1] The Netherlands and the United Kingdom are exceptions to this rule.  
[2] For a more extensive discussion of these issues see I. Katsirea (2008), *Public Broadcasting and European Law. A Comparative Examination of Public Service Obligations in Six Member States* Kluwer, Boston.  
[3] European Parliament and Council Directive 2010/13/EU of 10 March 2010 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) OJ L 95/1, 2010 (hereafter referred to as the AVMS Directive).



sing from editorial content, the protection of minors and the right of reply, this article will demonstrate that in some respects national legislation exceeds the standards set by the AVMS Directive, while in others it still lags behind.

### Salient features of the public broadcasting orders of three Member States

During most of its post-war existence broadcasting in France has been dominated by the State. Until 1982 broadcasting was a state monopoly that was vested in a sole body, initially the *Radiodiffusion télévision française*, and from 1964 onwards the *Office de la radiodiffusion télévision française* (ORTF). ORTF was entirely financed by licence fees until 1968 when advertisements were permitted. The government only loosened its grip on broadcasting somewhat in 1981 when Mitterand was elected. A law adopted in 1982 abolished the state monopoly on broadcasting and established an independent authority, the *Haute autorité de l'audiovisuel*, to appoint the presidents of public channels and to guarantee their political independence<sup>4</sup>. The Chirac government that came to power in 1986 liberalized French broadcasting further. In 1987, in a very controversial move, the government privatized TF1, the biggest and most favourite broadcaster in France. To assuage public anger, the government was forced to impose special cultural obligations on TF1 (Holznagel 1996 :44). The French broadcasting system is mainly characterised by the view of television as a cultural asset that needs to be protected from an onslaught of bland, uniform American or other international productions. To this end, programming and investment quotas are imposed that go beyond the requirements of the Audiovisual Media Services Directive, and the mandatory use of the French language is rigorously overseen.

The German broadcasting system places less emphasis on cultural protection and quotas than on pluralism. Public broadcasters are asked to ensure that their internally pluralistic organs bring a diversity of viewpoints to bear on their programming. Quotas are viewed with suspicion in Germany since they fit uneasily with the fundamental constitutional principle that broadcasting should be free from state control. The same uneasiness is displayed towards the recent calls by the European Commission for a clearer definition of the public service remit. These unique features of the German broadcasting system have been shaped to a great extent by the experience of the role played by the German media in the first half of the twentieth century. In the Weimar Republic, conservative elements in the German press strove to undermine democratic institutions. Later, the Third Reich exploited all media for propaganda purposes. After the Second World War, when the allied occupational forces established public broadcasting in Germany, they sought to make sure that it would be pluralistic, independent of the State and free from political interference. Therefore, they entrusted public broadcasting to regional broadcasting companies in accordance with the federal structure of Germany. In 1950, these public broadcasters formed an association, the ARD (*Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten Deutschlands*). To counterbalance the ARD, a second public television channel, the ZDF (*Zweites Deutsches Fernsehen*), was established in 1961 by a treaty between all West German *Länder*. ZDF's mission is the transmission of a national television service.

[4] Law 82-652 of 29 July 1982.



The governance of the BBC, the foremost English public broadcaster, has been significantly reformed under the new Charter and Agreement. The BBC Governors were replaced by a Trust, and an Executive Board was set up with the aim of overcoming the dark legacy of the Hutton Inquiry. Still, the reform has left many pressing issues untouched, not least BBC's tenuous relationship with the super-regulator Ofcom. On the European front, the detailed definition of BBC's public purposes in the new Charter together with the rigorous accountability mechanisms to which the BBC is subject meet the European Commission's expectations to a great extent.

### AVMS Directive: A roadmap for convergence?

The Television without Frontiers (TwF) Directive was adopted in 1989 and was amended for the first time in 1997. A second revision has recently been completed. The TwF Directive only covered the simultaneous transmission of a predetermined schedule of programmes to more than one recipient, but not on-demand services such as video-on-demand. After a lengthy consultation process that began in 2003 and was concluded in 2005 and a legislative process of 18 months, a new Audiovisual Media Services without Frontiers (AVMS) Directive has been agreed upon. The new Directive covers all audiovisual media services, both scheduled and on-demand ones, whose principal purpose is the provision of programmes. It also includes more flexible rules on television advertising. We will now look at the changes introduced by the new Directive in the areas under discussion. We will then try to assess their impact on national public broadcasting orders.

#### *The European quota*

The European broadcasting quota, laid down in Article 4 of the TwF Directive, obliged Member States to ensure, where practical and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services, and teleshopping. European works were defined in a rather complex way in Article 6 of the same Directive.

Despite widespread criticisms against the European broadcasting quota, this provision has been incorporated *in toto* in the AVMS Directive as far as linear services are concerned. As regards non-linear services, the Commission decided to strike a middle path. It did not impose a quota on on-demand services but asked Member States to ensure that such services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works. It clarified further that "Such promotion could relate, *inter alia*, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service"<sup>5</sup>. However, the implementation of Article 13 is left to the individual Member States, which is problematic from the point of view of legal certainty.

[5] AVMS Directive, Art. 13 (1).



### *The principle of separation of advertising from editorial content*

The principle of separation marks the dividing line not only between advertising and editorial content but also between the conception of television as a cultural experience from its conception as an economic good like any other. It ensures audiences are not misled about the nature of content –programming or advertising- they are consuming. It also ensures that broadcasters retain full responsibility and control for their programmes without further interference from advertisers, thus safeguarding the independence and credibility of mass media (Ofcom 2007).

The TwF Directive endorsed the principle of separation of advertising from editorial content in Article 10 (1), which stipulated that “television advertising and teleshopping shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means” Also, Article 10 (4) of the Directive prohibited surreptitious advertising, which was defined in Article 1 (d) as “the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a 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 AVMS Directive maintains the prohibition of surreptitious advertising. It distinguishes it, however, from product placement, which is exceptionally allowed for certain types/genres of programmes: cinematographic works, films and series made for audiovisual media services, light entertainment and sports programmes, or in cases where no payment is made but certain goods or services are merely provided free of charge. Children’s programmes are specifically excluded from this derogation. Moreover, programmes that contain product placement must meet a number of requirements, which seek to protect, on the one hand, viewers from being misled about the advertising intention behind the product placement and, on the other hand, the editorial independence of broadcasters. However, it is questionable whether these requirements suffice to ward off the dangers lurking for the editorial integrity of programmes. Once the Pandora’s box of product placement has been opened, the content and scheduling of programmes will easily fall prey to external manipulation.

The explanation given in recital 46 of the AVMS Directive for the liberalization of product placement is that it is “a reality in cinematographic works and in audiovisual works made for television, but Member States regulate this practice differently. In order to ensure a level playing field, and thus enhance the competitiveness of the European media industry, rules for product placement are necessary”<sup>6</sup>. Indeed, its treatment in the Member States varied considerably. Austria allowed it under certain conditions, while few Member States explicitly banned it and others relied on the prohibition of surreptitious advertising. By taking this regulatory mosaic as its starting point for the liberalization of product placement, the Commission might have paved the way for increased convergence, albeit at the expense of the trustworthiness and editorial integrity of programmes.

[6] AVMS Directive, recital 91.





[7] 2nd Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Dir. 89/552/EEC "Television Without Frontiers", 24 Oct. 1997, COM (97) 523 final, para. 4.2; Council Recommendation 98/560/EC of 24 September 1998 on the protection of minors and human dignity in audiovisual and information services, OJ L 270/48, 1998 recital 18; contra L. Woods and J. Scholes, "Broadcasting: the Creation of a European Culture or the Limits of the Internal Market?" (1997) 17 YEL, 47, 80.

[8] Only child pornography is explicitly banned according to the provisions of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L13/44, 2004. See Common Position of 24 May 2007, recital 32a.

[9] D. Levy, *Europe's Digital Revolution. Broadcasting Regulation, the EU and the Nation State* (London, Routledge, 1999), p. 148 fn. 8 notes characteristically that "the weakest link in most parental control systems is frequently the parents themselves, particularly when it is their children who are the most technically adept users in the household".

[10] See AVMS Directive, Art. 28.

### Protection of minors

As far as the protection of minors from offensive content is concerned, the relevant norm in the TwF Directive was Article 22. This provision absolutely banned programmes which might *seriously impair* the physical, mental or moral development of minors, in particular those that involved pornography or gratuitous violence. It extended to programmes which were *likely to impair* the physical, mental or moral development of minors, except where it was ensured, by selecting the time of the broadcast or by any technical measure, that minors would not normally hear or see such broadcasts.

The AVMS Directive left Article 22 of the TwF Directive unaltered. Only the title of Chapter VIII was changed to "Protection of Minors in Television Broadcasting" to indicate that a different regime applies to non-linear services. The AVMS Directive did not attempt to define notions of pornography and gratuitous violence nor the kind of programmes which are likely to impair the development of minors. Likewise, the definition of the age group of minors and of the time that is suitable for adult programmes to be transmitted is still left to the discretion of the Member States. This is a wise choice of the European Union legislator, since attitudes to the upbringing and education of young people and, ultimately, moral standards differ widely across Europe<sup>7</sup>. These cultural differences also explain why recent suggestions for a common European rating system did not meet with acceptance. It is true that the elbowroom left to the Member States can give rise to obstacles to the free circulation of television services. Yet this is a fair price to pay for upholding the power of the Member States to decide such sensitive issues, especially since the competence of the European Union to regulate them is doubtful.

As far as on-demand audiovisual media services are concerned, the AVMS Directive does set a new common standard, albeit at the lowest possible level. Article 12 states that "Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which 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 on-demand audiovisual media services" In other words, programmes involving pornography and gratuitous violence can be shown in on-demand services as long as measures are taken to minimize the chances that minors will have access to them<sup>8</sup>. Moreover, recital 60 advises that measures of this sort, such as PIN codes, filtering systems or labelling, must be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union. This limited protection offered to minors from harmful content in a non-linear environment is hardly compatible with the proclamation in recital 104 that this Directive aims at ensuring "a high level of protection of objectives of general interest, in particular the protection of minors and human dignity". It also ignores the Commission Study on Parental Control of Television Broadcasting which suggested that it might well be too early to rely exclusively on technical measures as regards seriously harmful material on non-linear services<sup>9</sup>.

### Right of reply

Finally, the AVMS Directive left the right of reply in television broadcasting untouched<sup>10</sup>. The European Parliament and the Council, together with the public broadcasters, have been in favour of extending this right to the



[11] See Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry OJ L378/72, 2006, recital 15.

[12] See DCMS, "Protection of Minors and Human Dignity: Right of Reply". [www.culture.gov.uk/what\\_we\\_do/Broadcasting/international\\_broadcasting\\_15/05/2007](http://www.culture.gov.uk/what_we_do/Broadcasting/international_broadcasting_15/05/2007); Liverpool final report of the Working Group 1, "Protection of Minors and Human Dignity: Right of Reply".

[13] Law 86-1067 of 30 September 1986, Art. 27 and Decree 90-66 of 17 January 1990, Arts 7, 13, 14. For the distinction between audiovisual and cinematographic productions, a number of criteria are laid down in Arts 2, 3, 4 of Decree 90-66. French language productions are defined in Art. 5 of Decree 90-66, European productions in Art. 6 of the same Decree that implements Art. 6 of the TwF Directive.

[14] Ministry of Culture and Communication, Draft decree relating to on-demand audiovisual media services. [www.dgmic.culture.gouv.fr](http://www.dgmic.culture.gouv.fr). 1/07/2010.

online media<sup>11</sup>. This right would have a more extended scope than the right of reply for traditional broadcasting services. It would be granted to every natural or legal person whose legitimate interests have been affected by an assertion of facts in a transmission regardless of whether these facts were incorrect or not. This proposal has been vigorously opposed by the United Kingdom, the commercial broadcasters, the written press and most telecom operators and internet service providers (ISPs) with the argument that it would stifle the development of the European internet and other digital platform industries and restrict their ability to compete with non-European operators<sup>12</sup>. It was also argued that the internet automatically embodies a right of reply, given that persons considering themselves harmed by an on-line entry can easily rebut it by setting up their own websites or blogs. This argument is, however, not wholly convincing in regard to those television-like services available on the web that are covered by the AVMS Directive. A compromising assertion made in a programme transmitted online would arguably have a much greater capacity to reach the public than a reply given in a private website or forum. Nonetheless, the European Parliament's proposal did not find its way in the final text of the AVMS Directive in the end. It is therefore up to each Member State whether they wish to introduce a right of reply for the online domain or not.

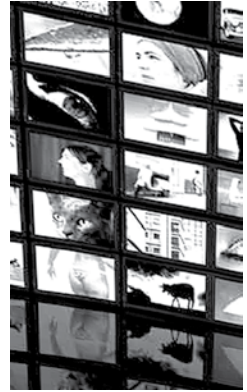
## Implementing the AVMS Directive

### *The European quota*

Quotas are a favoured instrument for protecting cultural identity and for stimulating programme-making in France. Programming quotas go beyond the requirements of the AVMS Directive. Broadcasters are required to reserve at least 60 per cent of their yearly audiovisual and cinematographic productions for European creations and at least 40 per cent for French language productions<sup>13</sup>. Interestingly, the French language quota was lowered from an initial percentage of 50 per cent as a result of an agreement reached with the Commission in the beginning of the nineties, so as to allow a wider "corridor" for European works. As far as on-demand services are concerned, a public consultation was launched in March 2010. The consultation closed on 16 April 2010 and will lead to the publication of a decree in autumn 2010. The draft decree that is included in the consultation document stipulates that providers of catch-up TV, of subscription services and of other on-demand services need to devote a certain percentage of their yearly turnover to the production of European cinematographic and audiovisual works or of French language works<sup>14</sup>.

In Germany, there are no precise cultural quotas as they would go against the grain of the highly valued programming autonomy of broadcasters. The quota rules of the Television without Frontiers Directive have been rather loosely transposed into German law. The RStV only requires broadcasters to reserve the main part of their broadcasting time for European works<sup>15</sup>. This requirement also binds providers of non-linear services<sup>16</sup>.

The United Kingdom has not adopted any quota as regards the broadcasting of programmes of European origin either. The Broadcasting Act 1990 only refers to a "proper proportion" of programmes of European origin<sup>17</sup>. However, the BBC agrees targets with Ofcom regarding the programming of European output each calendar year. The Audiovisual Media Services Regulations 2009 that are part of the implementation of the AVMS



Directive in the UK also stipulate that providers of on-demand programme services must promote, where practicable and by appropriate means, production of and access to European works<sup>18</sup>.

### *The principle of separation of advertising from editorial content*

Prior to the liberalisation of product placement under the AVMS Directive, surreptitious advertising (*publicité clandestine*) was one of the main reasons for intervention by the *Conseil Supérieur de l'Audiovisuel* (CSA), the French broadcasting authority, and for the imposition of numerous sanctions<sup>19</sup>. Its definition in Article 9 of Decree 92-280 was stricter than the one laid down in the TwF Directive. The CSA did not consider it necessary to prove the existence of remuneration in order to establish the surreptitious nature of advertising. Even if a television station had only been incautious, but had not drawn any financial or other advantage, the surreptitious character of advertising could not be excluded<sup>20</sup>. The crucial distinction was between promotion and information. The reference to goods or services in programmes was not prohibited as long as it aimed to inform the viewers without promoting the products in question.

The CSA has now published a deliberation laying down the conditions for authorising product placement on television, in accordance with Article 14-1 of the Act of 30 September 1986 as amended by the Act of 5 March 2009 transposing the AVMS Directive into national legislation<sup>21</sup>. Product placement is henceforth authorised in cinematographic works, audiovisual fiction works and music clips, but not during information or news programmes, documentaries or children's programmes. Placement in favour of products such as alcohol, tobacco, medicines and firearms for which advertising is either banned or restricted for public health or safety reasons is not allowed. The same applies to lotteries and gambling. Thus both the types of products that can be placed and the genres of programmes in which product placement is allowed are drawn more narrowly than under the AVMS Directive. In accordance with Article 14-1 of the Act of 30 September 1986, programmes including product placement must also comply with requirements that mirror those of Article 11 (3) of the AVMS Directive. Where a product is placed in a programme produced, co-produced or pre-purchased by the editor, "a contract shall define the economic relations between the advertiser, the producer of the programme and the editor of the television service" (Iris 2010: 4-23).

Before the adoption of the AVMS Directive, Germany had incorporated the tight definition in Article 1 (d) of Directive 97/36 and required a proof of intentional acting by the broadcaster. As well as the existence of payment the following were deemed to be strong indications of such intentional acting: contractual arrangements for the representation of goods, services etc; the production of a programme with a view to including such promotional references; the discounting of programme rights in return for product placement<sup>22</sup>. All these factors were very hard to prove. The case of surreptitious advertising was especially hard to make as regards acquisitions as opposed to in-house productions, co-productions or commissions. When broadcasters transmit previously acquired programmes they cannot influence their content nor is it always possible to remove references to branded products. The interpretation given to the definition of surreptitious advertising by the German authorities even fell behind the Directive's standard in some respects<sup>23</sup>. The existence of similar consideration was disputed where goods were provided free of charge.

[15] Interstate Treaty on Broadcasting and Telemedia of 31. August 1991 as amended by the 13. April 2010 (RStV), § 6 (2).

[16] *Ibid.*, § 58 (3) 2 in connection with § 2 (3) Nr. 5 and § 6.

[17] For instance, Broadcasting Act 1990, s. 25 (2) (e) for Channel 4.

[18] Audiovisual Media Services Regulations 2009 of 19 December 2009 (AVMS Regulations 2009), s. 368 (3); see also Ofcom, "Audiovisual Media Services Directive. Guidance on compliance with Articles 4 and 5". [www.ofcom.org.uk/tv/ifa/guidance/epq.pdf](http://www.ofcom.org.uk/tv/ifa/guidance/epq.pdf), 1/07/2010.

[19] CSA, "Chaînes hertziennes nationales: une observation systématique". [www.csa.fr/infos/controle/controle\\_chaines.php](http://www.csa.fr/infos/controle/controle_chaines.php), 18/07/2007; C. Debbasch, X. Agostinelli et al. (2002) *Droit des médias*, Dalloz, Paris para : 1454.

[20] Debbasch, *Droit des médias*, para : 145

[21] CSA, "Deliberation of 16 February 2010 on product placement in television programmes"

[22] R. Hartstein et al. (2003), *Rundfunkstaatsvertrag Kommentar vol. I*, Jehle-Rehm, Munich: § 7 RStV para. 48.

[23] See Interstate Treaty on Broadcasting and Telemedia of 31 August 1991 as amended by the 9. Interstate Treaty of 1 March 2007, § 2 (6).





The *de facto* toleration of props has now been countersigned and regulated in transposition of the provisions of the AVMS Directive. Product placement is now allowed in cinematographic works, films and series, sports and light entertainment programmes provided that the programme in question is not a children's programme and has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider<sup>24</sup>. The second condition only applies to public broadcasting and is more stringent than required by the AVMS Directive. The Directive only lays down this condition if a Member State chooses to waive the identification requirement. Product placement is further allowed in the case of goods or services that are provided free of charge as long as the programme concerned is not a news or political programme nor a consumer programme, a children's programme or a religious service. The exclusion of certain categories of programmes from the *carte blanche* for prop placement also goes further than is required by the AVMS Directive. The requirements for programmes containing programme placement under § 7 (7) RStV mirror those of the AVMS Directive.

In the UK, the principle of separation between the advertising and programme elements of a service is contained in Section Ten of the Ofcom Broadcasting Code (Ofcom 2009). However, this Section only applies to the commercial public service broadcasters, not to the BBC which is not allowed to carry advertising on its public television programmes. Rule 10.4 of the Broadcasting Code prohibits the giving of any undue prominence to a product or service in a programme. Undue prominence may result from the lack of editorial justification for a commercial reference or from the manner in which the reference is made. Under Rule 10.5 of the Broadcasting Code, product placement is also prohibited.

A consultation launched by Ofcom in December 2005, testing the water for a limited and controlled introduction of product placement into certain genres of programmes, concluded that there was no consensus on the deregulation of product placement and that predicted economic benefits appeared to remain modest. However, pursuant to a recent consultation, the Government announced in February 2010 that it would allow television product placement so as to provide "meaningful commercial benefits to commercial television companies and programme makers" (DCMS 2010). In view of consultation responses, the legislation to be enacted later this year will restrict the types of programme in which products may be placed over and above the AVMS Directive. As a result, placement in current affairs, consumer and religious programming will not be allowed. Also, the legislation will prohibit more categories of products and services from being placed than is provided by the Directive. Placement of alcoholic drinks; foods and drinks high in fat, salt or sugar; gambling; smoking accessories; over-the-counter medicines; and infant and follow-on formula will be prohibited. The BBC will continue to be prevented from carrying advertising or product placement on its public television programmes under the new regime.

As far as on-demand services are concerned, product placement is regulated by means of the AVMS Regulations 2009. The Regulations faithfully transpose the rules of the AVMS Directive and also spell out explicitly the minimum standards that any form of commercial communication must meet under Art. 9 (1) of the Directive. The UK has made use of the derogation in Art. 11 (3) of the Directive and waives the identification requirement where the programme featuring the product placement has not been pro-

[24] RStV, § 15 (2).





duced or commissioned by the provider of the service (AVMS, 2009: Art. 368H 6 (b), (14)). The definition of product placement in Art. 368H (2) of the Regulations is narrower than under the Directive since it is stipulated that the provision of the product, service or trade mark must have no significant value.

The examined Member States have transposed or are about to transpose the requirements of the AVMS Directive, often protecting legitimate interests involved at a higher level than is required by the Directive. It is doubtful, however, as to whether these more stringent national rules will suffice to safeguard viewers' interests and the editorial integrity of programmes. Be that as it may, the regulatory mosaic existing prior to the adoption of the AVMS Directive is about to be replaced by far-reaching harmonisation of the rules on product placement across the EU once and for all.

### *Protection of minors*

As far as linear programmes are concerned, France has only partially transposed the Directive's requirements since it allows pornographic and extremely violent programmes on authorized channels subject to a specific dual access lock between 12 midnight and 5 am<sup>25</sup>. Such programmes fall under the highest category of the French youth certificate rating system, which is based on a classification according to age. Each channel has a viewing committee that is responsible for the classification of programmes. The CSA monitors the coherence of the classifications and the programming hours decided by the channels. It may only take action after a programme has been broadcast. As a result of the Directive's imperfect transposition, Canal Plus and certain cable channels are allowed to transmit pornographic programmes in the small hours (Franceschini 2003: 136). CSA proposals to modify Article 15 of the Broadcasting Law of 30 September 1986 so as to explicitly ban pornographic and extremely violent programmes were dropped as a result of allegations that the CSA President at the time, Dominique Baudis, was involved in sadomasochistic orgies (Harcourt 2005: 191).

As far as non-linear services are concerned, the CSA launched a public consultation on 14 June 2010. The consultation was closed on 28 June 2010 and will lead to the adoption of a CSA deliberation. The draft deliberation that is part of the consultation document lays down a system of classification according to age similar to the one applying to linear programmes (CSA 2010). The programmes of the highest category are prohibited for minors under the age of 18. They are only available on a pay-per-view or subscription basis, subject to an access lock, between 10:30 P.M. and 5 A.M.

In Germany, the *Jugendmedienschutz-Staatsvertrag* and the broadcasting laws of the *Länder*, which are closely modelled on it, contain two types of rules in accordance with Article 22 of the AVMS Directive as far as linear programmes are concerned. First, they absolutely prohibit a range of particularly harmful programmes<sup>26</sup>. Secondly, they allow the transmission of other programmes that might impair the development of minors provided that the broadcaster ensures by technical or other means or by selecting the time of transmission that children of particular ages will not watch them (*Ibid.*, § 5). Classifications of programmes into three categories are carried out by the Voluntary Self-Regulation of the Film Industry (*Freiwillige Selbstkontrolle der Filmwirtschaft*, FSK). Compliance with this system relies on the social responsibility of public broadcasters which, together with all other national broadcasters, are obliged to appoint a Commissioner for

[25] Such channels need to enter into a contract with the CSA, which specifies the maximum number of broadcasts allowed per year, and obliges the channels to invest in film production. Vedel (2005), 'France' in *Television across Europe: Regulation, Policy and Independence*, Open Society Institute (ed.), Open Society Institute, New York: 698.

[26] *Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia of 10-27 September 2002 as amended by the 13. Interstate Broadcasting Treaty of 1 April 2010 (JMStV)*, § 4.



Youth Protection (*Jugendschutzbeauftragte*) who consults them on questions of youth protection and acts as a contact point for the viewers (JMStV, § 7).

In line with the AVMS Directive, telemedia providers, i.e. providers of online content, may transmit certain pornographic and other particularly harmful programmes as long as it is ensured that adults only will have access to them (JMStV, § 4 (2)). As far as content is concerned, which might impair the development of minors, it must be fitted with a technical system that has been certified as suitable by the competent State Media Authority (*Landesmedienanstalt*) and by the Commission for the Protection of Minors (*Kommission für Jugendmedienschutz*, KJM) (*Ibid.*, § 11). Such technical systems must allow for differentiated access according to age groups. A draft amendment to the Interstate Treaty on the Protection of Minors was signed by the Prime Ministers of the German *Länder* on 25 March 2010 and is due to enter into force on 1. January 2011 (*Iris* 2010: 5-17). This amendment enables providers to rate their offerings according to age groups mentioned in the Youth Protection Act (*Jugendschutzgesetz*) on the basis of their own assessment or an assessment/confirmation by the Certified Organisations for Voluntary Self-Regulation (*Anerkannte Einrichtungen der Freiwilligen Selbstkontrolle*)<sup>27</sup>. The amendment has been criticised for not really being based on the principle of self-regulation given that questionable content addressed to children under the age of 12 *must* be rated. Also, *Bund* and *Länder* have not been able to agree on a uniform classification system for online computer games.

In the United Kingdom, the law is unique in that it seeks to protect not only minors but also adults from violent or sexually explicit programmes. The Ofcom Code distinguishes more clearly than its predecessor, the ITC Code, between provisions protecting those under the age of 18 and provisions for the protection of adults. Material that might seriously impair the physical, mental or moral development of people under 18 is prohibited. Other material that is unsuitable for minors has to observe the watershed (9 P.M. for free-to-air television; 8 P.M. for premium subscription film services) and to be scheduled appropriately. There is no classification system. In accordance with the Communications Act 2003, appropriate scheduling depends on the context, i.e. the composition and likely expectations of the audience.

As far as on-demand services are concerned, the AVMS Regulations 2009 adopt the low level of protection of minors put forward by the AVMS Directive. As a result, on-demand programme services may contain material which might seriously impair the physical, mental or moral development of minors as long as the material is made available in a manner which secures that such persons will not normally see or hear it<sup>28</sup>.

### *Right of reply*

In France, the right of reply is triggered by allegations in a television programme that are likely to affect a person's name or reputation<sup>29</sup>. These allegations do not need to be factual ones nor do they need to be incorrect. The conditions for the exercise of the right of reply in France are therefore less stringent than under Article 23 of the AVMS Directive.

Law 2004-575 of 21 June 2004 on confidence in the digital economy introduced an even wider right of reply for the online media<sup>30</sup>. The modalities for the exercise of this right are laid down in Decree 2007-1527 of 24 October 2007<sup>31</sup>. The right of reply is granted to any natural or legal person that is di-

[27] E.g. Voluntary Self-Regulation of Television (Freiwillige Selbstkontrolle Fernsehen, FSF), Voluntary Self-Regulation of Multimedia Service Providers (Freiwillige Selbstkontrolle Multimedia-Diensteanbieter, FSM), Entertainment Software Self-Regulation (Unterhaltungssoftware Selbstkontrolle, USK) or the FSK.

[28] AVMS Regulations 2009, s. 368 F (2).

[29] Law 82-652 of 29 July 1982, Art. 6.

[30] Law 2004-575 of 21 June 2004, Art. 6 (4).

[31] Decree 2007-1527 of 24 October 2007.



rectly or indirectly named in an online communication service. The named person has a right of reply on the same service regardless of whether the assertion made has been inaccurate or whether his/her legitimate interests have been damaged. The right of reply is only granted provided there is no possibility of direct reply on the respective site. Two questionable provisions of the Decree are, first, that the person exercising the right of reply can refrain from using it if the webmaster agrees to modify or remove the contentious entry and, second, that the reply cannot exceed 200 lines<sup>32</sup>. This vaguely defined maximum length makes it clear that the right of reply envisaged by the decree is not tailored to websites whose principal purpose is the distribution of audiovisual content, but to ones containing mainly text.

In Germany, the right of reply is granted to every person that has been affected by a factual allegation in a television programme. Again, there is no express requirement that the allegation has to be incorrect. As far as online services are concerned, providers are obliged to publish a reply only if the service concerned includes journalistic edited offers which are press-like<sup>33</sup>. This obligation does not give rise, however, to a right of reply<sup>34</sup>.

In the United Kingdom, there is no right of reply. The right of complaint to Ofcom does not constitute an equivalent remedy to the right of reply given that it is subsidiary to the avenue of judicial review<sup>35</sup>. Also, the only redress offered is the publication on Ofcom's website or the transmission by the broadcaster of a summary of Ofcom's decision (Ofcom 2010).

## Conclusion

Having examined the systems of public broadcasting in France, Germany and the United Kingdom, it is possible to discern considerable commonalities among them, which arguably amount to a "European audiovisual model", a "common law of European broadcasting systems"<sup>36</sup>. They all subscribe to the principle of separation of advertising from editorial content, to the need to protect minors and to grant a right of reply against offending broadcasts. Some of these commonalities can be attributed to the AVMS Directive's harmonization impetus, leading to a certain convergence in national broadcasting regulation across Europe<sup>37</sup>.

However, the considerable commonalities in the canon of public service obligations adhered to by these countries cannot mask the diversity of their public broadcasting systems, which also accounts for the different forms and methods each Member State has chosen in order to implement European Union rules.

In some respects the three Member States examined in this article exceed the minimum standard set by the Directive, while in others they fall behind it. France, for instance, imposes cultural obligations that are more far-reaching than the quotas set by the AVMS Directive, and places more stringent conditions on product placement than prescribed by the Directive. On the other hand, France has not implemented adequately the Directive's requirements on the protection of minors. Germany has correctly transposed the Directive's provisions on the protection of minors and in some respects exceeds its requirements on product placement. However, it has implemented the European quota rule in narrow terms and the independent quota rule inadequately. The United Kingdom also protects the legitimate concerns affected by the liberalization of product placement at a higher level. However, a formal right of reply has yet to be introduced in this country.

[32] Decree 2007-1527 of 24 October 2007, Arts. 3, 5.

[33] RStV, § 56.

[34] F. Fechner, *Medienrecht: Lehrbuch des gesamten Medienrechts unter besonderer Berücksichtigung von Presse, Rundfunk und Multimedia* (Tübingen, Mohr Siebek, 2010), 92 para 93.

[35] *Broadcasting Act 1996*, s.114 (2).

[36] Holznapel, *Rundfunkrecht in Europa*, p. 355: "Gemeinrecht europäischer Rundfunkordnungen"

[37] Harcourt, *Regulation of Media Markets*, p.158 et seq., 194.



The fact that Member States impose standards on their own broadcasters that are in some respects higher than required by the AVMS Directive is not surprising. The method of minimum harmonization has been expressly chosen in an area that is so close to Member States' cultural sensibilities so as to accommodate national diversity above the minimum standards set in the Directive. What is perhaps more surprising is the fact that national laws to some extent still lag behind the Directive's requirements. Obviously, even the minimum standards adopted at EU level are sometimes hard to reconcile with commercial interests or with basic tenets of the national broadcasting orders.

Public service obligations are at the interface between conflicting constitutional rights and freedoms<sup>38</sup>. Setting them involves a fine balancing exercise between interests of equal value. Member States hold on to their power to resolve these tensions in accordance with their own constitutional traditions, even in defiance of the imperatives of European Union law. Germany values its constitutional principle of freedom from State control over the quota requirements of the AVMS Directive. The United Kingdom and also the Netherlands resist the introduction of a right of reply so as not jeopardize broadcasting freedom<sup>39</sup>. The tension between EU law and national constitutional orders, ostensibly settled by the principle of supremacy, might well resurface in the field of broadcasting law in the future. The uneasy symbiosis between the EU state aid regime and the licence fee funding for public broadcasting is a prime example of this tension.

The AVMS Directive has taken the TwF Directive's harmonization programme further by setting new rules for the promotion of European works and the protection of minors in the online domain and by liberalizing product placement. Great scope for differentiation in the way in which Member States choose to implement it remains. It is deplorable, however, that convergence has been used as a welcome excuse for harmonization at all cost, even if it means sacrificing the vulnerable values that are the *raison d'être* of broadcast regulation.

AVMS Regulations (2009), Art. 368H 6 (b), (14).

B. Holznel (1996), *Rundfunkrecht in Europa: Auf dem Weg zu einem Gemeinrecht europäischer Rundfunkordnungen*, Jus publicum, vol. 18, J. C. B. Mohr, Tübingen.

CSA (2010), "Deliberation relating to the protection of minors, to the deontology and accessibility of programmes on on-demand audiovisual media services". Disponible en: [www.csa.fr/upload/decision/projet\\_delib\\_smad.pdf](http://www.csa.fr/upload/decision/projet_delib_smad.pdf), 1/07/2010.

DCMS (2010), "Written Ministerial Statement on Television Product Placement". Disponible en: [www.webarchive.nationalarchives.gov.uk](http://www.webarchive.nationalarchives.gov.uk), 9/02/2010.

L. Franceschini (2003), *Télévision et Droit de la Communication*, Ellipses, Paris.

Ofcom (2010), "Procedures for handling fairness and privacy complaints", London. (2009), *Broadcasting Code*.

(2007), "Product placement. A consultation on issues related to product placement". Disponible en: [www.ofcom.org.uk/consult/condocs/product\\_placement/product.pdf](http://www.ofcom.org.uk/consult/condocs/product_placement/product.pdf), 4/09/2007.

S. Nicolitchev (2007), "European Backing for Public Service Broadcasting: Council of Europe Rules and Standards" in *Iris Special: The Public Service Broadcasting Culture*, European Audiovisual Observatory (ed.), European Audiovisual Observatory, Strasbourg: 7-10.

[38] See A. Leidinger, "Programmverantwortung im Spannungsfeld von Programmgrundsätzen und Rundfunkfreiheit" [1989] DVBl, 230

[39] In the Netherlands, besides the civil remedies available, an injured party can only file a complaint with the Netherlands Press Council