

EPHA Briefing and Position Paper

Subject	Directive on Audiovisual Media Services – A Revision of the “Television Without Frontiers” Directive
Date	June 2006

The European Public Health Alliance (EPHA) represents over 100 non-governmental and other not-for-profit organisations working in support of health in Europe. EPHA aims to promote and protect the health interests of all people living in Europe and to strengthen the dialogue between the EU institutions, citizens and NGOs in support of healthy public policies.

Introduction

On 13 December 2005, after several public consultations¹, the European Commission adopted the legislative proposal for the revision of the “Television Without Frontiers” Directive (Directive 97/36/EC)². The Commission proposal is for a new Directive on Audiovisual Media Services, which aims to modernise the current “Television without Frontiers” Directive (TWFD). The Directive on Audiovisual Media Services (COM(2005)646final)³ is the new name for the revised TWFD.

The current “Television Without Frontiers” Directive (first adopted in 1989, then revised in 1997) establishes the legal framework for television broadcasting activities in the European Union. The TWF Directive is considered by the Commission to be the “cornerstone” of the European broadcasting policy⁴. Through the TWF Directive the European Union seeks to create the conditions necessary for unrestricted broadcasting across the territory of its Member States, a similar principle to that of ensuring free movement of capital, goods and persons. The Directive also sets broadcasting quotas, such as the requirement that television channels reserve over half of their broadcasting time for European works.

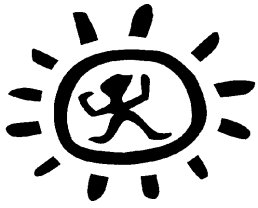
The 2005 revision of the TWF Directive – the Directive on Audiovisual Media Services (AVMS) - could be described as the next step following the process of public consultation begun in 2003. The proposed Directive on AVMS aims to define rules for audiovisual media services in a “platform neutral

¹ For more info on public consultations from 2003 – 2005 see http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/consultation_2005/index_en.htm

² TWF Directive 97/36/EC may be found at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31997L0036:EN:NOT>

³ http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm

⁴ See <http://europa.eu/scadplus/leg/en/lvb/l24101.htm>



EPHA Briefing and Position Paper

way”. This means that the same basic rules apply to the same kind of services across Europe. Its main objective is to co-ordinate national rules of the Member States in order to remove barriers to an internal market for television broadcasting and related services in the Union.

If implemented, the revised AVMS Directive can be expected in 2008/09 at the earliest. It will include a transitional period for implementation of the proposal at National level.

Why the need to revise the current regulatory framework?

The rapid pace of technological developments since 1989 has led to a need to modernise many of the current “TV without Frontiers” rules substantially. New technological innovations include “convergence”⁵ of technologies and services as well as expansion of fixed broadband, digital TV and 3G networks. This is accompanied by a corresponding increase in the provision of **non-linear** services, notably video on demand (for more information on linear and non-linear services, see page 4). Web TV, interactive TV, and films on mobile telephones are now available on demand to most Europeans and compete with a vast array of traditional **linear** TV programmes broadcast in fixed schedules.

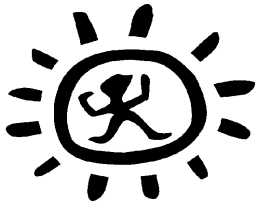
In recognition of the changing nature of the audiovisual industry, the proposed Directive on Audiovisual Media Services aims to expand the rules beyond traditional (linear) broadcasting to all types of audiovisual media services. By doing so, the hope is to provide a “level playing field” between the different audiovisual services, thereby facilitating fairer competition in this sector⁶. In other words, the proposal aims to create a single market for all types of television services, irrespective of the technology used to transmit them.

In addition, the common framework allows the new audiovisual service providers to more easily offer their services on a pan-European basis. Since there are 25 or more different regulatory regimes at present, the revision aims to lay down basic principles, simplify the rules and liberalise rules on advertising - which is referred to in the Directive as “audiovisual commercial communication”.

From a public health perspective, the revision of the advertising framework will impact on the regulation of advertising of unhealthy foods, cigarettes and tobacco products, alcohol, and medicinal products and treatments. The proposed Directive also opens the debate on who regulates advertising in audiovisual services, including the concerns of many of Europe's citizens about the effectiveness

⁵ Convergence in this sense refers to the coming together of two or more disparate disciplines or technologies.

⁶ <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1573&format=HTML&aged=0&language=EN&guiLanguage=en>



EPHA Briefing and Position Paper

self-regulation of the advertising industry.

What does EPHA think?

EPHA welcomes the revision of the Television Without Frontiers Directive and we generally agree with the approach of the Commission to find a *technology neutral* approach for regulation of all audiovisual commercial communications whether linear or non-linear. However, this approach should not result in downward harmonisation and in the abolition of important audiovisual commercial communications rules in the TV sector.

EPHA's comments and concerns are rooted in public health concerns, especially the protection of minors. It is generally agreed that this Directive must remain a minimum harmonisation directive that allows individual Member States to go beyond the minimum requirements of the Directive, therefore it is of utmost importance that the Directive includes provisions to protect the public health of minors. This concern is in line with the Commission's impact assessment⁷.

The revision of the advertising framework impacts directly on public health issues such as food, tobacco, alcohol and medicinal products. So too does the ability of the commercial sector to co-regulate or self-regulate. The scope of the Directive is creating confusion at all levels and thus has the potential to pose serious threats to the safeguarding of the public health of Europeans. The regulation of non-linear services in particular is problematic, especially in protecting minors and protecting citizens' health.

What are the main features of the AMVS Directive?

Scope of the Directive

The scope of the Directive provides for a regulatory framework for both **linear** (scheduled) and **non-linear** (on demand) delivery of audiovisual content.

- Linear products refers to “*where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedules.*” (art 1)⁸. For example, scheduled broadcasting via traditional TV, internet, mobile phones which 'pushes' content

⁷ Impact Assessment document may be found at
http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm

⁸ For the complete Directive COM(2005)646final), see
http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm



EPHA Briefing and Position Paper

to the viewers.

Non-linear products refers to "audiovisual media services where the user decides upon the moment in time when a specific programme is transmitted" (art 1). For example, on-demand films or web based news services, which the viewers 'pull' from a network.

However, there is confusion, even at European Parliament levels⁹, on what exactly the Directive would cover. **EPHA calls for clarification of the Directive's scope, in particular with regard to audiovisual commercial communications, product placement placement, and surreptitious advertising¹⁰.**

Ambiguity on the scope of the Directive has the potential to pose serious threats to the safeguarding of the health of European citizens. For example, what would be the scope of the regulatory framework with regard to advertising cigarettes and other tobacco products? In real terms, how would the proposed Directive affect the current ban on cigarettes and other tobacco products and their toxic effects on health in non-linear services¹¹?

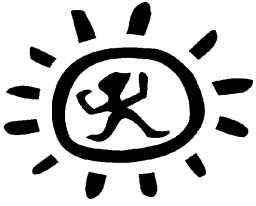
Since the proposal only covers moving images with or without sound, the draft Directive does not cover electronic versions of newspapers or audio transmissions and radio. With regard to all these non-audiovisual services, the Commission did not identify a need or a justification for harmonised rules, despite its wide consultations. EPHA believes that such services should not be regulated in the same way as television but we do urge for **a common set of qualitative rules for radio, electronic magazine/newspapers and other non-linear services.**

Audiovisual Commercial Communication - What does the Directive say about advertising?

⁹ See reports of several parliamentary hearings on this topic:
http://www.europarl.europa.eu/hearings/default_en.htm

¹⁰ According to the AVMS Directive, surreptitious advertising means "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".

¹¹ More than 79,000 adults die each year as a result of passive smoking in the 25 countries of the European Union - "Lifting the smokescreen: 10 reasons for a smoke free Europe", a report by Smoke-free Partnership, March 2006
http://www.ersnet.org/ers/default.aspx?id_fiche=232801



EPHA Briefing and Position Paper

The proposed Directive aims to liberalise the rules on television audiovisual commercial communication (advertising) and abolishes a number of quantitative limitations. The insertion rules are simplified and made more flexible. Broadcasters will be able to choose when to insert advertising during programmes. At present, broadcaster must allow twenty minutes time between each advertising break.

However, cinematographic films, children programmes and news remain protected and may only be interrupted once per each period of 35 minutes time. The proposal also maintains the hourly limit for advertising of 12 minutes as well as the qualitative restrictions of non-linear services (for example, minimum rules with regard to advertising of alcohol or advertising targeted at minors).

What about product placement?

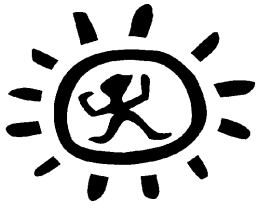
Product placement is defined as *"any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or a trade mark, thereof so that it is featured within audiovisual media services."* (art 1). The Directive provides product placement with a legal framework, allowing it in certain programmes, while excluding it in sensitive programmes such as news and children programmes.

The Commission's proposal to place product placement on the same footing as other advertising, through the new definition of *"audiovisual commercial communication"* is contentious. This would have the unacceptable effect of legalising, by definition, a form of advertising which has until now for good reasons been illicit¹².

The European Commissions argues that by providing clearer framework on product placement, which anyway is practised all over Europe, will boost the level of consumer protection. However, the Commission also acknowledges the benefits of product placement for business.

Product placement as outlined in the Directive needs to be much more clearly defined. **EPHA believes that product placement and surreptitious advertising of unhealthy foods, alcohol, tobacco and medicinal products must remain banned. In addition, we believe that the ban should be extended to other audiovisual media, where television services are also offered.**

¹² See BEUC position paper on Revision of the "Television without Frontiers" Directive, plus BEUC brochure on "Advertising without Frontiers" - www.beuc.org



EPHA Briefing and Position Paper

Audiovisual Commercial Communications of Unhealthy Foods

The revised directive presents an opportunity to protect children across the EU from the over promotion of unhealthy foods and drinks¹³ by including such restrictions among the basic tier of rules for all audiovisual media services. EPHA is very concerned that the revised Directive does not address the ever-increasing problem of obesity and the issue of audiovisual commercial communications of unhealthy foods and drinks.

The European Union is facing an obesity epidemic, rising fastest amongst children. Intensive marketing of unhealthy foods targeting children has been shown to be a significant contributor to the dramatic increase in childhood obesity¹⁴. In 2006, almost 22 million children in the EU are estimated to be overweight or obese (out of a total of 71.5 million children), rising by 1.2 million per year¹⁵.

Research shows that audiovisual commercial communication of food *do* affect children's eating habits. A UK study undertaken by Professor Gerard Hastings, looked at the impact of audiovisual commercial communication of food on children. The study, "*A Systematic Review of the Effects of Food Promotion on Children*"¹⁶, was conducted for the UK Food Standards Agency and found that -

- a large proportion of food audiovisual commercial communications is directed at children
- children enjoy and engage with food promotion
- the advertised diet is less healthy than the recommended one
- food promotion affects children's preferences, purchase behaviour and consumption. This effect is independent of other factors and operates both at brand and category level

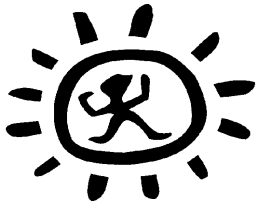
EPHA is concerned that there is an imbalance between the recommended diet and the diet advertised to children via commercial communications. Many Member States are already introducing restrictions on the type and amount of audiovisual commercial communications of food to children. Considering

¹³ Unhealthy food and drinks are defined here as foods and drinks that are high in fat - particularly saturated fat - salt or sugar and low in essential minerals.

¹⁴ European Heart Network report on "The marketing of unhealthy food children in Europe", 2005
<http://www.ehnheart.org/content/listpublication.asp?level0=1456&level1=1552&level2=1556>

¹⁵ Of these children, 5.1 million are obese, rising by 0.3 million per year. At present rates, by 2010, over 26 million children in the EU will be overweight or obese, rising by some 1.3 million children per year. Of the overweight children, 6.4 million will be obese, and that figure is rising by over 350 000 per year. *Source: Estimated burden of paediatric obesity and co-morbidities in Europe. Part 1. the Increase in the prevalence of child obesity in Europe is itself increasing; Rachel Jackson-Leach & Tim Lobstein, International Journal of Paediatric Obesity, 2006;1:26-32*

¹⁶ Food Standards Agency. Does food promotion influence children? A systematic review of the evidence (2003).



EPHA Briefing and Position Paper

the reality of obesity and the role of audiovisual commercial communications of unhealthy foods, **EPHA calls for restrictions on the commercial communications to children of foods that contribute to an unhealthy diet.**

In addition, EPHA urges that restrictions on the audiovisual commercial communications and promotion of food to children must cover the times when children are most likely to be watching television and not just cover dedicated children's programming. Research in the UK¹⁷ highlights that the most popular programmes amongst 2-9 year olds are those shown in the early evenings. Therefore, **EPHA urges a 6am-9pm watershed on audiovisual commercial communication of unhealthy foods and drinks.** This would offer a practical means of extending protection to older children and would be consistent with other broadcasting controls. This would also guarantee a clear legislative framework for the broadcasters, because it is based on more objective parameters.

Audiovisual Commercial Communications of Cigarettes and Other Tobacco Products

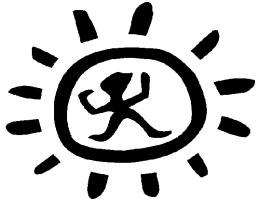
Directive 2003/33/EC on Tobacco Advertising and Sponsorship prohibits advertising of cigarettes and other tobacco products in the press and other printed publications, in radio and in information society services. It also bans tobacco industry sponsorship of radio programmes and of cross-border events. **EPHA urges that these bans are extended to non-linear services,** as the only way of providing more effective protection of citizens' health. Non-linear commercial communications calls for the same protection of public health as linear.

Audiovisual Commercial Communications of Alcohol

As regards alcohol, only audiovisual commercial communications aimed at minors and/or encouraging immoderate consumption are prohibited. While **EPHA welcomes the ban on audiovisual commercial communications for alcoholic beverages aimed at minors, we strongly suggest the inclusion of more objective parameters,** which are easy to implement, monitor and measure. For example a recommendation of the Working group on Alcohol under the UK presidency in November 2005 recommends a **watershed** set between **6am-9pm**. Therefore, EPHA strongly suggests that a new rule should be added to article 15 specifying -

“Audiovisual commercial communications for alcoholic beverages should not be broadcast before 9pm.”

¹⁷ Which? survey of 815 parents of 0-16 year olds in Great Britain between 9th February and 7th March 2006, in Which? briefing: Ofcom's Proposals On Food Advertising To Children, April 2006



EPHA Briefing and Position Paper

EPHA welcomes the proposed insertion of a new Article 3h concerning product placement and sponsorship, in which the placement of certain products such as tobacco or prescription drugs are prohibited. However, **EPHA calls for Article 3h to be expanded to include alcoholic beverages**, specifically specifying -

“Audiovisual media services may not be sponsored by undertakings whose principal activity is the manufacture or sale of alcoholic beverages. Further, audiovisual media services must not contain placement of alcoholic beverages or product placement from undertakings in furtherance of the manufacture or sale of alcoholic beverages.”

Audiovisual Commercial Communications of Medicinal Products

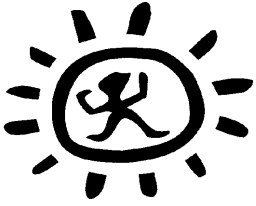
In the case of prescription medicines and medical treatment (Article 14), a distinction depending on whether the audiovisual commercial communications is placed in linear or non-linear media is unjustified. The audiovisual commercial communications ban is intended generally to protect health, and cannot therefore be aimed solely at the consumers of traditional TV programmes. In addition, it is a fact that in countries outside Europe where medical prescription products is authorised, the level of audiovisual commercial communications of these products in comparison with “cosmetics & hygiene” products is higher¹⁸. The authorisation of such products in the non-linear environment will go against consumer protection. Therefore, **EPHA urges that audiovisual commercial communications bans on medicines and medical treatment be extended to all audiovisual media services, and not just television.**

Co-Regulation and Self-Regulation

The proposed Directive *encourages* Member States to have recourse to co-regulatory regimes in the fields covered by the Directive. The Commission believes that such instruments can deliver a high level of consumer protection.

EPHA believes that co-regulation should be the general rule, and not the exception to self-regulation. As well as Member States co-regulatory regimes, we call for setting up a body at European level with the necessary legal support. In addition, EPHA urges that the criteria of

¹⁸ Comparative study of the impact of regulatory measures on television advertising markets - Carat, July 2005



EPHA Briefing and Position Paper

co-regulation be included in the text of the Directive, to ensure minimum harmonisation standards across the EU.

The advisory expert group should be made up of at least 50% of professionals working in the area of public health as well as professionals working in audiovisual commercial communication in order to be recognised as a valid entity by all people involved.

According to Inter-Institutional Agreement on Better Law-making (IIA), co-regulation is defined as:

“A mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).”¹⁹

Despite claims from the industry that self regulation on audiovisual commercial communications is effective, many citizens have concerns it is often not sufficient to restrain unacceptable practices. Self-regulation is most commonly adopted by industries under threat of government regulation. This is particularly the case with regard to a commercial sector that involves products which can be harmful to health, such as tobacco, processed food and alcohol. There are numerous studies to dispute the effectiveness of self-regulation including the Commission's own recent landmark report on alcohol in the EU which states that -

“Self-regulation of commercial communications by the beverage alcohol industry does not have a good track record for being effective”²⁰.

For more information regarding the effectiveness of co-regulation, see EPHA's briefing paper entitled *“An Introduction to Co-regulation and Self-regulation in the EU”²¹.*

Country of Origin Principle

The country of origin principle remains a basic obligation of audiovisual media services. This principle sets down that broadcasters only have to comply with the national law of the member State in which they are located. Once this compliance is verified, a broadcast that is transmitted to another member state is not be subject to secondary control under the national law of the receiving State. This is seen by the Commission as essential for the creation of an internal market.

¹⁹ OJ C 321/1 of 31.12.2003

²⁰ For the full report on Alcohol in Europe by the Institute of Alcohol Studies, see the Commission's website http://ec.europa.eu/health-eu/news_alcoholineurope_en.htm

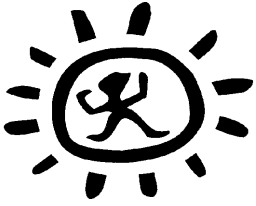
²¹ See EPHA's website at <http://www.eph.org/a/1684>



EPHA Briefing and Position Paper

However, it is extremely difficult to predict all the consequences that may result (see case law of the European Court of Justice). The country of origin principle affects the legislation of individual Member States by choice of location. Therefore, the possibility of circumvention of stricter rules in some Member States by choice of location needs to be expressly addressed and properly enforced.

EPHA calls for minimum harmonisation standards across the EU allowing individual Member States to go beyond the minimum requirements of the directive.



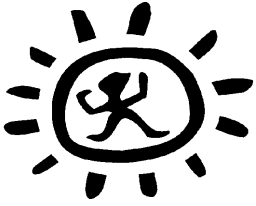
EPHA Briefing and Position Paper

Summary of EPHA's Demands

- EPHA calls for severe restrictions on the commercial communications to children of foods that contribute to an unhealthy diet, therefore EPHA urges a 6am-9pm watershed on audiovisual commercial communications of products high in fat, sugar, or salt in a new article of the Directive.
- While EPHA welcomes the ban on audiovisual commercial communications for alcoholic beverages aimed at minors and we strongly suggest the inclusion of more objective parameters. Specifically, a new rule should be added to article 15 setting a 6am-9pm watershed and Article 3h to be expanded to include alcoholic beverages.
- EPHA encourages the Commission to opt for co-regulation rather than self-regulation provided that (i) it is supported by effective legislation, (ii) there are independent advisory bodies involved closely in the regulation process and (iii) minimum criteria of co-regulation are included in the text of the Directive.
- EPHA urges that cigarette and tobacco bans are upheld in the proposed Directive and extended to non-linear services as well, as the only way of providing more effective protection.
- EPHA welcomes the audiovisual commercial communications bans on medicines and medical treatment and urges to be extended to all audiovisual media services, and not just television.
- EPHA believes that both surreptitious advertising and product placement of unhealthy foods, alcohol, tobacco and medicinal products must remain banned. In addition, we believe that the ban should be extended to other audiovisual media, where television services are also offered.
- EPHA calls for clarification of the scope, in particular with regard to audiovisual commercial communication including product placement and surreptitious advertising and the definition of linear and non-linear services.

Further Reading

- Open Society Institute report on Television across Europe "Television across Europe: Regulation, Policy, and Independence"
http://www.soros.org/initiatives/media/articles_publications/publications/eurotv_20051011?skin=printable
- EPHA article on Regulation of Television Advertising



EPHA Briefing and Position Paper

<http://www.eph.org/a/1717>

- Eurocare and European Heart Network responses to revision of the “Television without Frontiers” Directive
<http://www.eph.org/a/1915>