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THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN SHAPING CERTAIN ASPECTS OF THE AUDIOVISUAL MEDIA FRAMEWORK

Rad se prvenstveno bavi evolucijom pojedinih aspekata audiovizuelne regulative Evropske unije i ulogom Evropskog suda pravde u tom procesu.

Nakon toga se analizira u kojoj meri pravila nove Direktive o audiovizuelnim medijskim uslugama doprinose zaštiti i unapređenju kulturne raznolikosti, koja je između ostalog zagaranotvana Uneskovom Konvencijom o zaštiti i promociji raznolikosti kulturnih izraza, koju je ratifikovala i EU.

Ključne reči: audio-vizuelna regulativa EU; Evropski sud pravde; Uneskovska Konvencija o zaštiti i unapređenju kulturne raznolikosti

1. Introduction

The European Union's audiovisual market is the largest in the world. The European market for audiovisual works has expanded greatly over the past decade and will continue to do so in the near future. According to the study carried out by the European Commission, the European audiovisual market is the fastest growing in the world.¹

The growth of cable and satellite television has been immense. The video market as well as the cinema industry expanded over the time. Furthermore, the convergence of new technologies had open new markets at the crosswords of the audiovisual and software industries for multimedia works and computer games, which accounts for an ever-growing share of

¹ *Final Report*, 15 April, 1997; The Report estimated that industry's overall revenue was likely to grow by 69% over the period 1995-2000. See also Pascal Kamina, *Film Copyright in the European Union*, Cambridge University Press, 2002, at page 1.

the entertainment industry. Finally, the development of high-speed, high capacity and digital communications networks has allowed expansion of new modes of distribution for audiovisual works, such as video on demand or on-line delivery of films.² In other words, the proliferation and diversification of audiovisual products and services created growing demand for films, television programmes and multimedia products in digital age.

In 2007 there were 5300 transnational, national and local TV channels in the EU. The sector brought EUR 105 billion net revenues, including EUR 72 billion from TV/broadcasting and EUR 33 billion from retail (cinema, DVD).³ This significant economic potential and rapid expansion of the audiovisual industry explain why the EU shows a considerable interest in the audiovisual sector. However, during the first 25 years of its existence, the European Community did not develop a comprehensive and integrated media or audiovisual policy.⁴

The first attempts to shape a European Community audiovisual policy were triggered by the development of satellite in the 1980s broadcasting.⁵ However, the European Community had not have any treaty-based competence in the field of culture or the audiovisual sector before the Maastricht Treaty came into force.⁶

However, the attempts to shape the EC audiovisual policy began before the Maastricht Treaty. The 1984 Green Paper on the Establishment of a Common Market for Broadcasting, especially by Satellite and Cable⁷ was a starting point for further developments of the Community's audiovisual media policy. It was stated that the competences of the

² Ibid, at 2.

³ Karol Jakubowicz, *Audiovisual Policy of the European Union*, http://www.anem.org.yu/admin/article/download/files/EU_Audiovisual_Policy-Jakubowicz.pdf?id=122, p. 1

⁴ Ibid.

⁵ http://ec.europa.eu/avpolicy/reg/history/historytvwvf/index_en.htm.

⁶ *Treaty on European Union*, adopted in Maastricht, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253, See Mira Burri Nenova, *The Reform of the European Community Audiovisual Media Regulation: Television Without Cultural Diversity*, *The International Journal of Cultural Property* (2007), p.171, http://journals.cambridge.org/download.php?file=%2FJCP%2FJCP14_02%2FS0940739107070105a.pdf&code=cf192e2305cdf6bc6ca4bcf617ba24df.

⁷ *European Commission, Television without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable*, COM(84) 300, May 1984

European Community in the field of broadcasting derived from the provisions of the Treaty aimed at establishing a Common Market. In addition, it was pointed out that the Treaty applies not only to economic activities but, as a rule, also to “all activities carried out for remuneration, regardless of whether they take place in the economic, social, cultural (including in particular, information, creative or artistic activities and entertainment), sporting or any other sphere”.⁸

From the very beginning, the European Court of Justice played a significant role in expanding the scope of activities falling under the Community’s prerogative in this regard. In its rulings, the Court held up a key principle of the treaties—that services should have free movement within the common market.⁹

The first significant ECJ case dealing with television transmission came before Television without Frontiers Directive, in 1974. The European Court of Justice found in the *Italian State v. Sacchi* case that broadcasting be considered a tradable service.¹⁰ Therewith the Court claimed the sector as within its jurisdiction of the Treaty of Rome. The ECJ ruled that “in the absence of express provision to the contrary in the treaty, a television signal must, by reason of its nature, be regarded a *provision of services*”. It added that “trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods.”¹¹

Then in 1980, the Court applied this principle to a case of cross-border broadcasting. In the 1980 *Debauve* case¹², the European Court of Justice established that any discrimination by a Member State against a broadcasting signal due to national origin is illegal. The Court ruled that the companies transmitted from abroad were liable to their domestic le-

⁸ *Ibid*, COM (84) 300, p. 6, May 1984.

⁹ Alison Harcourt, *Institution – Driven Competition: The Regulation of Cross-Border Broadcasting in the EU*, European University Institute Robert Schuman Centre for Advanced Studies, European Forum Series, EUI Working Paper RSCAS No. 2004/44, p. 7, http://www.iue.it/RSCAS/WP-Texts/04_44.pdf.

¹⁰ Case 155/73 *Guiseppe Sacchi*, ECR [1974] 409.

¹¹ Alison Harcourt, *Institution – Driven Competition: The Regulation of Cross-Border Broadcasting in the EU*, European University Institute Robert Schuman Centre for Advanced Studies, European Forum Series, EUI Working Paper RSCAS No. 2004/44, p. 7, http://www.iue.it/RSCAS/WP-Texts/04_44.pdf.

¹² Case 52/79 *Procureur du Roi v. Marc J.V.C. Debauve and others* ECR [1980] 860.

gislations, not to laws in countries of reception. To put it simply, the 1980 *Debauve* case ensured that broadcasting from one Member State to another was legal. Based precisely upon these two ECJ rulings the EU passed its Television without Frontiers (TVWF) Directive in 1989.¹³

2. Television without Frontiers Directive – TVWF Directive

2.1 Basic Principles

These case laws led to the adoption of the main Community instrument in this area, the Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, which is commonly known as the Television without Frontiers Directive (TVWF Directive).¹⁴

This Directive was adopted in 1989, and mostly it reflects the structure and the basic provisions of the Convention on Transfrontier Television (CTT) of CoE.¹⁵

The goal was to encourage, via deregulation, the exploitation of new technologies, initially cable and satellite broadcasting, throughout the establishment of single market in television broadcasting services.¹⁶ In order to create preconditions for large internal market as well as to boost the inter-

¹³ Alison Harcourt, *Institution – Driven Competition: The Regulation of Cross-Border Broadcasting in the EU*, European University Institute Robert Schuman Centre for Advanced Studies, European Forum Series, EUI Working Paper RSCAS No. 2004/44, p. 7, http://www.iue.it/RSCAS/WP-Texts/04_44.pdf.

¹⁴ http://www.itb.hu/dokumentumok/green_paper/greenpaper/greenpaper_8.htm.

¹⁵ See Council of Europe, *European Convention on Transfrontier Television*, (ETS No. 132, 1989), Strasbourg, May 5, 1989. The Convention served as a basis for the preparation of the Television without Frontiers Directive (89/552/EEC). The Convention creates a pan-European framework for the free circulation of television programme services, without providing regulation for domestic broadcasting activities as such. This presents the fundamental difference between the Convention and the Television without Frontiers Directive. Actually, the Convention only applies to transfrontier programmes whereas the Directive applies to both domestic and transfrontier broadcasting in the EU Member States. However, given that many broadcasting services, initially created with a domestic intention become transfrontier, the Convention rules therefore also apply to such services, available at the website: www.budobs.org/bo-documents/bo-documents/television-without-frontiers-the-convention-and-the-directive.html.

¹⁶ It applies to television broadcasts made over wires and over the air (including by satellite) and explicitly does not apply to services provided on individual demand. See Article 1(a), <http://www.ipandit.practicallaw.com/3-285-1978>.

national competitiveness of the European audiovisual industry vis a vis the USA, the EU-wide liberalization was needful.¹⁷

The 1989 Television without Frontiers Directive provided for firms within the EU, a framework for capital mobility, previously confined to national markets—television broadcasters.¹⁸ The TVWF Directive paved the way for cross border transmission via satellite and cable by means of defining television signals as services. The 1989 Television without Frontiers Directive introduced vital principle: that a broadcaster could only be regulated by the country of origin and not by the country of reception.¹⁹

This principle was derived from ECJ rulings in the 1970s and 1980s. Under the country of origin principle, the television broadcasts are required to comply only with the laws of the member state from which they emanate.

Further, the TVWF Directive required Member States to impose certain minimum standards on scheduled television services, which originate in their jurisdiction, covering *inter alia* following aspects:

- Rules of television advertising and sponsorship²⁰
- Protection of minors and public order²¹

¹⁷ Karol Jakubowicz, *Audiovisual Policy of the European Union*, http://www.anem.org.yu/admin/article/download/files/EU_Audiovisual_Policy-Jakubowicz.pdf?id=122, p. 4.

¹⁸ Alison Harcourt, *Institution – Driven Competition: The Regulation of Cross-Border Broadcasting in the EU*, European University Institute Robert Schuman Centre for Advanced Studies, European Forum Series, EUI Working Paper RSCAS No. 2004/44, p. 8, http://www.iue.it/RSCAS/WP-Texts/04_44.pdf.

¹⁹ Under the Television without Frontiers Directive, notwithstanding the application of the country of origin principle, Member States may still take measures that restrict the freedom of movement of television broadcasting, but only under certain conditions listed in Article 2(a) and following the procedure laid down in this Directive. However, the European Court of Justice has consistently held that any restriction of the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively. See Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 28; and Case C-348/96 *Calfa* [1999] ECR I-0011, paragraph 23., see http://www.ec.europa.eu/avpolicy/reg/tvwf/jurisdiction/index_en.htm.

²⁰ See Articles 10–20 of the Council Directive on the coordination of certain provisions laid by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC), (OJ L 298, 17/10/1989, p.23), <http://www.eur-lex.europa.eu/LexUriServ/site/en/consleg/1989/L/01989L0552-19970730-en.pdf>.

²¹ See Articles 22, 22(a) and 22(b) of the Council Directive on the coordination of certain provisions laid by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC), (OJ L 298, 17/10/1989).

- Promoting the production and distribution of European works²² and works by independent producers²³
- Right of reply²⁴

This cornerstone document of the European Union's audiovisual policy was amended by the Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997.²⁵

Rules on the free access of the public to major events (such as the Olympic Games) are one of the most important innovations incorporated by the revised Directive of 1997.²⁶

Each Member State is entitled to draw up a list of events, seen as being of major importance for society. These events must be broadcast unencrypted even if exclusive rights have been bought by pay-television stations. Besides that, on the basis of the principle of mutual recognition, Member States must ensure that broadcasters under their jurisdiction respect the lists of other Member States.²⁷

²² See Articles 4 and 6 of the Council Directive on the coordination of certain provisions laid by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC), (OJ L 298, 17/10/1989). Required television broadcasters shall transmit a certain quota of "European" works rather than simply buying in programmes from outside the EU. European works are defined in the Directive and are, broadly speaking, works originating or produced in member states.

²³ See Article 5 of the Council Directive on the coordination of certain provisions laid by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC), (OJ L 298, 17/10/1989).

²⁴ See Article 23 of the Council Directive on the coordination of certain provisions laid by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC), (OJ L 298, 17/10/1989). The remedy of "right of reply" was established. This remedy allows people and other legal entities, such as companies, to require that any publication of inaccurate facts about them in the media, or any other publication of information which affects their legal rights, is publicly corrected.

²⁵ <http://www.greens-efa.org/cms/topics/dok/134/134500.htm>.

²⁶ See Article 3a of the *Directive 97/36/EC Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities*, (OJ L 202/60, 30/07/1997).

²⁷ See Article 3a of the *Directive 97/36/EC Amending Council Directive 89/552/EEC on the Coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, (OJ L 202/60, 30/07/1997). In this context is also relevant the Court of First Instance ruling in the *Infront WM AG v Commission of the European Communities* case of 15 December 2005, OJ, 10 February of 2006.

Teleshopping rules were also added by the 1997 amendment to the TVWF Directive.²⁸

2.2 Cultural Diversity Issues

Of the various innovations that the TVWF Directive has introduced, this paper primarily examines the aspects of audiovisual media regulation, which are likely to influence the diversity of cultural expressions in Europe.

In this context, the special attention will be attributed to the existing quota mechanisms for European works and for independent productions and to their effects to cultural diversity in the European media.

Article 4 (1) of the Television without Frontiers Directive stipulates that:

”Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, (within the meaning of Article 6), a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster’s informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.”

Article 5 (1) of the Television without Frontiers Directive provided further that, “where practicable and by appropriate means, broadcasters shall reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, or alternatively, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters.”

The Court annulled the decision on the procedural grounds and consequently the judgment does not comment on the material legitimacy of measures taken by the Commission under Article 3a or of list regulations adopted by Member States.

²⁸ The definition of teleshopping in Chapter I is introduced in 1997, see 18 and 18a of the *Directive 97/36/EC Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities*, (OJ L 202/60, 30/07/1997).

The aforementioned provisions of the TVWF Directive ensure investment into European and independent productions and their availability to European audiences.²⁹

The impact study prepared for the TVWF review³⁰ demonstrated that the measures to promote European and independent productions made indeed significant impact. Namely, the average ratio of European works in the qualifying transmission time of the channels increased from 52.1% in 1993 to 66.10% in 2002, while the average proportion of independent productions increased from 16.2% in 1993 to 21.10% in 2002.³¹

The higher share of European productions is a clear sign of the achieved balance of offerings in the EC broadcasting markets. Although the increased circulation of programs within the EU is apparently achieved, it remains quite disputable whether these policy measures has contributed to promoting exports what was declared as one of overall goals from the very beginning.

However, it is apparent that the so-called “cultural” quota system envisaged by the TVWF Directive by no means influenced the cultural diversity in Europe.

There has been a stark contrast between political rhetoric³² and concrete regulatory instruments, which have been put in place. On one hand cultural diversity has been frequently invoked as justification for

²⁹ Karol Jakubowicz, *Audiovisual Policy of the European Union*, http://www.anem.org.yu/admin/article/download/files/EU_Audiovisual_Policy-Jakubowicz.pdf?id=122, p. 9.

³⁰ See also *European Commission, Seventh Communication on the Application of Articles 4 and 5 of Directive 89/552/EEC Television without Frontiers, as Amended by Directive 97/36/EC for the Period 2003–2004*, COM(2006) 459 final, August 14, 2006.

³¹ *European Commission, Sixth Communication on the Application of Articles 4 and 5 of Directive 89/552/EEC Television without Frontiers, as amended by Directive 97/36/EC, for the period 2001-2002* {SEC(2004) 1016}, July, 2004, <http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0524:EN:NOT>.

³² The European Council stressed that future TVWF initiative should “provide an opportunity of demonstrating the richness and diversity of European culture” and “contribute to a substantial strengthening of a European cultural identity.” See *European Council Decisions* of December 2–3, 1988, Rhodes, in *Bulletin of the European Communities*, No. 12/1988; also the EU Commissioner for Information Society and Media, Viviane Reding stressed out that high share of European works proves “the high quality of Europe’s home-grown audiovisual content and of the vitality of an audiovisual industry that draws upon Europe’s rich cultural diversity.” See *European Commission, “European Works’ Share of TV Broadcasting Time Now Stable Over 60%,”* IP/06/1115, Brussels, August 22, 2006.

the EU audiovisual policy regulation while on the other hand, legislator has never taken into consideration its real importance so far.

The Article 6 of the Television without Frontiers Directive, which provides a legal definition of “European works” is pertinent in this context.

This definition ensures that European works are only audiovisual productions, which comply with one of the following conditions:

- a. works originating from Member States;
- b. works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe (paragraph 2);
- c. works originating from other European third countries and co-produced with a producer established in a Member State (paragraph 3);
- d. works co-produced between producers established in third countries and in Member States in the framework of a bilateral co-production treaty between those States (paragraph 4).³³

There are several legally precisely defined conditions to ensure that European works are controlled either by a Community producer or by a co-producer established in an European third country party to the Convention.³⁴

It is clear from the wording of Article 6 of the TVWF Directive that requirements for European works are neither based on content quality nor on originality. In particular, there is no single criterion established with regard to the content of European work, that would also further contribute to achieving the cultural diversity goals.

Quota mechanisms based on the existing definition of European works cannot anyhow contribute to the protection and promotion of

³³ See Article 6 of the *Directive 97/36/EC Amending Council Directive 89/552/EEC on the Coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, (OJ L 202/60, 30/07/1997).

³⁴ Article 6 paragraph 4 states that productions which are not “European works” but are made in the framework of bilateral co-production agreements concluded between Member States and third countries will be treated as European works provided that the Community co-producers supply a majority share of the production costs and the production is not controlled by the producer from the third country.” See *Directive 97/36/EC Amending Council Directive 89/552/EEC on the Coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, (OJ L 202/60, 30/07/1997).

cultural diversity. Indeed, the criteria were determined based on a maximization of profit and “origin of profit principle”, thus relying solely on economic rationale.

Arguably, the introduced quota mechanisms even give rise to deterioration of quality of cultural programmes and to the homogenization of their content. Actually, in order to meet quota requirements, TV companies usually recourse to the “Big Brother” type of TV shows as to the inexpensive and profitable solutions. These low-budget programmes at the same time qualify as both a European work and as an independent production.³⁵

3. Audiovisual Media Services Directive – AVMS Directive

3.1. Basic Principles

The Television without Frontiers Directive incorporated an obligation for the Community to review it by 2002.³⁶ The actual review process of the Television without Frontiers Directive commenced with the Fourth Communication on the Application of the TVWF Directive for the period 2001 and 2002.³⁷

In December 2007 the Television without Frontiers Directive was further considerably amended and changed by the Directive 2007/65/EC concerning the provision of audiovisual media services (so called the Audiovisual Media Services Directive)³⁸ in order to keep abreast of the technological developments since 1997.

³⁵ There is evidence that TV channels have reduced the proportion of European works that are stock programs (generally more expensive) and increased the share of (generally cheaper) flow programs. See Mira Burri Nenova, *The Reform of the European Community Audiovisual Media Regulation: Television Without Cultural Diversity*, *The International Journal of Cultural Property* (2007), p.196.

³⁶ See Article 25 (a) of *Directive 97/36/EC Amending Council Directive 89/552/EEC on the Coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, (OJ L 202/60, 30/07/1997).

³⁷ *European Commission, Fourth Report on the Application of Directive 89/552/EEC “Television without Frontiers,” COM (2002) 778 final*, January 6, 2003.

³⁸ *Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities* (OJ L 332/27, 18/12/2007).

The Audiovisual Media Services Directive entered into force on 19 December 2007. Member States have two years to transpose the new provisions into national law, so that the modernized legal framework for audiovisual business will fully apply by the end of 2009.³⁹

The new, wide-ranging directive extends the Internal Market to audiovisual non-linear services ('pull' contents) and modernizes the rules on linear services ('push' contents).⁴⁰ Most importantly, the country of origin principle, as essential to the EC audiovisual media system, encompasses now all content services, including the nonlinear.

The Audiovisual Media Services Directive introduces "graduated regulation", or, in other words, the different level of strictness for previously defined audiovisual media services subcategories. Namely, due to the users' different degrees of choice and control over on-demand audiovisual media services, only a basic tier of rules applies to them. In fact, the regulation of conventional television broadcast (or linear media services) remains almost unchanged. The relaxation is introduced only with regard to the rules on advertising and product placement.⁴¹

On the other hand, nonlinear services are subject to a much lighter regime and would have to satisfy only a basic tier of rules with regard to the protection of minors and human dignity, right of reply, identification of commercial communications, and minimum qualitative obligations regarding commercial communications.⁴²

³⁹ http://ec.europa.eu/avpolicy/reg/avms/index_en.htm.

⁴⁰ The audiovisual media services as umbrella term encompasses two subcategories: television broadcast or linear services and on-demand or nonlinear services. Television broadcast (or linear services) cover audiovisual media services "provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule", while on-demand (or nonlinear services) offer audiovisual content "for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider". See Article 1 of the *Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007* (OJ L 332/27, 18/12/2007).

⁴¹ Thomas Walter Haug, *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*, *European Law/ Europarecht*, 2008, 35-41, 37, <http://www.hanselawreview.org/pdf6/Vol4No1Art03.pdf>.

⁴² The notion of audiovisual commercial communication is taken from the e-Commerce Directive with an almost identical content and it encompasses all rules related to advertising; http://www.ec.europa.eu/avpolicy/reg/avms/index_en.htm.

3.1 Cultural Diversity Issues

The cultural diversity rhetoric was again frequent during legislative process. According to the European Commission, the reform aimed to increase choice, diversity, and investment in the European audiovisual media leading to a “vibrant audiovisual content without frontiers industry that is strongly rooted in the EU.”⁴³ The Commission expressed its expectations that new rules on product placement will “help to boost our creative economy and thus reinforce cultural diversity.” Moreover, both the rules on advertising and the rules on product placement have been seen as “further instruments safeguarding cultural diversity.”⁴⁴

However, the AVMS Directive does not incorporate any new concrete provision addressing cultural diversity considerations. As far as cultural diversity issues are concerned, the AVMS Directive does not bring about any substantial improvement.

Cultural diversity considerations are repeatedly affirmed in the Preamble of the AVMS Directive as well as in Article 3(i) (3) of the Directive. The adherence to the principles of the approved UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions was especially emphasized. The culture-based Article 151 (4) of the Treaty was also invoked. However, the mechanism for implementation of these articles are not envisaged by the Directive.

It was finally agreed after long discussions during legislative process that quota regime will be to a certain extent extended to the realm of non-linear audiovisual services.⁴⁵ Actually, the quota system, as determined by the TVWF Directive is preserved under the AVMS Directive but it applies only to linear (television broadcasting) services.⁴⁶ With regard to nonlinear services, the AVMS Directive does include a soft-law provision, which creates an obligation for the member states to ensure that media service

⁴³ *The Commission Proposal for Modernization of the Television without Frontiers Directive*, MEMO/05/475, Brussels, December 13, 2005.

⁴⁴ *Ibid.*

⁴⁵ See Mira Burri Nenova, *The Reform of the European Community Audiovisual Media Regulation: Television Without Cultural Diversity*, *The International Journal of Cultural Property* (2007), p.179.

⁴⁶ See 25(a) of the *Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities* (OJ L 332/27, 18/12/2007).

providers under their jurisdiction “promote, where practicable and by appropriate means, production of access to European works.”⁴⁷

During legislative process, it was argued that it would be hard to install and monitor quota mechanisms applicable to non linear services. Nevertheless, quota system for on-demand services was adopted, too. However, Article 3(i)(2) specifies set of potential quotas for on-demand services that are considered technically applicable:

“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.”⁴⁸

The European Commission is further obliged to report to the Parliament and to the Council on the application of this provision, taking into consideration the market and technological developments and the objective of cultural diversity.⁴⁹

The cultural diversity issues are not properly addressed solely by means of preserving the previously established quota system for linear services and by creating soft-law stimulus for nonlinear services. As it was previously elaborated, without providing adequate redefining of notion of European works cultural diversity goals will remain unfulfilled.

Although the Commission stated that the new rules on advertising as well as regulation of product placement are deemed as “further instruments

⁴⁷ See Article 3 (i) (1) of the *Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities* (OJ L 332/27, 18/12/2007).

⁴⁸ See Article 3(i)(2), *Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities* (OJ L 332/27, 18/12/2007).

⁴⁹ See Article 3i(3) of *Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities* (OJ L 332/27, 18/12/2007).

safeguarding cultural diversity”, legal interpretation of the AVMS Directive cannot support this statement.

Actually, product placement is defined as “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 considerations.”⁵⁰

While it is undisputable that product placement will become important financial source for European audiovisual industry, it remains unclear how this creative economy boost would further “reinforce cultural diversity.”⁵¹

The very same arguments can be brought up for the other rules aimed at liberalizing of advertising in audiovisual media. A removal of the quantitative limits on advertising certainly enhances financial opportunities for broadcaster and content providers, but by no means has it contributed to cultural diversity goals.

Conclusion

Proponents of the AVMS Directive usually invoke the principle of subsidiarity as the proper justification for “culturally blind” approach taken by legislator. However, this argumentation does not seem very persuasive.

In this context Clause 4 of Article 151 of Treaty,⁵² Article 22 of the Charter of Fundamental Rights, the UNESCO Convention on the Pro-

⁵⁰ Article 1(m) of the *Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities* (OJ L 332/27, 18/12/2007).

⁵¹ See *The Commission Proposal for Modernization of the Television without Frontiers Directive*, MEMO/05/475, Brussels, December 13, 2005.

⁵² Culture was for the first time formally brought within the responsibility of the EU under the Maastricht Treaty establishing the European Community in 1992. There are now three articles concerning culture in the Treaty: Article 3(q) sets out the principle whereby the activities of the Union should include „a contribution to education and training of quality and to the flowering of the cultures of the Member States“. Article 87(3)(d) takes account of cultural goods and services. It authorises the Member States to provide aid for economic operators in order to promote culture and heritage conservation, provided such aid is compatible with the common market. The main legal basis, Article 151 (ex-article 128) defines the scope for Community action in the field of culture, mostly focussing on cultural exchange and cooperation, and providing the framework for initiatives such as the programme Culture 2000. See *Inventory-Legislation for Culture*, available at www.efah.org/index.php?id=98&pagelang=en.

tection and Promotion of the Diversity of Cultural Expressions,⁵³ and relevant case law should be taken into special consideration.

Namely, Clause 4 of Article 151 of the Treaty of Nice⁵⁴ stipulates that the Community must “take cultural aspects into account in its action under other provisions of this Treaty.” In fact, it marks the important recognition of the transversality of culture and establishes a formal relation between culture and other segments of European policy.

Further, Article 22 of the Charter of Fundamental Rights of the European Union merely stipulates that the “Union shall respect cultural, religious and linguistic diversity”, but it has no direct legal effect.

In addition, the EU as a party to the UNESCO Convention on Cultural Diversity, has committed itself to the protection and promotion of cultural expressions and needs to meet these aims.

The *Cassis de Dijon* is also of crucial importance in this regard.⁵⁵ In addition to the derogations to the free movement that were explicitly prescribed by Article 30 of the Treaty, the ECJ developed an open-ended list of imperative requirements in the public interest.

Actually cultural policy measures implemented in the audiovisual sector fall under this category constituting “an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services”. The ECJ jurisprudence clearly demonstrates that besides single market objectives there is an enough room for parallel protection of public interest goals, related *inter alia* to the domain of culture.⁵⁶

Apparently, regulatory framework established by the Audiovisual Media Service Directive does not fully reflect the aforementioned legal provisions. Hopefully, the ECJ will throughout its rulings shape the

⁵³ The EU ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions ratified on 18 December of 2006, see http://ec.europa.eu/culture/portal/action/diversity/unesco_en.htm

⁵⁴ Consolidated Versions of the Treaty on European Union and the Treaty establishing the European Community, OJ No. C 321 E of 29 December 2006.

⁵⁵ Case 120/78 *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

⁵⁶ See case C-353/89 *Commission v. the Netherlands*, ECR [1991] I-4069, para. 30; C-148/91 *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, ECR [1993] I-487, paras. 9-10 and case C-23/93 *TV10 SA v. Commissariaat voor de Media*, ECR [1994] I -4795, paras. 18-19. See also Mira Burri Nenova, *The Reform of the European Community Audiovisual Media Regulation: Television Without Cultural Diversity*, *The International Journal of Cultural Property* (2007), p.187.

audiovisual policy to meet cultural diversity objectives. Furthermore, it is expected that in long run, the ECJ case law, sensitive to public interest goals, will pay the way for the improvement of the AVMS regulatory framework.

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THE ROLE OF THE EUROPEAN COURT OF JUSTICE
IN SHAPING CERTAIN ASPECTS OF THE
AUDIOVISUAL MEDIA FRAMEWORK

This article firstly examines the background and development of certain aspects of the EC audiovisual media framework and initial role of the European Court of Justice in that process.

Subsequently, it discusses whether the existing audiovisual media framework appropriately guarantees the balance between the competition and the cultural diversity considerations and draws conclusions in this regard.

Key words: certain aspects of the EC audiovisual media framework; European Court of Justice; cultural diversity;