



Statement on the reform of the directive “TV without frontiers”

Abstract

As an audiovisual medium, online games will be covered by the regulatory scope of the new TV directive. Hence, the protection of independent game developers in their corresponding function as independent producers needs to be guaranteed. The widening of the scope of the TV directive has positive and negative aspects: A possibly premature regulation of an emerging market ruled by definitions subject to rapid changes could cause trouble. The attribution of games to the audiovisual sector can be rated positive. The systematic regulation of product placement has no support.

General

The TV directive needs substantial revision, with a focus on its adjustment to the changed technical general framework.

The impact of games is growing in technological and economic terms, but most important of all, in the field of culture. Like films, games are a cultural asset. In a converging environment, Games will develop a leading quality. The impact of Games in technological and narrative terms in the near future must not be underestimated, as they have already influence on contemporary society. Hence, Games are not only of technological and economical importance; they represent a significant **audiovisual medium**.

Despite this development, the game developers in their function as group of independent producers in the sector of non-linear media have not been involved in the discussion on the TV directive so far. This can be attributed to the fact that the inclusion of Games in this area of application has been a controversial topic even among specialists

In this respect, the commission’s draft at present is comparatively unequivocal. Only online Games that demand a constant connection to a server and use the latter as “playing surface” fall into the scope of the regulation suggested by the commission. This part will be affected if the scope of application remains as planned.

Although online games might fall into the limits of the directive, they were not considered in the legislative process. As a consequence, there will arise a number of practical problems in terms of implementation. The TV directive as legislation for the TV medium might be insufficiently adjusted to the needs and business models in the sector of interactive media. That fact leaves the topic open to questions.

As the extinction to on-line-services, was initially thought to be the new distribution of TV programmes, the directive is based upon the thinking patterns of television. The directive was initially not thought to take care of the specificities of on-line-games, and the games

industry. Therefore, it is possible, that the legal framework does not fit. Hence, it is quite important to create a committee, which constantly revises the application of the directive. Here the game developers need to be included.

Independent Producers

The directive will have effects on the position of independent producers. These do not only exist in the area of linear media. In the field of non-linear media, independent content producers have a solid impact on technological and cultural innovation as well as cultural diversity. Games are subject to similar mechanisms as cinema in their production structures. The creative part of game development will be effectuated by SmE's as major companies will avoid the too big and imponderable risk of development.

The fact that this connection was recognized by the commission is **supported** by the EGDF. In line with Article 3f No. 1 Member States shall ensure that media service providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works within the meaning of Article 6.

. From our point of view, we want to clarify that this does not only apply to the TV section but the whole area of audiovisual media.

As far as the deletion of Article 3f is requested, we strongly object to it. From the independent game developers' point of view, the article in question is a crucial part of the reform package that is meant to help balancing obvious economic restrictions in this specific sector. If it is impossible to avoid games becoming part of the scope of application of the TV directive, special care has to be taken of the fact that the wording of Article 3f remains as minimal consent. Especially in the light of future development, this is necessary to avoid restrictions of financial support opportunities of non-linear media by the member states.

The equal treatment of linear and non-linear services/providers is not kept up: Independent TV producers, as an example, enjoy privileges. For the field of non-linear services/providers, the support of independent producers would have to be seen similarly.

Scope of Application

Seen from the viewpoint of independent game developers in Europe, the expansion of the directive's application area has its assets and drawbacks.

A clarification of definitions is desirable, as it would provide legal certainty. We assume that online games fall into the scope of the directive. As far as they are concerned, a differentiated approach is necessary.

First of all, the problem of ambiguous **definitions** needs to be solved. According to the present draft, the sector of media service providers includes companies that launch online Games created by development companies as third parties. We think that the term 'media service provider' is too fuzzy. It should be made clear that the term applies to those companies distributing non-linear media (e.g. online Games), even if a game's content was designed by a third party. Game developers are normally jointly responsible for the content, whereas advertising is brought in by a publisher or a third party. In addition to that, many publishers of online Games only provide a small number or even only one single Game.

The idea of a regulation independent of any platform is basically in line with aims of the directive, but at the same time, idealistic. A general applicability of the directive is threatened

by technical obstacles hard to overcome. This applies especially to the definitions of linear (push) and non-linear (pull) services that are subject to rapid changes. When it comes to online games in particular, the *push* and *pull* technologies are oddly intertwined. In this matter, the incessant validation of ambiguous cases by a commission of technological and political experts will be indispensable in which the voice of the independent game developers is a vital element.

Separating games from other online activities in connection with Games poses questions of definition. For one, the definition of online games in constant connection to the server appears to be slightly too undifferentiated. There are numerous hybrid solutions. Among other things, there are discussions on copyright mechanisms that require the player to be permanently online. Other problems may arise in case a game enables a user to change data (*modding*) without the developer/publisher being able to interfere.

The assignment of online Games to the area of **audiovision** is to be rated positive. The phenomenon of the cultural reference of Games and its rapid ascent in the near future has to be taken into consideration. Not only are there cross-references to the culture of the respective member states to be found in games. Games also have a great impact on the cognitive and thinking processes within a society. So far, this value-shaping character was exclusively assigned to the consumption of linear media. This has changed fundamentally.

While the member states go to great lengths to provide public TV and film funding to ensure cultural and medial diversity, similar efforts are not made yet for the production of games. In the light of market dynamics and the minor importance of European games on the global market, this aspect is particularly unsatisfying. The importance of independent production becomes even bigger when the fact is taken into consideration that most of the technology carriers do not hail from Europe. The argument of linear media having a greater impact on society because a multitude of people are faced with the same content at a given time cannot hide the fact that linearly transmitted media transform more and more into background media. At the same time interactive devices come to the fore, due to the fact that they offer a higher attention stimulus for the users. In a public domain subject to structural change, the widening of the scope of audiovision is only consistent to secure the objectives of the directive, i.e. media pluralism in a democratic Europe.

This is even more important against the background of the ongoing WTO negotiations concerning GATS. The assignment of Games to the field of audiovision has to be appreciated. Right now, we are in the process of finding definitions; affairs are awaiting final decisions. In this matter, EGDF is holding the view that an expansion of the field of application of audiovision in the WTO context is justified matter-of-factly, as the growing cultural importance hardly leaves other choices. The only alternative to achieve diversity is a media-specific regulation. If Europe is not to leave the development of interactive entertainment to other geographical markets, it is bound to encourage and support the development and technology – and thus secure the financial aspect - of these particular devices to an increasing degree. This goes especially for games. With special regard to the transfer of the cultural heritage into the digital age, there is the danger of marginalisation of European values and their cutting off from global development. To avoid this, the expansion of the directive's field of application is a valuable contribution.

Concerning the differentiation to the regulation of **E-Commerce** and software services, the possibility of a double regulation should not be ruled out in principle. There is no need to worry about resulting disadvantages. Rather so, the overlapping of fields of application in the area of cultural assets is actually appropriate. The reasoning behind this directive and the direction aimed at deviate. While the *E-Commerce* directive deals with instructions from the domain of economic law, the TV directive has the regulation of the cultural media phenomenon and its diversity at its core (and the specific market regulation as a result of the

specific cultural media context). However, this behind this directive and the direction aimed at deviate. While the *E-Commerce* directive deals with instructions from the domain of economic law, the TV directive has the regulation of the cultural media phenomenon and its diversity at its cultural phenomenon is detached from the business models and technical structures it is based on. Thus, an overlapping of the areas concerned is to be taken. To give an example: Games are part of a regime regulating economic matters in the domain of Services & Applications, and they are representations of cultural contexts at the same time. In this respect, Games today constitute an important audiovisual medium and consequently, a part of the TV directive. There is no aspect that justifies the dogmatic idea of an exclusive classification, if this does not lead to results in coherence of the aims of the respective directives.

It is consistent to include live streaming and IPTV in the operative area of the directive. The actual technical realisation is a completely different story. Sometimes one gets the impression that the practical implementation of the directive has not been taken into account properly.

One of the **risks** of widening of the scope is that the regulation of an **emerging market** demanded by some might come too early. Neither are there empirical facts available on that topic, nor have the creators of the directive considered its possible effects on the game industry. The systematic advertising in games has only just begun. The regulation of a newly emerging market could interfere with certain economically sensible phenomena that might come into being by the help of the “invisible hand” on their own. As a consequence, losses in efficiency that figure as local disadvantage for Europe might occur.

The conditions of application for advertising in Games are unclear. Here it become very obvious, that the fathers of TV derective initially had not interactive games in mind. Though it might be clear that especially at sports events consumer messages can be inserted when the billboards at location are replaced virtually or overlayed by new images, under the condition that the implemented virtual advertismment is not more visible or obtrusive than the actual advertismment at location, a comparable case for online games must remain in the realms of imagination.

The principle of separating advertising from program does not go for games at all. Unlike in conventional (linear) TV, in Games the player actively directs the plot. As an example, the player may look for a certain refreshment to boost his character in the action. To point to the advertisements in addition would usually interfere with the action. In this respect, a constant examination of the directive that allows immediate reactions to changes in technology and of business models is recommended.

Advertising Rules and Product Placement

The cultural impact of Games goes without saying. On the other side, there is the danger of over-regulation. A newly emerging market could be strangled by a too tight net of rules even before it had the chance to get established. Hence, a restriction of **product placement** in the sector of interactive media must be declined. The introduction of fundamental qualitative interdictions (e.g. for tobacco products) would be acceptable at most, as far as the legal operative area in this matter up to now is subject to a non harmonized national legislation in the respective European member states.

A regulation beyond that aspect – as to be found in the current version of the TV directive for TV – must be judged overambitious and uncomprehensive. Fresh business models will establish new opportunities for independent developers, especially at this stage of market development. That way business models could help to shift the balance of power within the value chains slightly in favor of game developers. This can only be realised by leaving

sufficient operating space for the latter, which until now seems to be within the bounds of possibility. In this respect, an over-regulation could possibly prove counterproductive at this stage of market development.

The technical practicability of an exact regulation of advertising is a matter of doubt, as in the sector of Games advertisement spots etc. do not exist. Hence, the discussion focuses on product placement from the start. Here, a thorough regulation would be counterproductive. On top of that, we must assume that the intelligent user community of interactive media is usually better informed than the passive users of linear media, thus being able to deal with product placement in a more sophisticated and suitable manner.

The rule for the separation of advertisements and actual program is a criteria not applicable to Games, as the placement of advertisement spots as in television is inconceivable. Browser-based, sponsored games of different complexity levels have been provided on the internet for a couple of years already. Most important of all, the market still is very volatile, meaning that a group of players is not to be made out yet. Hence, a similar regulation cannot be kept up in the sector of non-linear media.

The content of Article 3h b, stating that direct invitations to buy, rent or lease goods or services must not be part of Games, has to be rejected for reasons of vagueness. New electronic media in particular enable direct access to the publisher's or provider's website intermediate. It remains unclear whether networking of that kind is permitted.

As in product placement, the art of restraint should be exercised in the regulation of *theme placement* and *place placement* in the game sector as well; with global competition at the doorstep, development would only be made even more difficult. The most important thing however is to avoid the over-regulation of a newly emerging market. Despite a number of imponderabilities, there are no fears of advertisement clusters becoming the major part of Games with the actual programs designed to fit, thanks to a high latency factor. As the production of Games requires a lot of time (an average of 2-3 years), it is not sensible to place particular products in a game's history, as the product in question (e.g. mobile phones) might be outdated by the time the game is launched, with the manufacturer having no further interest to advertise the item in question.

From our perspective it is sufficient for the game sector to introduce an additional icon containing product information, in correspondence with a *product placement* announcement in the credits of the game. A general notice in the credits on the advertisements contained will prove sufficient to protect legitimate consumers' interests. Extended notice would annoy consumers and make games less attractive. As the choice is given to the player to interrupt sequences and information early has widely gained the status of an industry standard, this should go for commercials as well.

The idea of a reduction of financial support on the basis of the introduction of a product placement permission, thus creating an operating space within the lines of promotion, is incomprehensible. A correlation is conceivable in inverse order, at the most, as risks and market participants figure as different items. The support is aimed at breaking up network and scale effects for the sake of diversity. Financing a project by product placement aims at different matters.

The exclusion of additional sources of income by regulating the ways of financing through advertising strongly requires the opening of film-funding systems for compensation. This is the only way to avoid the backwardness of Europe in this future domain. A support policy for Games is imperative and long overdue. The standing of Games as the latest audiovisual medium is even more delicate than that of film projects, owed to incomparably higher costs for project development. Network and scale effects have a big impact in particular, as the major part of platform technology falls under the control of institutions outside Europe.

Protection of Children and Young People in the Media Sector and Structures of Supervision

The preservation of an individual system for Games and films should be maintained in the process of putting the harmonization of the protection of children and young people in the media sector into practice. Dealing with interactive media requires specific media experience and knowledge of the subject, preconditions that are by far not self-evident in the remaining media sectors. As a matter of fact, the film control mechanisms for adolescents are different from those of the Pegy or USK. With a standardization, the particular subject knowledge of the different commissions would be void.

Some member states provide the strictest directives for the protection of children and young people in the sector of online and games. If the principle of national regulation should remain as it is, there would arise a competitive disadvantage in a competitive system, as manufacturers would make use of the principle of origin by sidestepping to European countries where they are met with less requirements. This way, location and tax deficits are to be expected that are unwanted. Hence, a differentiation of the principle of origin exceeding the present version of the TV directive is recommendable. The different cultural traditions in a diverse Europe have to be taken into account in the process of the factual standardization of protection directives. The standardization of a factual framework in accordance with individual cultural and institutional features in this respect would be welcomed.

As far as the requirements of the EU TV directive are concerned, the employment of instruments of selfcontrol and co-regulation in the realisation process of the directive is to be promoted strongly. Care should be taken that this is covered by the definition of co-regulation.

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Literature:

Behrmann, Malte

Kino und Spiele. Medien in Frankreich und Deutschland

Ibidem, Stuttgart, ISBN 3-89821-469-9

Loewenheim, Ulrich

§2 Rz 184 in Schricker, Urheberrecht,

Beck, München, 1999, ISBN 3-406-37004-7

Natkin, Stéphane

Jeux vidéo et médias du XXIe siècle : Quels modèles pour les nouveaux loisirs numériques ?

Vuibert, Paris, 2004, ISBN 2-7117-4844-8