

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE OF THE EFTA STATES

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SUBCOMMITTEE II ON THE FREE MOVEMENT OF CAPITAL AND SERVICES

EEA EFTA Comment

on the Commission proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in the view of changing market realities (COM(2016) 287 final)

1. SUMMARY

- All forms of gambling advertising and marketing for gambling services should be excluded from the scope of the Directive.
- The grounds for derogation set out in Article 3 (2) (c) are an important step towards sufficiently ensuring public health considerations, but should be strengthened by removing the phrase “serious and grave risk”.
- The Directive should recognise the importance of Member States regulating and limiting alcohol advertising. The minimum rules regulating alcohol advertising should be strengthened, especially to ensure the sufficient protection of children and vulnerable people.
- Article 9 (2) should be strengthened to provide greater protection of children regarding marketing/advertising of products high in saturated fats, *trans*-fatty acids, salt and free sugars.
- On-demand services should be obliged to reserve a share of at least 30% for European works in their catalogues and to ensure adequate prominence of such works.

2. INTRODUCTION

1. The EEA EFTA States welcome the European Commission's proposal to modernise the Audiovisual Media Services Directive (AVMSD) to reflect changes in the market, consumption and technology.
2. Rapid changes in the media market are generating new challenges from a public policy perspective. At the same time, the primary goals of the current audiovisual regulatory framework (protection of minors, promotion of cultural diversity and media pluralism, etc.) remain just as significant. Broadcasters and video-on-demand providers are competing for the same audiences. The EEA EFTA States therefore welcome the proposal to create a more level playing field for broadcasters and video-on-demand providers.
3. The EEA EFTA States recognise the importance of the country of origin principle. However, there are several challenges related to this principle. The possibilities for an individual Member State to derogate from the country of origin principle are strict, and may undermine national policies on issues of general public interest, such as the margins within which it may take measures according to national regulation of gambling, health policy and other areas where the EEA EFTA States wish to protect their national policies. For this reason, the EEA EFTA States propose changes to the Directive, in order to efficiently maintain national policies of public interest relating to gambling and alcohol.

3. AUDIOVISUAL COMMERCIAL COMMUNICATIONS FOR GAMBLING SERVICES

4. Both the Court of Justice of the European Union (CJEU) and the EFTA Court have made it clear that the principle of subsidiarity is applicable to regulation of the gambling sector, allowing Member States a wide margin of appreciation when regulating this area. Furthermore, the Courts have clearly stated that Member States have no obligation to recognise gambling licences granted in other Member States, and may regard services to be illegal if offered to citizens residing within their territory.
5. The EEA States' wide margin of appreciation to regulate gambling services may be severely undermined if audiovisual commercial communications for gambling services fall under the country of origin principle in the AVMSD. This may allow audiovisual media service providers outside a state's national jurisdiction to target audiovisual commercial communications for gambling services that are prohibited in the receiving state. The EEA EFTA States consider it important to ensure that both gambling and advertising for gambling are compliant with the legal framework for gambling products and services in the country of the consumer.
6. The EEA EFTA States are of the opinion that advertising and marketing for gambling services are excluded from the scope of the AVMSD. In this regard, the EEA EFTA States refer to a statement made by the European Commission during the AVMSD Contact Committee on 9 September 2016. During this meeting, the Commission presented a preliminary view that as regards gambling advertising, the AVMSD did

not affect the Member States' competences. In order to ensure legal clarity on this issue, the revised directive should clarify that advertising and marketing for gambling services are explicitly excluded from scope of the AVMSD.

7. The EEA EFTA States' proposed amendments to recital no 22:

(22) For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, **including gambling advertising and marketing**, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.

4. **AUDIOVISUAL COMMERCIAL COMMUNICATIONS FOR ALCOHOLIC BEVERAGES**

8. Some of the EFTA EEA States enforce a total ban on alcohol advertising to ensure a high level of protection of public health. A ban or strict regulation of alcohol advertising is an important component in the wide range of policy instruments employed to restrict alcohol consumption and reduce alcohol-related harm. The CJEU and the EFTA Court have, in several cases, found that reducing alcohol-related harm is a legitimate public health objective, and that restricting alcohol advertising can be a proportionate measure to achieve such a goal.
9. Excessive consumption of alcohol has negative effects on health. Furthermore, alcohol contributes to damaging individuals, families and professional life, and generates high social costs. There are several studies documenting that advertising has an effect on the consumption of alcohol, especially among youth. This was last confirmed in an article in the journal "Addiction" from November 2016, which stated that there was a positive association between the level of marketing exposure and the level of youth alcohol consumption.¹ The EU-funded "Study on the exposure of minors to alcohol advertising on linear and non-linear audio-visual media services and other online services" found that on average, a minor in the EU saw 200 alcohol advertisements in 2013, while an adult saw over 450 in the same period, despite the fact that children should be shielded from such advertising.
10. The effectiveness of national legislation and protective measures related to alcohol advertisements should not be limited because of the borderless character of

¹ <http://onlinelibrary.wiley.com/doi/10.1111/add.13591/full>

audiovisual media services. Articles 9 and 22 have not been strengthened, apart from including paragraphs 3 and 4 in Article 9 to encourage self- and co-regulatory codes of conduct regarding inappropriate audiovisual commercial communications for alcoholic beverages and, if appropriate, for the Commission to facilitate such development. Although such codes of conduct are welcomed if they are enforced and have effect, research shows that in the area of alcohol advertising, self-regulation has not had the desired effect, and should thus not limit efforts to reduce advertising through legislation.² For this reason, the EEA EFTA States find it unsatisfactory that the Commission proposal makes no changes to the country of origin principle.

11. Because of the well documented negative effects of alcohol advertising on public health, several improvements should be made. As a general change, the wording “serious and grave risk” should be deleted from Article 3 (2) (c). This will strengthen the possibility for a Member State to ensure the level of protection of public health that it seeks to attain. Second, the circumvention procedure in Article 4 should be strengthened so that a country’s stricter legislation on alcohol advertising can be enforced. Third, Articles 9 and 22 should be strengthened to ensure that children and vulnerable groups are not negatively affected by alcohol advertisements. This could be done by introducing a watershed or limitation on hours when alcohol advertisements may be broadcast. Finally, a new point c) should be added to Article 11, paragraph 4; *(c) alcoholic beverages or product placement from undertakings whose principal activity is the manufacture or sale of alcoholic beverages.*

5. AUDIOVISUAL COMMERCIAL COMMUNICATIONS FOR UNHEALTHY FOODS AND NON-ALCOHOLIC BEVERAGES TO CHILDREN

12. An unhealthy diet is a risk factor for noncommunicable diseases. The risks presented by an unhealthy diet start in childhood and build up throughout life. In order to reduce the future risk of noncommunicable diseases, children should maintain a healthy weight and consume foods that are low in saturated fat, *trans*-fatty acids, free sugars, and salt. Unhealthy diets are associated with overweight and obesity; conditions that have increased rapidly in children around the world over recent years.
13. Evidence from systematic reviews on the extent, nature and effects of food marketing on children conclude that advertising is extensive, and other forms of food³ marketing directed at children are widespread across the world. Most of this marketing is for foods with a high content of fat, sugar or salt. Evidence also shows that television advertising influences children’s food preferences, purchase requests and consumption patterns.
14. In Resolution WHA61.14, the Sixty-first World Health Assembly endorsed the action plan for the global strategy for the prevention and control of noncommunicable diseases. The action plan urges Member States to continue to implement the actions agreed by the Health Assembly in Resolution WHA60.23. In Objective 3 (paragraph 24 *Promoting healthy diet*, (e)), the action plan identifies a proposed key action for Member States “to prepare and put in place, as appropriate, and with all relevant

² <http://onlinelibrary.wiley.com/doi/10.1111/add.13432/full>

³ Henceforth, the term “food” is used to refer to foods and non-alcoholic beverages.

stakeholders, a framework and/or mechanisms for promoting the responsible marketing of foods and non-alcoholic beverages to children, in order to reduce the impact of foods high in saturated fats, *trans*-fatty acids, free sugars, or salt”.

15. Article 9 (2) is the most relevant for addressing this issue.
16. We suggest strengthening Article 9 (2) *to provide greater protection of children regarding the marketing/advertising of products high in saturated fats, trans-fatty acids, salt and free sugars. Measures on restricting the marketing of foods to children should be in line with the WHO set of recommendations on the marketing of food and non-alcoholic beverages to children. Foods and beverages should be further defined, and using the WHO Regional Office for Europe nutrient profile model as a tool is valuable.*

6. EUROPEAN WORKS AND FINANCIAL CONTRIBUTIONS FROM ON-DEMAND SERVICES

17. The EEA EFTA States welcome the Commission proposal to create a more level playing field in the promotion of European works by obliging on-demand services to reserve a share for European works in their catalogues and to ensure adequate prominence of such works (Article 13 no 1). Regarding the proposed quota, the EEA EFTA States are of the opinion that the proposed share is too low. Some of the most used on-demand services fall outside the jurisdiction of the EEA EFTA States. In order to promote European works in these services, the share should be raised from 20% to at least 30%.
 18. The EEA EFTA States support the proposal to allow Member States to impose financial contributions (direct investments or levies allocated to national film funds) on on-demand services, both in their own jurisdictions and, under certain conditions, on those services established in a different Member State but targeting their national audiences in Article 13 no 2.
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