

Audiovisual Media Services Directive: how far does it extend?

BROADCASTING STANDARDS ARE SOON GOING TO extend onto the internet. Companies running corporate websites will have to ask themselves over the coming year whether the Audiovisual Media Services (AVMS) Directive (2007/65/EC) will extend to them from 19 December 2009, the government's target date for implementation.

Its predecessor, the 1989 Television Without Frontiers Directive, had aimed to create a single market in television broadcasting services in Europe. It set some basic minimum standards and related obligations, and required member states to ensure freedom of reception and retransmission of services for any service that complied with the system of law of its country of origin. The new Directive amends the 1989 Directive, including changing its name to the AVMS Directive, and aims to respond to new transmission technologies by extending the single market to television-like services that are available on demand.

At the same time, amendments have been made to relax some of the rules on the amount and scheduling of television advertising, to control product placement across the board and to make some other relatively minor changes. This article focuses not on these other matters but on the scope of the extension to on-demand services.

SCOPE

What the AVMS Directive does is to define its area of application generically as audiovisual media services (AVMSs), which consists of television broadcasts on the one hand and on-demand AVMSs on the other. The extension is limited to on-demand AVMSs. What then is an on-demand AVMS? The answer lies in a series of interlocking definitions in Article 1 of the AVMS Directive, which are 'explained' in the Recitals to it.

In practice, it is difficult to say exactly what an on-demand AVMS is. The Department for Culture, Media and Sport (DCMS), which is responsible for transposing the AVMS Directive into UK law and which has been consulting on how to do so, has

on a number of occasions proposed a set of tests or criteria by which to identify such a service. Each time, however, the criteria have been slightly different, suggesting that DCMS is not finding it easy. It is suggested that, based on the AVMS Directive, an on-demand AVMS must be:

- a service that is normally provided for reward, as distinct from non-economic services that do not compete with television broadcasting (eg e-mails to a limited number of recipients, private websites and private user-generated content);
- provided under the editorial control (in terms of exercising effective control over both the selection of the programmes and their organisation in a catalogue) of a person under the jurisdiction of a member state;
- a mass media service, that is to say intended for reception by, and which could have a clear impact on, a significant proportion of the general public;
- provided by means of electronic communications networks;
- a service whose principal purpose is the provision of programmes, which excludes websites that have ancillary audiovisual elements such as animated graphic elements, short advert spots or information related to a product or a service that is not an AVMS, as well as most gambling sites, online games and search engines;
- a service whose programmes consist of moving images with or without sound, which takes radio, text and still picture services out of scope, although accompanying subtitles and electronic programming guides are included;
- a service the form and content of whose programmes are comparable from time to time to that of television broadcasting (eg feature films, sports events, sitcoms, documentaries and original drama), in the



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sense that they compete for the same audience as television broadcasts and the means of access to the service would lead the user reasonably to expect basic standards to be observed; and

- a service other than electronic versions of newspapers and magazines.

TRANSPPOSITION

The DCMS has described an on-demand AVMS as a video-on-demand (VOD) service and indeed may be planning to use this expression in the implementing legislation. This is no doubt helpful as a first approximation of the meaning of the expression because it is intuitively consistent with the broad notion that the service must consist of programmes of the kind seen on television, which people expect to be regulated, but it could be misleading. The AVMS Directive itself treats VOD as merely an example of an on-demand AVMS, which is different from treating it as an all-encompassing description. The DCMS is proposing to translate the definition of an on-demand AVMS into UK law by amending the Communications Act 2003 to create and define a new concept – an ‘on-demand programme service’ – the principal features of which would be:

- a VOD service as its principal facility;
- mediation by a service provider exercising ‘editorial responsibility’; and
- availability for members of the public to use.

Anyone active in this area is going to want to know not only what the AVMS Directive means but also that this is an accurate translation. Will this formulation either help with understanding or instil confidence in its accuracy? It is not entirely clear.

The DCMS recognises the need for as much clarity as possible for both businesses and consumers, although proper implementation of the AVMS Directive is said to remain the overriding priority. The DCMS has a range of options. At one extreme it could copy out what the AVMS Directive requires and, where the Directive is unclear or needs explanation, it could offer informal guidance as to what it thinks the AVMS Directive means. At the other extreme it could take a view on what the AVMS Directive means and transpose or translate it into UK law, which is the approach the government currently proposes to take. Is this the right approach?

The trouble with transposition is that in practice the courts may ignore the transposed version and rely on the underlying AVMS Directive. As Kitchin J

observed recently in an intellectual property case (*Football Association Premier League Ltd & ors v QC Leisure & ors* [2008]), it is well established that a domestic statute enacted or amended to implement an EC Directive must be construed in conformity with and to achieve the result intended by the Directive. He went on to say that, unfortunately, in that case as in others in the intellectual property field, the draftsman had not used the words of the Directive, with the result that he addressed the issues of interpretation which arose by reference to the Directive itself.

It is likely that the courts would adopt a similar approach to questions of interpretation of the AVMS Directive. If so, no matter how subtle, ingenious and helpful the drafter may be in the transposition exercise, their efforts are likely to be wasted because in case of doubt the courts will look at the AVMS Directive. If, however, through some accident of transposition the drafter gets it wrong, their work will be positively misleading, even if the courts ultimately look beyond it to the AVMS Directive. In these circumstances, the copy-out option with informal guidance notes might be a more attractive alternative.

The risk of transposition of this particular Directive into our law being a waste of effort or plain wrong is not small. The conceptual structure of UK broadcasting law is different from the scheme in the Directive for AVMSs. To transpose the AVMS Directive into our law, it is necessary to consider it at a level of abstraction beyond the words themselves. That is because we have, for example, no generic legal category for anything equivalent to an AVMS.

A PLACE IN THE LEGAL LANDSCAPE

In 2003 on-demand services on the internet and elsewhere ceased to be regulated under the Broadcasting Acts. Content regulation was withdrawn from them. It was sufficient to comply with the law of the land (in particular the laws of obscene publications and defamation). It is the newly liberated part of the broadcasting landscape that on-demand AVMSs will occupy. It is with the boundaries of its area of occupation that we are concerned here.

That landscape is largely occupied by various categories of regulated programme service. They are regulated if they are in the nature of what we might call ‘broadcasting’ services, although they are not called that in the UK legislation. Instead, they are services that are ‘available for reception by members of the public’ (s361 of the Communications Act 2003). Section 361 expressly excludes any service consisting of a ‘facility’ for the user to select and receive material on demand. This is what took on-demand services

outside the scope of content regulation in 2003. The DCMS now proposes to build on this exclusion by defining an on-demand AVMS as a service whose 'principal facility' is a VOD service. That would fit neatly with the exclusion for on-demand services but it would be something of an anomaly as a definition of a programme service. A facility is a means by which one might access a service but it is not the service itself. A search engine, for example, is a facility. There is nothing in the AVMS Directive about an AVMS being a facility. Why not define it as a programme service?

It is not clear what useful purpose is served by defining an on-demand AVMS in terms of the provision of a facility instead of the provision of programmes. It appears to be inconsistent with both the AVMS Directive and the scheme of UK broadcasting law. If it is wrong it will mislead. But whether it is right or wrong the courts are likely to ignore it anyway.

This is not the only example of a questionable approach to transposition of the AVMS Directive.

Another example is the DCMS proposal to introduce the novel concept of a service being 'mediated' by a service provider exercising editorial responsibility, to which there is also no reference in the AVMS Directive. It may be more helpful to all concerned, stakeholders as well as lawyers, if UK national legislation copied out the definition in the AVMS Directive of an on-demand AVMS rather than inventing new concepts that do not have any counterpart in the AVMS Directive and may not accurately reflect its requirements. Guidance from government is welcome but it would be more useful in an explanatory memorandum or guidance notes with contemporary examples than buried in the complex and sometimes counter-intuitive provisions of the Communications Act.

The current DCMS consultation closed on 31 October and an announcement of the government's policy decisions and draft legislation is expected at the end of January, although this timetable may slip. Anyone with strong views might try sending them to avmsconsultation@culture.gsi.gov.uk notwithstanding that the consultation has formally closed.

Football Association Premier League Ltd & ors v QC Leisure & ors [2008] EWHC 1411(Ch)