

Revision of the Audiovisual Media Services Directive

EPHA Summary position (27 June 2016)

Context of the revision

The current revision is introduced in the context of the proliferation of non-communicable chronic diseases responsible for 86% of the mortality and 77% of the disease burden in the EU, representing approx. €700 billion in healthcare costs annually. Today, unhealthy diet is the single largest risk factor for the entire burden of premature death and disease in the EU. Harmful alcohol consumption is a leading health risk factor with wide societal impacts beyond the drinker.

Cardiovascular diseases remain the main causes of death in Europe with unhealthy diet as core contributor. Nearly a fifth of all cancers are diet or alcohol-related. Type-2 diabetes is increasing dramatically with major consequences for human well-being and health budgets. Overweight and obesity rates are higher than ever and still on the rise. Liver mortality could be greatly reduced by tackling alcohol overconsumption.

To date, no single country has demonstrably contained and reversed the high prevalence of childhood obesity reaching up to a third of the child population. Early onset of type-2 diabetes, youth binge drinking and the increased sales of sweetened alcoholic beverages attractive to minors are reasons for grave concern.

The causal relation between advertising and consumption patterns has been authoritatively established. Limiting the exposure of minors to advertising and marketing of products prejudicial to health and well-being have consistently featured as key components of recommended public health strategies, including those accepted by EU Member States in the framework of the WHO. Member States are furthermore legally bound by the International Convention on the Rights of the Child.

Public policy should be guided by measures that are effective and proportionate to the challenges they seek to address. There is insufficient evidence that self- and co-regulatory measures alone, outside a proper policy mix, are cost-effective and efficient at achieving clear results within ambitious time-frames, particularly when economic operators face competing interests. Apart from numerous studies pointing at the inadequacy of these approaches, so much was also acknowledged in the evaluation conducted for the Directive's revision.

Improvements in the new proposal

EPHA welcomes a number of notable improvements in the Commission proposal compared to the active version of the Directive:

- 1) Reducing the *exposure* of minors to commercial communications is now the stated aim of the Directive, mentioned both in recitals 10 and 11 and Article 9.
- 2) Article 4(7) introduces requirements that co- and self-regulatory codes of conduct must have clear objectives allowing for monitoring and evaluation and that non-compliance shall be subject to sanctions.
- 3) Article 28a includes video-sharing platforms into the scope of the Directive.
- 4) Articles 30 and 30a address the independence and functioning of regulatory authorities.
- 5) Recital 10 mentions the WHO Regional Office for Europe nutrient profile model which is specifically established for the purpose of assessing the suitability of food products for advertising.



Areas for further improvement

[additions in **bold**, deletions *italic*]

Legal basis

Strengthen the legal basis by inserting reference to Article 168 TFEU:

“Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1), 62 **and 168** thereof,”

Article 168 TFEU mandates that “*A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.*” Given the importance of the AVMSD to public health and the references to the protection of health in the Directive this provision is a necessary inclusion.

Recital 27

Clarify that the maximum harmonisation previewed by the provisions on video-sharing platforms apply only to content and that Member States can set stricter requirements on commercial communications, by inserting an additional sentence to Recital 27:

“As regards commercial communications on video-sharing platforms, they are already regulated by Directive 2005/29/EC of the European Parliament and of the Council, which prohibits unfair business-to-consumer commercial practices, including misleading and aggressive practices occurring in information society services. As regards commercial communications concerning tobacco and related products in video-sharing platforms, the existing prohibitions provided for in Directive 2003/33/EC of the European Parliament and of the Council, as well as the prohibitions applicable to communications concerning e-cigarettes and refill containers pursuant to Directive 2014/40/EU of the European Parliament and of the Council, ensure that consumers are sufficiently protected. The measures set out in this Directive therefore complement those set out in Directives 2005/29/EC, 2003/33/EC and 2014/40/EU. **With regard to commercial communications other than those referred to above, Member States remain free to set stricter rules in accordance with the minimum harmonisation principle of this Directive.**”

Article 4 (4)

Provide interpretation to the minimum harmonisation principle on which the Directive is based and further enable Member States to take stricter measures than those provided in the Directive on public health grounds.

Add a final sentence to Article 4 (4):

“The Commission will assess these measures in light of the EU’s obligation to ensure a high level of public health protection and take the best interest of minors as a primary consideration in its assessment of Member States’ measures”

Article 4 (7)

Strengthen regulatory potential by rephrasing first sentence of Article 4 (7):

“Without prejudice to the adoption of regulatory measures, Member States shall encourage co-regulation and self-regulation through codes of conduct adopted at national level in the fields coordinated by this Directive, (..)

In the current proposal co- and self-regulation are stressed as vehicles for reducing exposure of minors to harmful marketing. This focus should not prevent or overshadow Member States’ legitimate powers to adopt regulatory measures.



Article 9 (1) (c) (e)

Strengthen the protection of minors from harmful commercial communications by replacing Article 9 (1) (c) (e) with:

“(e) the exposure of minors to audiovisual commercial communications for alcoholic beverages shall be minimised.”

This formulation is more consistent with the aim of minimising the exposure of minors to harmful commercial communications. It recognises that exposure is the essential concern, not only whether a commercial communication is ‘*aimed specifically at minors*’ as in the current text.

Article 9 (1) (c) (g)

Strengthen the protection of minors from harmful commercial communications by adapting:

“(g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not *directly* exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, *directly* encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations, **or in attractive situations that are not linked to the nature of the product advertised.**”

Commercial communications may superimpose the product advertised on a certain atmosphere which has little or no connection to the nature of the product. Such advertising that aims to leave viewers with a positive feeling is likely to mislead them to believe that the product promoted has qualities that it does not have.

Article 9 (2)

Strengthen the protection of minors from harmful commercial communications by rephrasing the proposed Article 9(2):

“The exposure of minors to commercial communications of foods and beverages the excessive intakes of which in the overall diet are not recommended, in particular fat, trans-fatty acids, salt or sodium and sugars shall be minimised.

In light of this objective, no such commercial communications shall be broadcasted in the Union between 7:00 and 23:00.

Member States and the Commission shall encourage the development of self- and co-regulatory codes of conduct or introduce binding legislation to further minimise the exposure of minors to such commercial communications accompanying or included in programmes with particular appeal to minors.

The Commission and ERGA shall encourage the exchange of best practices on self- and co-regulatory systems across the Union. Where appropriate, the Commission shall facilitate the development of Union codes of conduct.

The WHO Regional Office for Europe's nutrient profile model shall be used as reference unless a higher level of protection can be achieved by another model, to be duly notified to the European Commission while substantiating the grounds on which this assessment is based.”

In accordance with Recital 10 and Article 9 itself, the Directive should aim at limiting the exposure of minors to unhealthy marketing. The current proposal lacks consistency between stated aim and proposed mechanisms. A more suitable policy mix is to introduce a watershed provision establishing an equal level playing field across Europe, with high legal certainty, high level of protection and probably relatively low transaction costs and pairing this regulatory mechanisms with co- and self-regulatory codes of conducts to limit exposure to harmful commercial communications not covered by the watershed.



While mentioned in Recital 10, the WHO Regional Office for Europe's nutrient profile model should be explicitly referenced as default model as it already exists, is Europe-wide and authoritative.

The proposed policy mix will better contribute to the aim of limiting exposure of minors and will furthermore support innovation as mentioned in the 17 June EU Council conclusions which call for greater efforts to promote food product reformulation throughout the EU. The Commission impact Assessment rightly questions the effectiveness of a watershed "*when the time is not well adapted*", evaluating watersheds until 9pm. In our proposal a watershed shall apply between 7am-11pm which has a far superior coverage and is aligned with the timing in Article 23.

Article 9 (3)

Strengthen the protection of minors from harmful commercial communications by rephrasing the proposed Article 9(3):

"The exposure of minors to commercial communications of alcoholic beverages shall be minimised.

In light of this objective, no such commercial communications shall be broadcasted in the Union between 7:00 and 23:00.

Member States and the Commission shall encourage the development of self- and co-regulatory codes of conduct or introduce binding legislation to further minimise the exposure of minors to such commercial communications accompanying or included in programmes with particular appeal to minors.

The Commission and ERGA shall encourage the exchange of best practices on self- and co-regulatory systems across the Union. Where appropriate, the Commission shall facilitate the development of Union codes of conduct."

Both article 9(2) are and 9(3) are in this way aligned and fully reflecting the aims of *effectively* minimising exposure of minors to harmful commercial communications.

Article 10 (2)

Strengthen the protection of minors from exposure to harmful commercial communications by extending the scope of Article 10 (2):

"Audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products, **alcoholic beverages and food and beverages barred from advertising according to the WHO Regional Office for Europe's nutrient profile model.**

The restrictions on sponsorship should extend beyond tobacco products adding alcoholic beverages and foods and beverages detracting from healthy diets.

Article 11 (4)

Exclude alcoholic beverages and food high in fat, sugar and salt from product placement by adding two sub-paragraphs to Article 11 (4):

"In any event programmes shall not contain product placement of:

(...)

(c) Alcoholic beverages

(d) Foods and beverages barred from advertising by the WHO Regional Office for Europe nutrient profile model"

The liberalisation of product placement should not result in products prejudicial to health to be featured in programmes.



Article 22

Improve criteria for the content of commercial communications for alcoholic beverages, by adapting following formulations in Article 22:

“Television advertising and teleshopping for alcoholic beverages shall comply with the following criteria:

- (a) it may not be *aimed specifically at attractive to minors*, or in particular, depict minors consuming these beverages.
- (b) it shall not link *the consumption of* alcohol to enhanced physical performance or to driving;
- (c) it shall not create the impression that *the consumption of* alcohol contributes towards social or sexual success;
- (d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
- (e) it shall not encourage *immoderate* consumption of alcohol or present abstinence or moderation in a negative light;”

Article 33

Request for a Commission report with proposals to address commercial communications on internet and social media by adding sentence to Article 33:

“No later than three years after adoption of this Directive the Commission shall draw up a report to the European Parliament, to the Council and to the European Economic and Social Committee with proposals to limit the exposure of minors to commercial communications of products prejudicial to health on the internet and social media.”

The AVMSD does not cover commercial communications placed on internet, social media and video-sharing platforms. These sources of marketing are however on the rise and ever more innovative and pervasive. The Commission should make an analysis of this quickly evolving landscape and make proposals to limit exposure of minors to commercial communications for products prejudicial to health.