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**АУДИОВИЗУАЛЬНЫЕ МЕДИЙНЫЕ УСЛУГИ ПО ТРЕБОВАНИЮ****AUDIOVISUAL MEDIA SERVICES ON DEMAND****А. Гжещёк-Хорош  
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Автор включается в дискуссию о конвергенции средств массовой информации. Широкое использование новых технологий для распространения аудиовизуального контента, побудило органы Европейского союза к тому, чтобы связанные с ними явления были заново определены директивой об аудиовизуальных медийных услугах, которая была введена в Польше законом об изменении законодательства о радиовещании и телевидении от 12 октября 2012 г. В статье обсуждены избранные постановления данной директивы и адаптированное к ней польское законодательство. По мнению автора, в будущем медийные услуги по требованию смогут частично заменить телевизионное вещание.

The author wishes to take a position in the discussion about media convergence, understood in two ways, in line with the views represented by H. Jenkins. The broader meaning of convergence refers to a situation in which different media systems coexist, and media content is transferred between these systems without obstacles, whereas in the narrower meaning the concept refers to technological, cultural and social changes in the methods of media circulation within culture; transfer of content between different media platforms and migrations of the audience of such media moving freely in search of the desired type of entertainment.<sup>50</sup>

Ключевые слова: линейные аудиовизуальные медийные услуги, нелинейные аудиовизуальные медийные услуги, приспособление законов, директива.

**1. Introduction**

Convergence of media involves blurring of the boundaries between sectors of “traditional” telecommunication, radio and television broadcast and computers.<sup>51</sup> In the literature of the subject, emphasis is put on the multi-dimensional character of the phenomenon of media convergence and its consequences, both for the media and for their audience. Convergence is the reason why –under the influence of expectations of a new type of reader, closer and closer attached to the Internet, and due to the new technological possibilities –publishers and broadcasters started to “operate” in the virtual environment. Convergence results in an almost explosive multiplication of the channels of transmission, as information is facilitated in all forms –by newspapers, magazines, radio, television and on-line transfer.<sup>52</sup>

The ever more frequent application of new technologies to proliferation of audiovisual contents induced the European Union authorities to introduce new principles governing the relevant phenomena. The Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)<sup>53</sup> amended the previous regime of audiovisual services laid down in the Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Television without Frontiers

<sup>50</sup>H. Jenkins, *Kultura konwergencji, zderzenie starych i nowych mediów*, Warszawa 2007, p.21 ff.

<sup>51</sup>J. Barta, R. Markiewicz, *Telewizja interaktywna a prawo autorskie*, Warszawa 2007, p.24.

<sup>52</sup>J. Kolodzy, *Convergencejournalism: Writing and Reporting cross the News Media*, Lanham 2006, p.3, cited after Z. Kantyka, *Konwergencja mediów a polityczna sfera życia społecznego*, (in:) *Konwergencja mediów masowych i jej skutki dla współczesnego dziennikarstwa*, Vol. 1, (eds.) Z. Oniszczyk, M. Wielopolska–Szymura, Katowice 2012, p. 103 ff.; Z. Bauer, *Dziennikarstwo wobec nowych mediów. Historia - teoria- praktyka*, Kraków 2009, p.21 ff. See also J. Kreft, *Problemy z konwergencją*, „Studia Medioznawcze” 2011, no. 3; T. Mielczarek, *Konwergencja polskich mediów. Próba analizy zjawiska* (in:) *Konwergencja mediów masowych i jej skutki dla współczesnego dziennikarstwa*, Vol. 1, (eds.) Z. Oniszczyk, M. Wielopolska –Szymura, Katowice 2012, p.76.

<sup>53</sup>OJ UE L 95 of 15 April 2010, p. 1 (hereinafter the “Directive”). For more, see: A. Matlak, *Dyrektywa o audiowizualnych usługach medialnych*, “Prace z prawa własności intelektualnej” 2010, vol. 108, p. 129 ff.; K. Chalubińska- Jentkiewicz, *Audiowizualne usługi medialne. Reglamentacja w warunkach konwergencji cyfrowej*, Warszawa 2013, p. 88 ff.



Directive),<sup>54</sup>regulating, *inter alia*, audiovisual media services provided on demand, that is the services subject to the present considerations.

The process of adaptation of Polish law to the requirements prescribed by the Audiovisual Media Services Directive was not entirely seamless. The UE legislator or dained to align the legislative frameworks of the Member States until 19 December 2010, and the first attempt to implement the Directive was abandoned at the parliamentary stage. Chapter 6a of the Radio and Television Act, entitled “Audiovisual media services on demand” was introduced in Polish law by the Act of 12 October 2012 amending the Radio and Television Act.<sup>55</sup>It entered into force as of 28 February 2013.

Nevertheless, it should be borne in mind that the provisions concerning on-demand services were finally adopted in a version which, as compared to the original draft, seriously mitigated there quirements and burdens imposed on service providers.<sup>56</sup>

The author’s scientific interest in so called non-linear media services on demand, which include, *inter alia*, video-on-demand,is justified by the fact that in future they may partly replace television broadcast. The present considerations are going to address selected provisions of the Audiovisual Services Directive and the Polish law adjusted to these rules – independence of the provider to design the content of the service, principles of identifying the service and its provider, terms of product placement, provision of contents harmful to children, obligation to promote European programs, regulation of prohibited contents and the terms of providing services to the disabled.

## 2. European law

The definition of an audiovisual media service on demand, alternatively referred to as non-linear audiovisual media service, has been included in Art.1(1)(g)of the Directive. The concept relates to an audiovisual media service, provided by a media services provider,enabling the user to view a program at the time chosen by himself and on his demand out of a catalogue of programs prepared by the media services provider.<sup>57</sup>

It should be pointed out that, in accordance with Recital 21,the regulation of the Directive covers such audiovisual media services which are classified as mass media services, which means that they are intended to be viewed by a considerable portion of the general public and could have significant impact of the viewers.

As laid down in Recital 24 of the directive, a characteristic feature of audiovisual media services on demand is that they assume a quasi-television form, which means that they are addressed to the same recipients as television broadcast, and that their character and the method of access gives the user the reasons to expect regulatory protection.

One consequence of the differences between linear and non-linear services available on demand is the differentiation between the regulatory obligations imposed on both these categories of services.In the environment of services on demand, the user has a wider degree of choice and more control, and lower impact on public opinion, which allows for less stringent minimum obligations imposed on non-linear services. As provided in Recital 58 of the Directive, this means that they should only comply with the basic principles laid down in that piece of EU legislation.<sup>58</sup>

The Directive introduces a two-tier approach to the regulation, differentiating between the obligations in respect to linear and non-linear services. The first-tier regulation refers to all media services, introducing a catalogue of basic standards, relating to the establishment of jurisdiction, consumer protection and respect of human dignity.

All types of media services are covered by, *inter alia*, the requirements presented in this paper with regard to provider identification, as envisaged in Art. 5of the Directive, contents prohibited in media services,laid down in Art. 6of the Directive,and by the inducement of the providers on the part of the

<sup>54</sup>OJ EC L 298 (17/10/1989), p. 23-30. For more, see: A. Matlak, *Międzynarodowe regulacje prawne dotyczące działalności telewizyjnej*, (in:) p. 82 ff.; E. Stasiak- Jazukiewicz, *Polityka medialna Unii Europejskiej*, Warszawa 2005, p. 15 ff.; P. Wiśniewski, *Wpływ prawa Unii Europejskiej na tworzenie prawa mediów w Polsce. Zagadnienia wybrane* (in:) *Praktyczne aspekty wolności wypowiedzi*, (eds.) W. Lis, W. Husak, Toruń 2011, p.178 ff.; I. Kawka, *Dyrektywy Unii Europejskiej w zakresie nowych mediów audiowizualnych* (in:) *Prawo, etyka czy rynek? Zmiany w polskich mediach od 1989 roku*, (eds.) K. Wolny - Zmorzyński, W. Furman, B. Nierenberg, J. Marszałek- Kawa, Toruń 2010, p.71 ff.;seealso M. Pęk, *Nowe podejście regulacyjne do usług audiowizualnych w prawie wspólnotowym – w świetle zmian wprowadzonych dyrektywą o audiowizualnych usługach medialnych*, „Analiza Biura KRRiT” 2007 no. 6, p. 2.

<sup>55</sup>DziennikUstaw 2012, item 1315, hereinafter the “amendment”.

<sup>56</sup>S. Piątek, (in:)W. Dziomdziora, S. Piątek, K. Wojciechowski, *Ustawa o radiofonii i telewizji.Komentarz*,(ed.) S. Piątek, Warszawa 2014, p. 455.

<sup>57</sup>K. Chałubińska- Jentkiewicz, *Audiowizualne usługi medialne...*,p. 92.

<sup>58</sup> A. Matlak,*Dyrektywa o audiowizualnych usługach medialnych*, p. 143; M. Pęk,*Nowe podejście regulacyjne do usług audiowizualnych .....*, p. 10.



Member States to ensure that the services provided by the former become gradually available to persons with visual or hearing disabilities, in pursuance of Art.7 of the Directive. The provision of Art. 9 of the Directive prohibits advertising tobacco products, alcohol, medical devices and procedures, and presenting advertising spots which might cause physical or emotional harm to minors. Article 10 refers to appropriate marking of sponsor communications, and Art.11—to product placement.

The second tier of the regulation sets more specific standards, which differ with regard to linear and non-linear services.<sup>59</sup> Among others, these are additional quality standards protecting minors and promoting European audiovisual works, as discussed in this paper.

### 3. Polish law

A new concept introduced by the discussed amendment was, in accordance with Art. 4(6)(a) of the Radio and Television Act, the notion of public facilitation of an audiovisual media service on demand, understood as its provision in a manner enabling users in general, at any time chosen by the users and at their request, to view a program selected out of the catalogue offered under the service.<sup>60</sup>

Pursuant to Art. 47(a) of the Radio and Television Act, the entity providing an audiovisual service on demand designs the catalogue of such programs independently. Designing of the catalogue consists in the selection of programs, decisions concerning removal of the programs or their sub-division within the catalogue into specific categories, for instance, thematic, genre- or performer-based, which are to make the user's choice of the desired content easier.<sup>61</sup> It also refers to the determination of order in which the programs are offered to users and of the terms of availability relating to specific programs, in respect of their price, technical conditions of broadcast or the method of transmission.<sup>62</sup>

Moreover, the commented provision envisages that the service provider has the editorial responsibility for any violations taking place in the course of broadcast of the programs.

It must be added that such scope of the service provider's liability does not stand in opposition with legal provisions on third party liability for the content of specific programs, advertisements or other communications, both under civil, administrative and criminal law. Those third parties, such as authors, performers or producers of specific programs are jointly responsible for the contents of the programs.<sup>63</sup>

According to the provision of Art. 47(b), imposition of the obligation or prohibition to make a specific program or communication available to the public on the provider of an audiovisual service on demand may be ordered only under a provision of statutory law.<sup>64</sup> The discussed rule complements the principle of independence mentioned above.<sup>65</sup>

Provisions of Art. 47(c) implement Art. 5 of the Directive, which requires providers of audiovisual media services to assure to service users an easy, direct and durable access at least to the information concerning the name of the provider, its address, contact details and the regulatory or supervising authority. National legislators were left the freedom as to the choice of methods which, in practice, are going to enable accomplishment of that goal.<sup>66</sup>

As provided in Art. 47(c), the entity providing an audiovisual media service on demand is obliged to ensure to its users an easy, direct and permanent access to the information allowing for identification of the service and the entity providing the audiovisual media service on demand, especially to the information about the name of the service; name or commercial name of the entity providing the service; address of its seat or contact details, including the mailing address, email and website. As can be seen from the wording of the cited provision, the scope of information subject to disclosure is open. In general, this information is to serve the purpose of identification of the service and the providing entity. Thanks to such information, users of the service learn about the media service provider, and, in the same way, whom to report or sue for a crime or violation of personal interests.<sup>67</sup> This easy access – already at the initial stage of the electronic contact with the service provider – should be evaluated from the perspective of a user having average knowledge and expertise in the area of media services on demand.<sup>68</sup> Direct access – offered by means of

<sup>59</sup> M. Pęk, *Nowe podejście regulacyjne do usług audiowizualnych* ..., p.11 ff.

<sup>60</sup> E. Czarny- Drożdziejko proposes to infer from this definition that the provider of services on demand may facilitate only programs. E. Czarny - Drożdziejko, *Ustawa o radiofonii i telewizji. Komentarz*, LexisNexis, Warszawa 2014, p. 463.

<sup>61</sup> S. Piątek, *Ustawa o radiofonii i telewizji*..., p. 455.

<sup>62</sup> Ibid.

<sup>63</sup> See E. Czarny - Drożdziejko, *Ustawa o radiofonii i telewizji*..., p. 462; S. Piątek, *Ustawa o radiofonii i telewizji*..., p. 456.

<sup>64</sup> This may refer not only to the discussed Radio and Television Act but also to the Press Law Act of 26 January 1984 (Dziennik Ustaw no. 5, item 24, as amended), the Authorship and Related Rights Act of 4 February 1994 (Dziennik Ustaw 2006, no. 90, item 631, as amended) or the Act of 23 April 1964 – Civil Code (Dziennik Ustaw 2014, item 121, as amended).

<sup>65</sup> See S. Piątek, *Ustawa o radiofonii i telewizji*..., p. 456 ff.; E. Czarny - Drożdziejko, *Ustawa o radiofonii i telewizji*..., p. 463.

<sup>66</sup> Szerz. zob. A. Matlak, *Dyrektywa o audiowizualnych usługach medialnych*, p. 135 ff.

<sup>67</sup> E. Czarny - Drożdziejko, *Ustawa o radiofonii i telewizji*..., p. 464; S. Piątek, *Ustawa o radiofonii i telewizji*..., p. 457 ff.

<sup>68</sup> S. Piątek, *Ustawa o radiofonii i telewizji*..., p. 458.



electronic communication – signifies that procurement of information must not be made dependent on the use of the provider's services. It has to be possible before viewing the catalogue of available programs.<sup>69</sup> Permanent access means that the information should be available at any time and at any request of an interested party.

This provision imposes the obligation on the entity providing an audiovisual media service on demand to provide information at the request of the National Radio and Television Council, as the authority competent in matters pertaining to audiovisual media services on demand, so that even a user residing in another Member State could know to whom to complain about the provider's activity.<sup>70</sup>

As set forth in Art. 47(d), it is admissible to place a product within a system of audiovisual media services on demand, however, this may not encroach on the autonomy and editorial independence of the entity providing audiovisual media services on demand, in particular by influencing the content or position of the program in the catalogue, and it does not release this entity from its responsibility for the content of the program.<sup>71</sup>

It seems worthwhile to indicate, as E. Czarny-Drożdżejko does,<sup>72</sup> the central character of the prohibition imposed on the entity placing a product to influence the program's position in the catalogue, which can be of special importance from the point of view of the protection of recipients against excessive commercial load.

The principles outlined above refer as well to sponsorship of programs within the services on demand. They are to serve the purpose of autonomy and editorial independence of the provider of audiovisual media services on demand. The provision of Art. 47(d) prohibits violations on the part of the entities which provide commercial communications involving product placement and sponsoring.

The provision of Art. 47(e) of the Radio and Television Act is intended to protect minors accessing audiovisual media services on demand, by implementing the respective provisions of the Directive. Recital 59 of the Directive prescribes that protection of the physical, intellectual and emotional development of minors is necessary in reference to all audiovisual media services. It is addressed by such measures as the usage of personal identification numbers (PIN codes), filtering or designating systems.<sup>73</sup>

It is prohibited to publically facilitate an audiovisual media service on demand whose catalogue includes programs or other communications posing a threat to the physical, intellectual or moral development of minors, in particular by presenting pornographic contents or displaying unjustified violence, without applying technical security or other pertinent measures aimed at the protection of minors from the impact of such contents.<sup>74</sup>

The solutions implemented in the Polish Act are similar to those adopted in Art. 12 of the Directive. The entity providing an audiovisual media service on demand, taking into consideration the extent of the harmfulness of a program to minors within specific age groups, is obliged to properly qualify and designate programs and other communications in a manner enabling the user to easily recognize the designation, both at the time of selecting the program and in its course. This is to assure security both to minors and persons who do not wish to view such contents.<sup>75</sup>

The provision of Art. 13 of the Directive obliges the Member States to promote – within the scope of the existing possibilities and in the pertinent manner – the production and distribution of European works through audiovisual media services on demand provided within the area of their jurisdiction, and, consequently, to actively contribute to the promotion of cultural diversity.<sup>76</sup>

Under Art. 47(f) of the Act, entities providing audiovisual media services on demand are obliged to promote European programs, including ones originally created in the Polish language. Among other elements, this promotion is to involve: proper designation of the origin of the programs available in the catalogue and provision of the opportunity to browse for European programs, including ones originally created in the Polish language, or publication of information and materials promoting European programs, including ones originally created in the Polish language.

The provision of Art. 47(f) subparagraph 2 prescribes obligatory participation of European programs in the catalogue of programs on demand, which means that the minimum percentage of 20% of all content of the provider's catalogue – calculated as the sum of the products of the overall and transmission length of the programs on the catalogue in a given calendar quarter – is to be reserved for European programs, including

<sup>69</sup>Ibid.

<sup>70</sup>E. Czarny - Drożdżejko, *Ustawa o radiofonii i telewizji*, p. 464.

<sup>71</sup>E. Czarny - Drożdżejko, *Ustawa o radiofonii i telewizji*..., p. 465.

<sup>72</sup>E. Czarny - Drożdżejko, *Ustawa o radiofonii i telewizji*..., p. 465.

<sup>73</sup>A. Matlak, *Dyrektywa o audiowizualnych usługach medialnych*, p. 143.

<sup>74</sup>E. Czarny-Drożdżejko, *Ustawa o radiofonii i telewizji*..., p. 466; S. Piątek, *Ustawa o radiofonii i telewizji*..., p. 462 ff.

<sup>75</sup>A. Matlak, *Dyrektywa o audiowizualnych usługach medialnych*, s. 143 i nast.; zob. także E. Czarny-Drożdżejko, *Ustawa o radiofonii i telewizji*..., p. 468.

<sup>76</sup>I. Kawka, *Dyrektywy Unii Europejskiej w zakresie nowych mediów audiowizualnych*..., p. 77; A. Matlak, *Dyrektywa o audiowizualnych usługach medialnych*, p. 143 ff.



ones originally created in the Polish language.<sup>77</sup> These programs are to be appropriately displayed in the catalogue.<sup>78</sup>

The provision of Art. 47(h) of the Act provides that the programs provided within audiovisual media services on demand may not include contents which incite hatred or prove discriminatory based on race, disability, sex, confession or nationality. Article 6 of the Directive requires that audiovisual media services provided by the providers of media services subject to the jurisdiction of the Member States may not include any contents inciting hatred based on race, sex, confession or nationality. As can be seen, Polish law proves more stringent than European legislation in the discussed area.<sup>79</sup>

The provision of Art. 47(g) has been formulated as a postulate. It envisages that the entities providing audiovisual media services on demand should strive for the gradual increase in the availability of the provided programs to the disabled with the dysfunction of the organs of sight and hearing – by introducing appropriate facilities, such as audio description, subtitles and interpretation into sign language.<sup>80</sup> The commented provision implements Recital of 46 of the Directive, pursuant to which the right of the disabled and the elderly to integration and participation in social and cultural life of the Union is inseparably connected with the provision of available audiovisual media services. In addition, this implements the objectives of Art. 7 of the Directive under which the Member States are to encourage providers of media services to make sure that their services become gradually available to persons with sight or hearing disabilities.

It should be also indicated that any violation of the obligations and prohibitions mentioned in Art. 47(a), (b), (c), (d), (e), (f), (h) leads to the imposition of a fine by the President of the National Radio and Television Council (hereinafter referred to as the KRRiT) in a decision delivered under Art. 53(c) subparagraph 1. Maintenance of a program which violates the prohibitions discussed above may result in another decision imposing a penalty.<sup>81</sup>

Moreover, entities providing audiovisual media services on demand are obliged to annually submit to the KRRiT – until 31 March of the following year – reports on the performance of obligations aimed at the protection of minors and promotion of European programs. This reporting duty is intended to enable the KRRiT to monitor the execution of major obligations imposed on the providers of such services.<sup>82</sup> Such report should be composed of three parts and contain: the details of the entity and the method of public provision of the audiovisual media service on demand; description of the types of technical security or other appropriate measures aimed at the protection of minors from the access which are actually applied by a specific provider; and the description of the methods of promotion of European programs (designation, browsing possibilities, promotional materials), including ones originally created in the Polish language, used by a given provider, including the share of such programs in the quantitative and time dimensions.<sup>83</sup>

#### 4. Summary

Convergence has set new challenges for media policies. One of such challenges was to regulate the increasingly popular media services on demand. The standard broadcast of television programs, where the viewer is dependent on the contents composed and transmitted by the broadcaster at a given time, is, to an ever growing degree, supplemented or even replaced by interactive communications in which it is the viewer to decide what programs are to be made available to him at any specific moment. Thanks to the convergence, understood as mutual approaching of the traditional television technology and the IT and telecommunication sectors, the offer of audiovisual broadcast is widening, which is favoured by ever newer technical solutions.

In summary of the above considerations relating to audiovisual media services in Polish law, it should be pointed out that Polish legislation is perfectly conforming with the standards laid down in the Audiovisual Services Directive. There are no formal requirements pertaining to the commencement of business activity covering provision of services on demand. Moreover, in line with the principle of technological neutrality, recipients should be ensured the basic scope of protection regardless of the method of provision of audiovisual contents. Services on demand may be provided over the Internet, cable networks, digital platforms or in any other way, e.g. over mobile networks. In any of the above cases,

<sup>77</sup> E. Czarny - Drożdziejko, *Ustawa o radiofonii i telewizji...*, p. 473 ff.; S. Piątek, *Ustawa o radiofonii i telewizji...*, p. 469.

<sup>78</sup> Ibid.

<sup>79</sup> E. Czarny - Drożdziejko, *Ustawa o radiofonii i telewizji...*, p. 476 ff. Zob. także S. Piątek, *Ustawa o radiofonii i telewizji...*, p. 470.

<sup>80</sup> Szerz. E. Czarny - Drożdziejko, *Ustawa o radiofonii i telewizji...*, p. 475 ff.; S. Piątek, *Ustawa o radiofonii i telewizji...*, p. 469.

<sup>81</sup> More on the penalties in: E. Czarny - Drożdziejko, *Ustawa o radiofonii i telewizji...*, p. 502 ff.; S. Piątek, *Ustawa o radiofonii i telewizji...*, p. 490 ff.

<sup>82</sup> S. Piątek, *Ustawa o radiofonii i telewizji...*, p. 472.

<sup>83</sup> See E. Czarny - Drożdziejko, *Ustawa o radiofonii i telewizji...*, p. 481 ff.



protection afforded to the viewer should be the same. Bearing in mind the specific character of audiovisual services on demand, especially their opinion-forming character, it is essential that users know precisely who is responsible for the content of the provided services. In addition, attention has been paid – in connection with new platforms and products – to the problem of access to contents harmful to minors. As a result, it was found necessary to introduce provisions intended to protect the development of minors. The provision on the protection of minors against contents which are harmful to them and on the promotion of European works pertains exclusively to media services on demand.

The enacted amendment must be evaluated positively. However, one should make sure that excessive regulation, adopted in the name of consumer protection, does not actually turn against the consumer, quelling the freedom of expression and media pluralism, as well as competition among various providers of media services.