

# PROTECTION OF MINORS AGAINST THE NEGATIVE INFLUENCE OF AUDIOVISUAL COMMUNICATIONS AS A CHALLENGE TO LAW IN THE LIGHT OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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## **Abstract**

*It is not merely parents or guardians that should lavish attention on minors, but also all institutions of public life, in particular state institutions. The area where the need to protect the child should be particularly advocated is the area of media broadcasting. The Audiovisual Media Services Directive of the European Parliament and of the Council addresses the issue of protecting minors from the negative impact of such communications. This problem is highlighted as a vital component of the European Union regulatory policy in the audiovisual sector, which needs, now and in the future, to safeguard certain public interests, including the protection of minors, and raising public awareness and media literacy in general. The directive supplies standards of protection that member states should implement by enacting appropriate legislation. Considering the aforesaid, they pose a challenge to laws and legislators in member states.*

**Keywords:** *minors, institutions of public life, Audiovisual Media Services Directive of the European Parliament.*

## **I. Introduction**

Protection of minors against the negative influence of audiovisual communication is one of many issues addressed in the Audiovisual Media Services Directive.<sup>1</sup> In the said directive, the European Parliament and the Council of the European Union recognize standards already developed in this field by the existing legislation. They also stress that the regulatory policy in the audiovisual sector must, presently and prospectively, safeguard certain public interests, including, inter alia, the protection of minors, and elevating public awareness and media literacy.<sup>2</sup>

To have a better understanding of the issue in question, two concepts must be defined in the first place: "minor" and "audiovisual communication". The concept of a minor, used in civil law, means a person who has not reached majority.<sup>3</sup> A synonymous concept to be found in other legal acts is that of the child. The child is the subject of investigation of many scientific disciplines, particularly psychology, sociology and

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<sup>1</sup> Directive 2010/13/EU of the European Parliament and of 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) - OJ L 95, 15.4.2010, hereafter "the Audiovisual Directive"

<sup>2</sup> Cf. Point 12 of the Audiovisual Directive.

<sup>3</sup> Cf. The Act of 23 April 1964 - the Civil Code (Journal of Laws 1964, No. 16, item 93 as amended).

pedagogy. Law considers the child as the subject of legal protection. According to the definitions furnished by legal sciences, a child is a person in a specific age range. Under Polish law, it is assumed that a child is every human being from conception to the age of majority.<sup>4</sup> A similar definition was adopted by the United Nations General Assembly, including Poland, in the 20 November 1989 Convention on the Rights of the Child; according to this act, a child means every human being below the age of eighteen, unless under a law applicable to that child, majority is attained earlier.<sup>5</sup> These definitions correspond to the category of a minor.<sup>6</sup>

The other concept that needs to be defined is audiovisual communication. The authors of the Audiovisual Directive have adopted the following definition of audiovisual: "moving images with or without sound, thus including silent films but not covering audio transmission or radio services."<sup>7</sup> The media transmissions that meet the above characteristics should therefore be considered audiovisual communications. When analysing the problems in question, it is worth considering the origin of the limitations of audiovisual communications intended for minors.

## **II The origin of the limitations of audiovisual communications intended for minors**

The authors of the directive point to the specific character of media services as the underlying cause and justification for placing restrictions on audiovisual communication addressed to minors. According to the document, "The availability of harmful content in audiovisual media services is a concern for legislators, the media industry and parents. There will also be new challenges, especially in connection with new platforms and new products. Rules protecting the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including audiovisual commercial communications, are therefore necessary."<sup>8</sup> These risks are also highlighted in a number of legal acts and in the literature on the subject. The fact that media transmissions can have an adverse impact on the child ensues from two main reasons. First, the nature and character of media transmissions and, second, the nature of the child, which determines the way of child's perceiving and defining the reality, including the reality generated by the media.

First, attention should be paid to the social significance of the mass media and their powerful impact on the public. The world of today sees the increasing importance and value of information. Information became a commodity, often more valuable than goods traditionally classified as wealth. The growing importance of the media is intertwined with the increasing importance of the functions attributed to them, for example, the function of informing (which stems from the said growing importance of information), interpreting, exerting cultural influence, educating and entertaining. Globalization of the media reinforces their mighty influence, which lies for example in the fact that, owing to the development of new advanced technologies, the media are no longer confined to operate within one country, or continent, but they broadcast across the world. From the moment of

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<sup>4</sup> Article 2(1) of the Act of 6 January 2000 on the Ombudsman for Children (Journal of Laws 2000, No. 6, item 69).

<sup>5</sup> Convention on the Rights of the Child dated 20 November 1989 (Journal of Laws 1991, No. 120, item 526 as amended), hereafter referred to as ConRiChi, Article 1; it is worth noting that in the adopted definition, the Convention does not specify "the beginning of a human being," indicating only the upper age limit of being a child.

<sup>6</sup> By accepting the content of legal definitions, it should be pointed out that the child is not a homogeneous category - both a two-year-old and a fourteen-year-old will be so categorized, yet in practice, it is obvious that the level of development of these two is in principle completely different.

<sup>7</sup> Point 23 of the Audiovisual Directive.

<sup>8</sup> Point 59 of the Audiovisual Directive.

making a decision to transfer information to the time it reaches the public takes merely few seconds, or a few minutes at best. The nature of information has changed dramatically - the volume of broadcast information has grown, and its content has become a commodity.<sup>9</sup> Likewise, access to information, including education, culture and entertainment has evolved - in order to obtain them, one does not need to leave home, or we need to devote less and less time to reach them. Time and space have adopted a completely new shape and with the new information technologies they merged in an inseparable whole. Therefore, the role of the media is increasing, not only in culture, but also in the broader sphere of social life, and the media are considered to be the creators of the public sphere. This phenomenon is referred to as "mediatisation of societies".<sup>10</sup> A specifically overwhelming impact is attributed to the electronic media, mainly television, radio and the Internet. It arises from the immediate transfer of information and the ability to simultaneously broadcast video and sound to the wider public.<sup>11</sup> For years now, this awareness has accompanied the teams of individuals for whom the media are sole working tools. Already several years ago, in a study conducted in Poland on a representative random sample (1013 persons), assuming a statistical error of +/- 3% and the reliability estimated at 95% showed that 87% of the surveyed admit that television influences beliefs, habits and moral stance of people,<sup>12</sup> including children and adolescents. The corollary of this state of affairs is the development of the so-called "media consciousness", i.e. a situation in which the perception of oneself and the surrounding world is based solely on what has been provided by the media. The existence of such consciousness has been proven by sociologists who, when inquired Poles about the sources of information and knowledge about the world, received a response at 70-80% indicating that it came from the television.<sup>13</sup> This data testifies to the fact that the media are a powerful force shaping social consciousness, which should be used for socially desirable purposes; in this domain, taking into account the impact of the media on children, there should be concern for the correct development of the child, considered as a unique entity of social life and a unique social value. This justifies the need to regulate this sphere by the legislator.

Another reason justifying the need for restrictions aimed to protect the child against the negative influence of media transmission lies in the very nature of the child. Due to being at a certain stage of development and consciousness, a child requires special treatment.<sup>14</sup> The level of child's development determines the manner of receiving and defining the surrounding reality, including the media reality, and this reception and definition of reality is radically different from the perception of an adult. Therefore, not all content may be addressed to children. A child is an extremely sensitive recipient of the media transmission and is usually unable to reasonably assess the inbound information. Children's gullibility often reinforces the media communication materially. Under the influence of such transmissions, the child moulds its imagination, and often takes specific

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<sup>9</sup> Cf. Keane, J. (1992). *The Media and Democracy*, London, pp. 65-66.

<sup>10</sup> Cf. Szwed, R. (2003). "Mediatyzacja społeczeństw," In: *Spoleczeństwo wirtualne. Spoleczeństwo informacyjne*, Szwed, R., ed., Lublin, p.12.

<sup>11</sup> Cf. Rivers, W.L., Mathews, C. (1988). *Ethics for the Media*, Englewood Cliffs, p. 169

<sup>12</sup> Reykowska-Cybulko, M. (1998). "Polacy o wpływie telewizji," In: *Aktualności Telewizyjne*, 7, p. 112; also Niedziałek, J. (1997). "Oddziaływanie TVP S.A. na młodzież," In: *Aktualności Telewizyjne*, 1, pp. 104-113; Sobczak, J. (1995). "Wartości w programach TVP," In: *Aktualności Telewizyjne*, 7, p. 93--98.

<sup>13</sup> Cf. Sellin, "Media elektroniczne," In: *Spoleczeństwo...*, p. 29.

<sup>14</sup> As stated in the preamble of the ConRiChi "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."

action that should help its development, but often represents a threat to its health or life.<sup>15</sup> The colourful world of the media becomes so ubiquitous in the child's life that its guardians fail to notice that in addition to all the positive aspects of the media broadcast sometimes they pose a real danger and threat. No doubt, this also justifies the need for the legal protection of children against the negative effects of media transmissions.<sup>16</sup>

### **III The provisions of the directive on the protection of minors and the level of legal protection provided in Poland**

The European legislator registers the need for such protection. According to the directive, member states will take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programs that involve pornography or gratuitous violence.<sup>17</sup> Moreover, these measures also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.<sup>18</sup> When such programmes are broadcast in unencoded form, member states will ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.<sup>19</sup>

As required by the directive, member states will also take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction, which might seriously impair the physical, mental or moral development of minors, are only made available in such a way as to ensure that minors will not normally hear or see such on-demand services.<sup>20</sup> Finally, the authors of the directive are aware that the source of negative impact on minors may be advertising, and therefore provide restrictions also for this type of transmission. In accordance with the provisions of the directive, audiovisual commercial communications must not cause physical or moral harm to minors. Therefore they may 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.<sup>21</sup>

That standard of protection should be ultimately implemented by member states. The question then arises how that protection is guaranteed in Poland. The analysis of the binding regulation, which relate to audiovisual<sup>22</sup> activity leads to the conclusion that many

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<sup>15</sup> It is worth recalling the case of a child who after watching the *Batman* movie asked its parents for the main hero's costume and jumped from a building because it was convinced that having the right dress it could fly like the film's main protagonist.

<sup>16</sup> Extensively on the impact of media transmission on the child in: Dyczewski, L. (2005). *Rodzina, dziecko, media*, Lublin; Bogunia-Borowska, M. (2006). *Dziecko w świecie mediów i konsumpcji*, Kraków; Izdebska, J., Sosnowski, T. (2005). *Dziecko i media elektroniczne – nowy wymiar dzieciństwa* (vol. 1), Białystok; Goban – Klas, T. (2005). *Cywilizacja medialna*, Warszawa.

<sup>17</sup> Article 27(1) of the Audiovisual Directive.

<sup>18</sup> Cf. Article 27(2) of the Audiovisual Directive.

<sup>19</sup> Article 27(3) of the Audiovisual Directive.

<sup>20</sup> Article 12 of the Audiovisual Directive.

<sup>21</sup> Article 9(1)(h) of the Audiovisual Directive.

<sup>22</sup> The most important of them are the European Convention on Transfrontier Television of 5 May 1989 (Journal of Laws 1995, No. 32, item 160 as amended), hereafter as "ECTT"; The Act of 29 December 1992 on radio and television broadcasting (Journal of Laws 2004, No. 253, item 2531 as amended), hereafter "RTB" and follow-up regulations.

of these requirements are already met in Poland. The legal protection of children against the negative effects of media transmissions is implemented through the introduction of legal constraints, which can be divided into substantive and formal restrictions. The former safeguards the child against the content of media transmissions, the latter against a specific form of the media transmission.

Often it is the television broadcast that has a negative impact on the child. Among the substantive restrictions regarding the protection of children from the negative impact of such broadcast there are:

1. the obligation to respect human dignity and fundamental rights of others in the broadcast content;<sup>23</sup>
2. prohibition of the broadcast of transmission that threaten the physical, mental or moral development of minors, in particular containing pornographic content or exposing gratuitous violence;<sup>24</sup>
3. prohibition of promotion by the media transmissions of unlawful activities, including those contrary to the Polish *raison d'etat* and the attitudes and beliefs contrary to morality and social good, in particular those considered discriminatory in terms of race, sex or nationality;<sup>25</sup>
4. the obligation of language correctness and countering its vulgarization;<sup>26</sup>
5. the obligation of reliability and integrity of advertising communications.<sup>27</sup>

Additionally, the public broadcaster is obliged to mind the content of programs so that they exhibit responsibility for the spoken word and serve the promotion of culture, science and education, respect the Christian system of values, foster the strengthening of the family, develop pro-health attitudes and combat social pathologies.<sup>28</sup>

These rules and regulations also apply to television broadcasts provided on the Internet.

The other categories of restrictions intended for the protection of the child under current legislation are formal restrictions. With regard to television broadcasting these are:

1. the prohibition of broadcasting between 6:00 and 23:00 of transmissions that could have a negative impact on the healthy development of minors;<sup>29</sup> (other than strictly prohibited)
2. the requirement to label media transmissions with a suitable graphic symbol throughout the whole duration of a television broadcast;<sup>30</sup>

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<sup>23</sup> Article 7(1) of the ECTT

<sup>24</sup> Cf. Article 18(4) of the RTB

<sup>25</sup> Cf. Article 18(1) of the RTB

<sup>26</sup> Cf. Article 18(7) of the RTB

<sup>27</sup> Cf. Article 16b(3) of the RTB, Article 16b(2) of the RTB; Article 16(1)(3) of the Act of 16 April 1993 on combating unfair competition (Journal of Laws 2003, No. 11, item 1928 as amended), Cf. Article 16b(1) of the RTB, among others: tobacco and spirits to the extent permitted by specific provisions; the prohibited advertisement is that violating human dignity or threatening physical, mental or moral development of minors; being an incitement of minors to purchase products; encouraging minors to exert pressure on parents or others in order to induce them to purchase; using minors' trust that they put in their parents, teachers and others, unreasonably showing minors in dangerous situations; referring to the credulity of children or their feelings by inducing fear or superstition (non-factual advertising), and misleading. Restrictions are also imposed on the advertising of certain categories of goods, particularly tobacco and spirits.

<sup>28</sup> Cf. Article 21(2)(a) of the RTB

<sup>29</sup> Cf. Article 7(2) of the ECTT, Article 18(5)(5a) of the RTB

<sup>30</sup> Cf. Article 18(5b) of the RTB, and specifically: Regulation of the National Broadcasting Council of 23 June 2005 concerning the classification of programs or other broadcasts that might have an adverse impact upon a healthy physical, mental or moral development of minors and programs or other broadcasts intended for a

3. the requirement to respect the formal limitations on advertisements: a time limit of advertising (an advertisement may not occupy more than 15% of the daily broadcast time, and advertising and teleshopping may not occupy more than 20% of a one-hour period); the requirement to label advertisements in way clearly determining their nature and isolate from them form the whole of the program service by optical and/or audio announcements (such designation should contain the word "advertising" or "ad" in it);<sup>31</sup> the requirement to broadcast advertisements in blocks;<sup>32</sup> the prohibition of interrupting programs for children with ads if their scheduled duration is less than thirty minutes;<sup>33</sup> the prohibition of use in advertising of the voice or image of persons who host programs for children, both on the radio and television, less than three months before the advertisement;<sup>34</sup> the prohibition of use of surreptitious advertising,<sup>35</sup> including subliminal advertising (acting on subconsciousness).<sup>36</sup>

The examination of these provisions leads to the conclusion that the declared level of legal protection in Poland is satisfactory. Still, the compliance to these regulations leaves much to be desired. The program monitoring reaffirms that some broadcasters manipulate the qualification for certain age groups by lowering the age of viewers who can watch a specific program without any harm. This gives rise to the practice of "sneaking" programs and other communications in broadcasts that may have an adverse impact on minors until they are protected. There are also grounds to assert that the National Broadcasting Council (NBC) seems reluctant in enforcing their powers to prevent such a condition.<sup>37</sup> It should be emphasized, however, that this body endeavours to arrange for media education. It is also a response to the demands of the directive, since the role of media education, as part of social education in a civil society, has been clearly highlighted in this act.<sup>38</sup>

#### **IV Concluding remarks**

The provisions of the Audiovisual Media Services Directive set the standards for the protection of minors from the negative influence of audiovisual communications. Member states are required to meet these standards by the transposition of the directive. The analysis of Polish legislation reveals that the protection of minors in this regard is appropriate at the declaratory level. Yet, these provisions do not always live up to standards in practice, which should certainly signal a challenge to state authorities and all other entities responsible for the proper development of minors.

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given age group of minors, use of graphic symbols and forms of announcements (Journal of Laws 2005, No. 130, item 1089).

<sup>31</sup> Cf. Article 4(2) of the Regulation of the National Broadcasting Council of 3 June 2004 concerning principles of advertising and teleshopping in radio and television program services (Journal of laws 2004, No. 148, item 1565), hereafter "AdvertR".

<sup>32</sup> Cf. Article 12 and 13 of the ECTT

<sup>33</sup> If their scheduled duration is thirty minutes or more, general rules apply; cf. Article 14 of the ECTT (the program may be interrupted only once during each 45-minute period). A further interruption is allowed if the program lasts at least 20 minutes longer than two or more full 45-minute periods; the time between consecutive advertisement and teleshopping breaks may not be less than 20 minutes)

<sup>34</sup> Article 6 of the AdvertR.

<sup>35</sup> Cf. Article 13(2) of the ECTT, Article 16c of the RTB

<sup>36</sup> Cf. Article 13(2) of the ECTT, Article 16b(2)(5a) of the RTB

<sup>37</sup> For more, see: Jaskuła, L. (2008). "Prawna ochrona dziecka przed negatywnym wpływem przekazów medialnych," In: *Ochrona dziecka w prawie publicznym*, Parchomiuk, J., eds., Lublin; Jaskuła, L. (2010). "Działania Krajowej Rady Radiofonii i Telewizji na rzecz ochrony małoletnich odbiorców przed negatywnym wpływem przekazów medialnych," In: *Przegląd dyscyplin badawczych pokrewnych nauce prawa i postępowania administracyjnego*, Wrzosek, S., ed., Lublin.

<sup>38</sup> Point 47 of the Audiovisual Directive.

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