



**Expert Seminar on
“The European Convention on Transfrontier Television
in an Evolving Broadcasting Environment”**

Strasbourg, 6 December 2001

* * *

“What Future for Broadcasting in the Digital Era?”

**Report by Professor Bernd HOLZNAGEL
Institute for Information, Telecommunications and Media Law (ITM)
(Germany)**

A. Broadcasting in the Era of Convergence: The previous debate

I. The Green Paper on convergence and its options for regulation

The future of the media is digital. The European Commission dealt thoroughly with the legal implications of convergence in its “Green Paper” of November 1997, without however taking a standpoint or final decision on the issues at stake. The Green Paper basically mentioned two alternative options: maintaining the vertical regulatory model for broadcasting services and telecommunications— eventually also for the new services – and successively adapting/modernising the existing laws as needed (first option). Or, introducing a new and uniform regulatory model immediately or very soon (second option).

The Green Paper on convergence was extensively discussed at the Birminghamkonferenz in 1998. The Oreja report (*Report from the High Level Group on Audiovisual Policy*, http://europa.eu.int/comm/avpolicy/legis/key_doc/hlg_en.htm) as well as the Policy paper of 1999 (*Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age, 14.12.1999*) presented the main findings. Discussions have led to broad agreement on some important questions of broadcasting regulation. The broad agreement refers to the future basic structure of a digital media order, the central objectives of content regulation as well as the regulatory principles to be applied today. The discussion then did not focus in detail on the regulatory instruments to be used. Now, in the context of the upcoming amendment of the “Television without Frontiers” directive and the European Convention on Transfrontier Television, an intense discussion on these open questions is taking place. Before I focus however on the problem of an adequate choice of regulatory instruments, it is necessary to point out the agreement reached so far as regards regulatory objectives and principles. The choice of instruments of course depends on the answer to these preliminary questions.

II. Future media regulation: Agreement reached so far

1. The core points of a digital media order

Therefore, to start, one must underline the core points of a digital media order or for the regulation of electronic communications:

1. There must be a distinction between transport and content regulation. Transport regulation concerns the transportation of information and data; content regulation formulates requirements on the transported services.

2. With regard to network regulation, a horizontal approach should be taken. The trend of convergence of networks and terminals affects in this respect the transportation level. The same principles must determine the regulation of conditional access, regardless of whether telecommunications, broadcasting or other services are transferred via the networks. This horizontal regulatory approach has already entered the new draft EU directives in the telecommunications area.

3. As regards content regulation, the regulatory approach must be subtly differentiated according to the various services, rather than standardized. So the trend of convergence does not lead to a standardisation here. Rather, this regulatory approach takes into account that

digitalisation and interactive communication lead to the development and appearance of new services on the market. At present it is, however, open how many categories of services have to be developed and which content standards should be applied to these.

4. At present, media supervision varies across Europe and tasks are distributed among a variety of authorities. Standardization and concentration of supervisory structures therefore seems appropriate in times of convergence. The American FCC, the Italian ACCOM AG and the proposed OFCOM in the UK are examples of bringing telecommunications and broadcasting under one roof.

5. Public service broadcasting should play a special role also in times of digitalisation. Its remit has to be brought into line with the new challenges. Meanwhile, the extent of its activities in the Internet area is under dispute.

6. Establishing a stable regulatory framework in an environment of rapid development entails further reflection in the role that self-regulation can play as a complement to the regulatory frameworks established by public authorities (co-regulation)

2. Regulatory aims

Since the European Convention on Transfrontier Television only refers to content regulation, I want to confine myself in this area to the latter. There is broad agreement as regards the regulatory aims here. In particular these are:

- safeguarding of pluralism/diversity,
- promotion of cultural and linguistic diversity,
- protection of minors,
- right of reply,
- consumer protection, especially with regard to advertising and sponsorship.

These objectives also essentially characterise the discussion at the national level. As a further aim one should perhaps name the free flow of information and free circulation of services. It is interesting that there has not been any fundamental questioning of these aims within the last few years.

3. Regulatory principles

Generally speaking, there is also agreement on the main regulatory principles which in turn determine the choice of instruments.

These five general principles for regulatory action are that regulation should be:

1. Based on clearly defined policy objectives;
2. Be the minimum necessary to meet those objectives (principle of proportionality);
3. Further enhance legal certainty in a dynamic market;
4. Aim to be technologically neutral; and,
5. Be enforced as closely as possible to the activities being regulated.

III. The open question: Which regulatory instruments for which services?

1. Regulatory standards for broadcasting services

Taking a look at the regulatory instruments, one notices that their selection is made differently for different services. To be able to lead the instrument discussion adequately, it is of advantage if we make clear to ourselves briefly the instruments used for the different services. Let us start with broadcasting.

As is well known, the highest regulatory standards apply to broadcasting services. The reason for this is the assumption that broadcasting has great potential to influence public opinion. Broadcasting power in the hands of a few can strongly influence the formation of public opinion and correspondingly result in perils for the democratic order. When choosing instruments, the legislator had in mind traditional TV programmes. Let me give you a summary of the instruments applied:

1. Aim: Pluralism:
 - licensing
 - measures to secure plurality of opinion
 - programme standards
 - listed events
 - right to short reporting
 - access rights for political parties and citizens
2. Aim: Safeguarding of cultural and linguistic identity:
 - broadcasting time quotas for European and national programmes
 - quotas in favour of independent producers
 - investment quotas (partly)
3. Aim: Protection of children and young people:
 - prohibited broadcasts
 - scheduling/time restrictions
 - identification of broadcasts liable to corrupt the young
 - commissioners for the protection of young persons
 - special requirements on announcements of programmes
4. Aim: Right to personal privacy:
 - right of reply
 - right to complain
5. Aim: Consumer protection, especially regulation of advertising and sponsoring
 - advertising restrictions concerning special products or activities
 - protective regulations on advertising addressed to minors
 - restrictions on political, ideological and religious advertising
 - restriction on insertion of advertising
 - separation and identification of advertising

- insertion of advertising in blocks and between programmes
- interruption restrictions
- temporal restrictions
- new advertising forms, particularly sponsorship.

Within the last few years, doubts have arisen whether this arsenal of instruments are still up-to-date. Many have criticised advertising regulation as being too complicated, and as regards content, not being adequate any more. Moreover, it has been argued that regulatory differences between broadcasting and the new services are too big and in practice no longer feasible. Let us now take a look at the next category of services: information society services, which the e-commerce-directive now introduces Europe-wide.

2. Regulatory standards for information society services

Information Society Services, generally regarded as being synonymous with the term “new media services”, are defined as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.

It is striking that none of the traditional media-specific standards apply to these services under the e-commerce-directive. Meanwhile, there are a number of new obligations, for example, regulations on the identification of providers or the liability of communication mediators, the so-called service providers. However, this does not mean that primarily as regards the protection of minors, consumer protection or the right to personal privacy there are no legal requirements: general legislation on the protection of children and young people and criminal law are applicable. At the European level, harmonisation with this directive is only limited, though. From the perspective of broadcasting it is striking that the e-commerce-directive applies to a number of services which are traditionally attached to the broadcasting sector (at least in the Federal Republic of Germany), for example: video-on-demand services as well as Internet broadcasting, that is, television programmes which are distributed over the Internet. It is obvious that this regulation leads to contradictions with recognised regulatory principles such as the principle of technological neutrality, and therefore urgently requires a revision. Furthermore, maintaining the present classification of the Internet as a medium of individual communication is being questioned in the face of rapid technical developments in the area of digital media. I will come back to this point when I try to develop ideas for a European legal framework.

3. Regulatory standards for multimedia services or broadcasting services of a second order

Broadcasting services and information society services are two contrasting poles. Already at first sight it can be recognised that there are a number of services for which the regulatory standards of broadcasting are too high, but on the other hand, for which the standards for the information society service are too low. I am talking for instance of teleshopping services, different forms of online press or specialised TV programmes which go beyond the traditional model of a TV programme. The latter are services whose public opinion-making potential is not regarded as being high enough to impose on them broadcasting-level regulations. On the other hand, these services are not comparable to simple e-commerce services as they do have a potential to influence public opinion. If you think of the regulation of the press it becomes apparent what I mean by this: there are some minimum standards concerning the protection of third parties and the safeguarding of pluralism, but which are far below the standards of the broadcasting sector. The reason – among others – for this situation is the assumption that text

based media have a lower influencing and suggestive potential. Bearing this in mind, the identification of new categories of services and corresponding adequate standards is not astonishing. The Federal Republic of Germany has taken a certain forerunner role in this field. German media law mentions the so-called multimedia services which are defined as follows:

According to Article § 2 I Interstate Media Services Agreement, multimedia services are information and communication services for the general public of all kinds of speech, sound and picture, using electromagnetic oscillations without junction lines or along or by means of a conductor.

Like conventional broadcasting services, multimedia services are also addressed to the general public. Based on facts, it can be noticed that such services even fulfil the conventional concept of broadcasting as developed by the Federal Constitutional Court. Nevertheless, a lower level of regulation is applied to multimedia services, that is, different instruments apply. In detail, the regulatory instruments conceived for multimedia services look as follows:

1. Aim: Pluralism

In contrast to conventional broadcasting, multimedia services must neither be licensed nor registered. Furthermore, no regulations as regards the right to short reporting, the prevention of information monopolies or quotas are to be found for these services. Pluralistic programme standards, as for broadcasting, do not exist. News-type multimedia services, however, are subject to journalistic obligations of exercising due care.

2. Aim: Safeguarding of cultural and linguistic identity:

The Interstate Media Services Agreement does not contain regulations for the promotion of the production and distribution of content of European origin. Taking into account the global nature of these media, such a regulation would be absurd anyway.

3. Aim: Protection of children and young people

The obligations in the area of the protection of children and young people almost correspond to those applied to classical broadcasting.

4. Aim: Right to personal privacy

The Interstate Media Services Agreement provides for the right of reply at least as regards journalistic-editorial designed offers.

5. Aim: Consumer protection, advertising/sponsoring

Advertising regulations often depend on the existence of certain programme schemes or other structural conditions that cannot be found in the area of Internet television. Correspondingly, there are no regulations in the Interstate Media Services Agreement concerning the insertion or duration of advertising. On the other hand, there are protective regulations for advertising addressed to minors as well as an obligation of separation and identification. The more severe regulations of conventional broadcasting partly apply to teleshopping offers and sponsorship.

4. Preliminary result

Please let me draw the following conclusion with regard to the instrument discussion. Regarding content regulation it is sensible to differentiate between various services. At present, particularly high obligations apply to broadcasting services, whereas particularly low standards apply to information society services. However, a range of new services can be identified to which neither the high requests of broadcasting nor the low requests of information society services are adequate. Accordingly, the problem arises how these new services are to be defined and which instruments should be applied to them. We have seen that the Federal Republic of Germany introduced multimedia services as a third category. A lower level of regulation applies to them. Which consequences can now be drawn from these results for European broadcast regulation?

B. Consequences for European broadcasting law

I. The separation of regulation for television services and information society services should be maintained

In principle, it is sensible to limit European regulations to television. Radio is strongly formed at the regional or even local levels and as a rule not cross-border. Therefore, there is no need for minimum harmonization at the European level. Furthermore, it does not appear to be adequate to regulate information society services more severely than up until now.

II. Expansion of the definition of television services

Contradictory classifications would result if new forms of audio-visual services or television services were subject to the regulatory standards of information society services. Video-on-demand offers, interactive television services or Internet broadcasting services are part of these new forms of "audiovisual service", and, according to the principle of technological-neutrality, the same standards as for "normal" television services should apply to these. The crucial criterion is their potential to influence public opinion making. The latter is the essential reason for broadcasting traditionally being subject to a particular regulation. The purely technically oriented definition of point-to-multipoint takes into account this fact insufficiently. Literally applied, this concept would qualify all the World Wide Web as a "television service". However, there is no sense in subjecting single web sites to licensing or to apply traditional broadcasting instruments to these. The crucial legal criterion for the demarcation should therefore be that television services are aimed to the general public.

The term "television service" could replace the term "television programme" in Article 1a of the "Television without Frontiers" directive and in Article 2 of the European Convention on Transfrontier Television. The definition of "television services" could read as follows: "the distribution of television services to the general public by first transmission or on demand, by electronic means, regardless of the way of distribution"¹. The definition would include the transmission to other broadcasters for retransmission to the general public. Not included would be other communications services which transmit information or other services on individual demand, like faxing services, electronic databases or similar services. Video-on-demand services, Internet broadcasting services or also traditional free or pay TV channels

¹ In its paper *Draft preliminary positions on the revision of the "Television without Frontiers" Directive* the EBU provides an alternative definition for *audiovisual media services*: "**Provision of audiovisual content to the public by electronic means**", either simultaneously or on demand. One possible definition of *audiovisual* could be "all moving images and/or sound, whether live or recorded".

would be included in such a definition. In addition, such a definition would be in line with the initiative of the European Parliament expressed in the Third Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 89/552/EEC “Television without Frontiers” of 04.10.2001, giving the example of webcasting over the Internet or video-streaming as services that in the future should be included under the “Television without Frontiers” directive.

III. Forming further sub-categories of television services

As already mentioned, it will not make sense to apply the same content standards to all television services. At present, it is not yet foreseeable how many categories of services will normally develop and how individual service features will be determined. However, it seems to me that the German regulations in the Interstate Media Services Agreement can set an example. Here, the category of multimedia services is introduced, and lower standards apply as compared to traditional television. Accordingly, I would like to plead for defining one (or more) multimedia service(s) or television service(s) of second (or minor) order at the European level which would then be subject to lower requests as regards content. Naturally, defining these category(ies) of services in detail is difficult.

The European legislator could, however, take the general definition of the multimedia service as a model and develop a catalogue of examples. Should difficulties concerning the categorisation of a service occur in practice, catalogues/examples of services could be prepared which would make a definite categorisation possible. In addition, one might consider using some quantitative criteria, such as a given market share, in the definition.

One could even consider a more sophisticated classification approach like the one recently presented in Germany by the Hans-Bredow-Institute: they suggest the formation of five different classes of services and a corresponding graduated approach to regulation that takes into account the failure, real or potential, to reach the regulatory objectives mentioned above.

IV. Changing the regulatory standards for television services

Concerning traditional broadcasting services, it must be discussed whether the standards applied are still up-to-date. Especially, the sophisticated advertising regulations can be questioned. It has been suggested to dispose of advertising time limits and to leave it to the spectator to decide to what extent he wants to consume commercials. Pursuing such a deregulatory approach one has to take into account, however, whether such a measure does not excessively weaken the second pillar of the dual broadcasting system, the public service broadcasters. If this were not the case, it appears as absolutely adequate to rely more strongly on general consumer and economic law for the regulation of advertising. Nevertheless, effective regulations which protect children and teenagers from the exploitation of their inexperience and credulity, should also be guaranteed in the future.

Furthermore, the question arises whether a European Convention should include a number of regulations which are characteristic in the broadcasting legislation of member States. I think of the anti-concentration rules here. Furthermore, it should be discussed whether the cross-border free flow of information might not be limited excessively with the use of set top boxes, which restrict the broadcasting offers to national areas. The protection of intellectual property rights may support such a practice, but the use of such new digital technology results in a considerable factual restriction in the flow of information. Technology threatens to take up

more of the freedom of information than it has the right to. Possible countermeasures could be discussed in detail later.

V. Lower regulatory standards for new television or multimedia services

It is difficult to fix the obligations of television services of a second category in detail. A general consensus might be found on the point that these services should not be subject to licensing. The latter decision, however, lies within the regulatory scope of member States. Much also points to the fact that scheduling/time restrictions aimed at the protection of minors or quotas do not suit well these new services, as mentioned above. As far as on-demand services are concerned, it is doubtful whether the traditional right of reply does not become an empty provision. Before an agreement is found at the European level on these points, one should closely examine the experience with corresponding rules in the Federal Republic of Germany as regards multimedia services. Bearing in mind the incalculable number of channels, the necessity for regulations concerning the promotion of linguistic and cultural identity can at least be questioned too.

VI. Prospects for a horizontal regulatory approach as regards content regulation

Once such a matrix is drawn up, that is, once the categories of services are defined and assigned a corresponding level of regulation, there is room for considering whether there should be general requirements, for instance on the protection of minors or the right to personal privacy, which would apply to all services. Such general standards could then be a primary regulatory framework and labelled as “generally applicable requirements”. Especially with regard to problems of the protection of minors one should examine to what extent a pan-European co-regulatory approach could be beneficial: digital technology offers the possibility of applications which can filter content that might endanger the development of our children. Assuming such filters proved their effectiveness in practice, regulatory control on programming schedules in the form of transmission time restrictions could be reduced.

All these questions raised can finally be answered, only, however, based on a detailed analysis. I am therefore very curious about the following lecturers who will analyse, for example, to what extent the regulations on advertising or the protection of minors are still adequate for traditional broadcasting or which regulatory standards should apply to the new services. Thank you for your attention.