

2013-3

# Converged Media: Same Content, Different Laws?

## LEAD ARTICLE

### **Convergent Devices, Platforms and Services for Audiovisual Media**

*Challenges set by connected TV  
for the EU legislative framework*

- Introduction
- Regulatory approaches in EU law
- Summary

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# Converged Media: Same Content, Different Laws?



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In memoriam of Karol Jakubowicz † 28 April 2013

## Foreword

Convergence is no longer a future vision but can be experienced in the here and now. At least, this is true for those among us who possess a smart TV and manage to use its full technical potential. At the same time, media professionals never tire of pointing to the fact (and to supporting surveys) that for users traditional television still ranks high or even highest among the different media. Television screens are therefore one likely place for linear and non-linear audiovisual media services to meet. Thanks to the advanced technology employed they can in parallel function as an interface for other communication and information services. This turns television screens into a prime testing ground for consumers who wish to explore combined offers of formerly clearly distinct media and information services. Television screens are therefore also the place where consumers will learn whether or not the current legal framework takes care of their expectations regarding the protection of their interests.

When revising the then key EU legal instrument for television, the Television without Frontiers Directive, EU member states sought to level the playing field for comparable services. In other words, by consequently adopting the Audiovisual Media Services Directive (AVMSD) they aimed to avoid the rocky roads that offering broadcasting and on-demand audiovisual media services on one platform but under entirely different legal regimes might have implied. This has naturally led to today's discussion of whether or not this goal has been achieved. And irrespective of how one positions oneself on this question, the increasing options for offering audiovisual media services simultaneously with other communication and information services beg the further question as to whether (other) uneven roads still stretch before us.

This IRIS *plus* informs about where and to what extent linear and non-linear audiovisual media services are indeed subject to different rules. It also explores the potential gap that might exist between their legal regimes and that applicable to services which remain outside the scope of the AVMSD. To this end, the Lead Article examines the Directive's provisions on commercial communication and on the protection of minors and extrapolates in what way the AVMSD treats linear and non-linear audiovisual media services differently. Furthermore, it explains the extent to which these differences are leveled out by other European rules that back up the Directive and that apply to the broad range of all media and information services. The main focus of the Lead Article is the regulation of commercial communication given that many aspects of youth protection were already dealt with by IRIS *plus* 2012-6 "Protection of Minors and Audiovisual Content On-demand".

The fact that in a converged media environment different laws may apply to the same content on the same screen is not only of concern to consumers, who depending on the type of service used may experience variations in the level of protection of their interests. It is

equally relevant to the industry whose services though deploying the same content might have to respect different legal standards. And it is potentially important for policies by which states privilege certain content for the benefit of the general public. In the past, operators offering public service broadcasting enjoyed favourable conditions concerning frequency use, financing issues or must-carry rights, to mention only a few. At the same time, they were put under special obligations to ensure the quality and availability of public service content. In Europe, countries largely agree that the need to make public service content available persists in a converged environment and that it should also be accessible on mobile and via interactive services. But what does this plead for a transformation of public service broadcaster into public service media mean for specific rules that so far attach only to public service broadcasting? This question is picked up by the Zoom section which addresses some of the relevant regulatory issues concerning public service media that are currently being discussed for a connected environment and that might lead to further nuances in the overall regulatory framework of converged media.

The Related Reporting section links the Lead Article and the Zoom together in as much as it gives more background information on recent policy developments and regulation of converged media and on specific challenges that have emerged for public service media.

This IRIS *plus* is dedicated to Karol Jakubowicz, one of the great minds that the audiovisual sector in Europe had the chance to experience. Convergence and public service content were topics on which he consistently worked, generating awareness and providing valuable, often refreshingly unconventional guidance. He supported the work of the Observatory with occasional contributions to our legal publications as well as to some of our public events, but most of all he conveyed our common belief that transparency is important not only for the audiovisual sector but also for our democracies. We will miss him.

Strasbourg, June 2013

**Susanne Nikoltchev**

*IRIS Coordinator*

*Head of the Department for Legal Information  
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# Convergent Devices, Platforms and Services for Audiovisual Media

## Challenges Set by Connected TV for the EU Legislative Framework

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Institute of European Media Law (EMR)*

### **1. Introduction**

Understanding technology, how it works and what it can do is a challenge in itself for the average layman (and often for lawyers too, unless they are specially trained). Describing technology using words alone, without the help of diagrams, is usually tricky, if not impossible, particularly as it is often useful to illustrate what viewers would see on their screens in different situations. Nevertheless, that is exactly what this article sets out to achieve in relation to the modern generation of Internet-capable receivers that were initially called hybrid TVs or smart TVs, but have recently also become known as connected TVs or convergent devices.

Anyone who was invited simply to imagine seeing on a large (TV) screen in their lounge what they were already used to viewing on their smartphone or tablet computer would have every right to ask: "Which bits exactly?" After all, there are so many different things to see, depending on what the device is being used for and the selected function. We therefore need to adopt a different approach.

#### **1.1. Connected TV – a technical definition**

"Connectivity", in the context of this article, means the way in which devices connect to the Internet. A smart/connected TV is therefore primarily a device that receives television signals via traditional broadcast distribution methods (terrestrial, cable or satellite) but which can also access the Internet. This can be achieved either through a network adapter built in to the TV set itself to connect it to either a wired (LAN) or wireless (WLAN) Internet network, or by connecting a peripheral device (set-top box, games console, Blu-ray player) that contains such an adapter to the TV.<sup>1</sup>

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1) For more detail, see Olivier Hermanns/Peter Matzneller, "Whose Boots Are Made for Walking? – Regulation of On-demand Audiovisual Services", Workshop Report, in: Susanne Nikoltchev (ed.), *The Regulation of On-demand Audiovisual Services: Chaos or Coherence?*, European Audiovisual Observatory, Strasbourg 2011, pp. 8 *et seq.*

This is where the convergence of platforms for the distribution of and access to audiovisual and other information and communications services is evident. This convergence is also illustrated by the fact that smartphones or tablets, for example, are not only equipped with mobile broadband Internet access, but can also – sometimes with the aid of a small mobile adapter – receive terrestrial broadcasts such as television based on the DVB-T standard. These so-called “smart devices” can also show audiovisual content distributed via IPTV, at least within the area covered by a wireless home network (WLAN).<sup>2</sup> Internet content that can be received on such devices can also be transmitted to a TV screen using a wireless transmission interface (WLAN or Bluetooth).

There is therefore a particularly high level of convergence between television and services distributed via the Internet. They can both be accessed via a single device, which is usually located in people’s living rooms, and can be used simultaneously or in a complementary manner.<sup>3</sup>

The Hybrid Broadcast Broadband Television standard (HbbTV), which is now widely used in Europe, is specifically designed to support this link between television and content that may be either part of or separate from the programme being broadcast.<sup>4</sup> As well as the television signal, it delivers navigation information about additional services and enables the viewer to access these services via the Internet: if a symbol appears in one corner of the TV screen, pressing the red button on the remote control reveals information about the current programme.<sup>5</sup> HbbTV often provides access to modern video text, much more sophisticated electronic programme guides and/or the broadcaster’s video library. As well as this new feature, the technology can be used in connection with commercial communication. For example, an advertising spot may be used as a springboard to specially created websites containing product-related information provided by the manufacturer or service provider concerned; or users may be taken directly to a sales platform through which they can book a holiday.

Convergent devices can be controlled with a remote control, which may be similar to a TV remote control with some additional function buttons, or with another device, such as a smartphone or tablet equipped with the relevant apps (applications). The latest generation of connected TVs, however, can also be voice- or gesture-controlled. Users can therefore switch from one menu page to another or actually select a service without having to touch (or swipe) the screen, as they do with smartphones, for example.

## 1.2. Connected TV – presentation of functions

From the perspective of device manufacturers, platform operators, content and service providers and users, connected TV is much more than just a new way of presenting or enriching traditional television content. The most important difference compared to what viewers have become used to

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2) See European Audiovisual Observatory (ed.), *Yearbook 2012, Volume 1, Introduction to Germany*, Strasbourg 2013, p. 69.

3) It is mainly the potential of this technology that is under discussion here: although market penetration (the adoption of connected TVs as the basic household device) is increasing at a considerable rate, the technology is still being used relatively little. This is true of both the actual connection of convergent devices to the Internet and practical usage of most of the available functions. See the European Commission Green Paper “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”, COM(2013) 231 final, 24 April 2013, p. 3; Martin Culot, “Télévision connectée: Représentations et usages du public de la Fédération Wallonie-Bruxelles”, [http://csa.be/system/documents\\_files/1963/original/MCulot\\_20130108\\_Synth%C3%A8se\\_rapport\\_usages\\_TV\\_connect%C3%A9e3.pdf?1357816545](http://csa.be/system/documents_files/1963/original/MCulot_20130108_Synth%C3%A8se_rapport_usages_TV_connect%C3%A9e3.pdf?1357816545)

4) The standardisation process was completed with the publication by the European Telecommunications Standards Institute (ETSI) in June 2010 (ETSI TS 102 796); current version 1.2.1, published on 13 November 2012, [http://webapp.etsi.org/workProgram/Report\\_WorkItem.asp?wki\\_id=39272](http://webapp.etsi.org/workProgram/Report_WorkItem.asp?wki_id=39272). According to media reports, version 1.5 is being introduced in the Netherlands (as well as France and Spain), see [www.broadbandtvnews.com/2013/03/28/dutc-h-hbbtv-forum-adopts-hbbtv-1-5/](http://www.broadbandtvnews.com/2013/03/28/dutc-h-hbbtv-forum-adopts-hbbtv-1-5/)

5) See Michael Wagner, “Hybrides Fernsehen und das Europäische Medienrecht”, in: Kleist, T./Roßnagel, A./Scheuer, A., *Europäisches und nationales Medienrecht im Dialog*, volume 40 in the series published by the Institute of European Media Law (EMR), Baden-Baden 2010, pp. 325 *et seq.*

over the last five decades sometimes becomes apparent as soon as the device is switched on.<sup>6</sup> The user may not be “greeted” by the most recently watched TV channel, but by a user interface in which – depending on the default setting fixed by the manufacturer or the preference expressed by the user – only one window is used to show the content of a linear programme.

The range of possible home screen designs is extremely varied, and they change from one generation of connected TVs to the next. The crucial factor is that choosing television content is only one of numerous ways in which viewers can access audiovisual media on these screens. From the user interface, they can also select other portals that may provide access to on-demand audiovisual media, social media, the user’s own photos and videos either stored locally or downloaded from the cloud, or other apps. The home screen usually contains a number of icons, via which applications “recommended” by the manufacturer or selected by the user can be directly accessed without the need to switch to one of the submenus first. These include Internet access, which is unrestricted on many manufacturers’ devices, taking the user directly to the “open” WWW. There is often also at least one (third-party) electronic programme guide (EPG), which lists current and future programmes and provides a variety of additional information, sometimes with the option of recording onto an integrated or external hard disk. Finally, at least one search engine is often provided in order to look for suitable content from all or many of the listed access services.<sup>7</sup>

### 1.3. Convergent devices, platforms and services – the practical implications

The device manufacturer can influence the design of the user interface (home screen), as well as that of the portals for the aforementioned service categories. In general, a service, such as an app used by a publisher to distribute the “smart” version of a popular daily newspaper, can only be included if it meets the technical specifications that are laid down by, and compliance with which is controlled by, the manufacturer. However, even on screens that are becoming ever larger, the amount of available space is finite, which means that many services cannot be featured directly and will therefore not be noticed.

Nevertheless, the problems linked to connected TV do not end with the battle for space on the screen. Some of the key changes are as follows:

- *Multiplication and decentralisation*: while users can enjoy numerous additional ways of accessing (traditional) audiovisual and other content, television companies are losing their exclusive position as providers of the content that they typically select and make available. Content can be sourced not only from (professional) providers but, theoretically, from any kind of platform that aggregates services, including those that do not provide services themselves (such as collections of links to catch-up TV websites or broadcasters’ video libraries).
- *Loosening of the connection between television broadcasters and “their” content*: firstly, linear services based on a fixed programme schedule are gradually being replaced by video on demand (VoD) services. Secondly, rightsholders and exploiting parties (producers or VoD providers) can offer users their own content directly and charge them for it. Thirdly, the assembling of certain content by other providers (e.g. an app that offers access to crime films shown in France in the 1950s and 1960s) calls into question the broadcasters’ role as aggregators. It is becoming harder to develop a “broadcaster’s brand” as a means of identification.
- *Extension of the “television experience” to other media genres*: broadcasters are increasingly turning to the strategy of using viewers’ familiarity with their brands to position themselves in relation to new types of service. These include social networking sites devoted to an individual programme, for example, or specialist channels on platforms with user-generated content. Viewers can interact

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6) For reasons of contrast, this slightly simplified description deliberately masks the fact that, in the past, cable network operators, for example, have used similar portals, mainly when offering digital television via set-top boxes operated by the user.

7) [www.businessinsider.com/samsung-smart-tv-price-and-availability-2013-3#oid=xmd3NiYTre4mBSfN0xMYor83CDNSi2SV](http://www.businessinsider.com/samsung-smart-tv-price-and-availability-2013-3#oid=xmd3NiYTre4mBSfN0xMYor83CDNSi2SV)

(live) with a programme and with fellow viewers (so-called “social TV”, the most common type of service in which smart devices are used as second screens). The boost in interest in programme content thus achieved through new media is, in turn, supposed to increase or revive interest in the original audiovisual service. However, broadcasters must be careful to keep television channels as their (main) point of contact with users, so that they can direct them from there to their other media services. Here, a balancing act must be performed, since it is important to develop a sufficiently universal broadcasting concept that is attractive to the whole population, regardless of age and technical expertise, and which satisfies viewers’ desire to interact as well as to consume television passively for the purpose of relaxation (as a “lean-back” medium).

- *Specialisation or differentiation of content and use:* after the rapid increase in special-interest channels, particularly following the launch of pay-TV and the digitisation of television, the trend towards more specialised audiovisual, communications and information services is continuing. The flood of new services is making it increasingly difficult to find specific content if it is distributed as part of a TV company’s programming, and to find individual channels among the wide range of services available.
- *New competitive relationships:* more and more providers (including non-commercial ones) are competing for users’ attention with a whole variety of services. The use of other services in parallel to television and the (temporary) abandonment of television services can reduce television’s exclusivity and attractiveness for the advertising industry and thereby create funding problems. At the same time, other players are developing services that accompany or are linked to TV programmes in particular, in order to divert users’ attention away from television towards their own services. It is not currently clear whether the TV broadcasters will be able to replace lost programme sales income with additional revenue from commercial communication in their accompanying or new (on-demand) services.
- *Algorithms as programme makers:* the important role that TV broadcasters used to play in devising a menu from available content in order to please viewers is losing at least some of its relevance. On the one hand, users are becoming increasingly active in selecting the content that interests them, while on the other, technical aids to search for content are becoming more important. Algorithms used by search engines or that generate recommendations from users’ viewing habits are increasingly being used to steer viewers towards media content.
- *Market participation of “new” players:* the aforementioned role of device manufacturers involves more than simply making new technologies available. By placing their portals and app menus between the content and the user, manufacturers are entering the value chain themselves. Advertisers can therefore place commercial communications directly there – instead of with a television broadcaster as intermediary.
- *Hybrid forms of individual communication and mass media:* convergent devices are not only able to make available the content of “professional” providers or what is generally considered to be mass-media content in the sense of a “one-to-many” communication model. A variety of user-generated services and individual communication platforms are also available. The distinction is becoming increasingly blurred, since social networks, for example, can be used in such a way that they take on mass-media characteristics themselves, particularly since they are extremely open and can include external content.
- *Over the top (OTT) and therefore out of reach?* The Internet opens up access to the local media market for providers based outside the country in which the user lives, even outside Europe itself. These markets are not necessarily considered as being established in Europe. It is largely unclear how European regulations can respond to this challenge.

## 2. Regulatory approaches in EU law

The aforementioned functionality of convergent devices and the tendency towards change that goes hand in hand with the availability and use of both traditional and new services accessible via

those devices raise questions about the future suitability of the current EU legislative framework. In this article, we can only consider a few of the numerous themes that users, providers, regulatory authorities, representative bodies and politicians might consider relevant. We will concentrate on provisions concerning the protection of minors and advertising in media services, examining whether there are any imbalances in the level of regulation applicable to the various services. This is followed by an overview of questions related to technical infrastructure.

## 2.1. Regulation of service content and advertising

The functions that connected TV offers users mean that convergent devices, platforms and services are likely to have the following significant characteristics in future: since the (mostly audiovisual) content that is distributed via traditional television broadcasting methods is being combined with all kinds of information and communications services available on the Internet, including audiovisual services, different types of content are increasingly being presented on screens simultaneously.

Under the relevant EU legislative framework, the rules governing these content services either vary depending on the type of service or, in the case of certain services, are not to be considered binding. This is illustrated by the provisions on the protection of minors in the media. As far as advertising regulations are concerned, the legal situation is more complex and cannot simply be differentiated according to service type.

### 2.1.1. Protection of minors in audiovisual media and other information and communications services

A recent edition of this IRIS *plus* series looked closely at the various aspects of the protection of minors from harmful audiovisual content.<sup>8</sup> It noted that, on the one hand, the Audiovisual Media Services Directive<sup>9</sup> contained different provisions for linear audiovisual media services (television) and non-linear audiovisual media services (on-demand services). On the other, there are virtually no binding EU regulations for services not covered by the AVMSD. A service that does not meet all the criteria of an audiovisual media service as defined in the Directive, or whose provider is not subject to the jurisdiction of an EU member state, remains unregulated, since the Directive does not apply.<sup>10</sup> However, such services<sup>11</sup> may be subject to co- and/or self-regulatory initiatives, the content of which is set out and, in some cases, monitored through recommendations, aid programmes and measures jointly agreed by market players and the European Commission.<sup>12</sup>

Below we will explain, using an example, the substantive provisions that may but do not necessarily apply, depending on the type of (audiovisual) service. We will then refer to the technical tools that can play an important role in protecting minors in this area.

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8) See Alexander Scheuer/Cristina Bachmeier, "The Protection of Minors in the Case of New (Non-Linear) Media – European Legal Rules and their National Transposition and Application" in: Susanne Nikoltchev (ed.), *Protection of Minors and Audiovisual Content On-demand*, IRIS *plus* 2012-6, European Audiovisual Observatory, Strasbourg 2012, pp. 11 *et seq.*, 28 *et seq.*, 43 *et seq.*

9) 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) (codified version), OJ EU L 95/1 of 15 April 2010 ("AVMSD").

10) See Article 2(2) *et seq.* AVMSD and Articles 2(c) and 3(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ EC L 178/1 of 17 July 2000 ("E-Commerce Directive").

11) In this article, "communications and information services" primarily means the so-called "information society services" that are regulated by the E-Commerce Directive. They are defined in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ EC L 204/37 of 21 July 1998, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ EC L 217/18 of 5 August 1998. It defines a "service" as "any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services" (Article 1(2) of the Directive).

12) See Alexander Scheuer, "Additional Youth Protection Measures in the European Union – Filters, Children's Networks, Media Literacy" in: Susanne Nikoltchev (ed.), *Protection of Minors and Audiovisual Content On-demand*, *op. cit.* (footnote 8), pp. 45 *et seq.*

Content which might seriously impair the development of minors, such as programmes that involve **pornography**, may not be shown on television (Article 27(1) AVMSD). However, under Article 12 AVMSD, such content may be provided by on-demand audiovisual media services as long as steps are taken to ensure that minors will not normally be able to hear or see it. In order to prevent children and young people accessing such content, so-called age verification systems are frequently used. Based on standards drawn up in numerous member states, these systems are used along with certain technical measures whose suitability has been evaluated (positively or negatively) by national media regulators. Neither the AVMSD nor the E-Commerce Directive places comparable restrictions on services that provide such content but that are not audiovisual media services in the sense of the AVMSD.

As far as the possible uses of convergent devices are concerned, this means:

- the part of the screen that contains the television picture must not show content that might seriously impair the development of minors. If it contained pornography, for example, it would breach the AVMSD and the national regulations adopted to implement it;
- pornography may be shown in another part of the screen that is used to show the content of an audiovisual media service accessed independently by the user, as long as reliable checks have been carried out to ensure that the viewer is an adult. If no such checks have taken place, or if the protection mechanism created for this purpose is inadequate, the corresponding provisions of the Directive and of the member state's domestic law will also have been breached;
- another part of the screen, set aside for content that does not meet the criteria of an audiovisual media service, can be used to show pornographic content. For example, this could be content from a provider based outside the EU that has been found on the Internet using a search engine and downloaded.

It seems doubtful whether most users would consider the resulting, extremely varied levels of protection afforded to children and young people who use convergent devices to be either comprehensible or even desirable. However, they can use the technical solutions integrated in Internet access software (browsers) that provide for age-appropriate access and/or filter out content that is harmful to the development of minors. With connected TV, the use of such technical solutions, as well as responsibility for content selection, therefore lies with parents and guardians. It is not (primarily) the service providers' responsibility, unless they provide audiovisual content that falls under the scope of the AVMSD.

#### *2.1.2. Regulation of advertising in services accessible on convergent devices*

As regards advertising in audiovisual media services, here also the AVMSD itself already contains a tiered regulatory regime in terms of both quantitative and qualitative provisions on audiovisual commercial communication. There are also a few qualitative measures in the E-Commerce Directive, although the Unfair Commercial Practices Directive<sup>13</sup> and other sector-specific legislation are more relevant to the numerous information and communications services that can be accessed via the Internet.

##### a) Quantitative and qualitative advertising rules for audiovisual media services

The AVMSD's *quantitative advertising rules*, i.e. those limiting the amount of television advertising and teleshopping and governing how they should be incorporated in programming, only apply to linear audiovisual media services. They stipulate that:

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13) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ EC L 149/22 of 11 May 2005, as amended in OJ EC L 253/18 of 25 September 2009 ("UCP Directive").

- the proportion of television advertising and teleshopping spots within a given hour must not exceed 20% (Art. 23(1) AVMSD);
- the transmission of films made for television, cinematographic works and news programmes may only be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes. The same applies during children's programmes, provided that the scheduled duration of the programme is greater than 30 minutes. No television advertising or teleshopping may be inserted during religious services (Art. 20(2) AVMSD);
- teleshopping windows must be of a minimum uninterrupted duration of 15 minutes (Art. 24 AVMSD).

In its *qualitative advertising provisions*, the AVMSD frequently distinguishes between television services on the one hand and on-demand audiovisual media services on the other. This is illustrated by the following examples:

- whereas, in both linear and non-linear services, any kind of audiovisual commercial communications (i.e. including sponsorship and product placement) must be **recognisable** as such (Art. 9(1)(a) AVMSD), television advertising and teleshopping must also be **distinguishable** from editorial content (Art. 19(1) AVMSD);
- audiovisual commercial communications for **alcoholic beverages** that are transmitted in or in connection with an on-demand service must not be aimed specifically at minors or encourage immoderate consumption of such beverages (Art. 9(1)(e) AVMSD). A series of additional, more detailed rules apply to television advertising and teleshopping (Art. 22 AVMSD);
- on television, teleshopping for **medicinal products** that are subject to a marketing authorisation and for **medical treatment** is prohibited (Art. 21 AVMSD). However, Article 9(1)(f) AVMSD, which applies to all kinds of audiovisual commercial communication and all audiovisual media services, "merely" prohibits teleshopping for products and treatments only available on prescription.

As regards audiovisual media services regulated by the AVMSD, it is therefore clear that the possibility of using audiovisual commercial communication depends on what type of service is being offered and used. If the user watches a film from a VoD catalogue on a convergent device, the level of protection is lower than if the same film appears on a television broadcasting schedule. This is true of both the qualitative advertising rules and, to a greater extent, the quantitative rules that apply to linear services only.

#### b) Examples of qualitative, product-specific advertising rules for electronic information and communications services

As we have seen, there are quantitative advertising rules<sup>14</sup> for television only, while other media are not subject to such measures. Comparing the provisions that apply to all audiovisual media services with those applicable to other audiovisual, communications and information services reveals further significant differences.

14) Although "(television) advertising" is a specifically named form of commercial communication with its own definition in the AVMSD (Art. 1(1)(i)), other EU legislation defines it differently. See, for example, Article 2(b) of Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ EC L 152/16 of 20 June 2003, as amended in OJ L 67/34 of 5 March 2004 ("Tobacco Advertising Directive"): "For the purposes of this Directive, 'advertising' means any form of commercial communications with the aim or direct or indirect effect of promoting [a tobacco product]". Other, broad legal definitions that include "advertising" can be found, for example, in Article 2(f) of the E-Commerce Directive ("commercial communication": any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession) or Article 2(d) of the UCP Directive ("business-to-consumer commercial practices" (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers").

- Advertising for **alcoholic beverages**, for example, is only directly restricted<sup>15</sup> by the AVMSD. Otherwise, the use of commercial communications for these products is “merely” governed by self-regulatory measures.<sup>16</sup>
- Article 9(1)(d) AVMSD prohibits all advertising for **tobacco products** and, in many cases, restricts advertising for other goods and services by companies whose main activity is the manufacture or sale of cigarettes and other tobacco products.<sup>17</sup> According to Article 3(2) in conjunction with Article 3(1) of the Tobacco Advertising Directive, information society services are at least permitted to direct advertising at tobacco industry professionals.
- Other product-specific regulations are found in the Community code relating to **medicinal products for human use**,<sup>18</sup> which, *inter alia*, distinguishes between advertising to the general public and advertising to professionals (doctors and pharmacists), as well as dealing with the theme of “information” about medicinal products (Articles 86 *et seq.* and 88a *et seq.*). In a similar way to the AVMSD, the code imposes a general ban on advertising to the general public of medicinal products that are available on medical prescription only (Art. 88(1)(a)); it does not mention medical treatments that are available on medical prescription only. Several provisions govern the admissibility of advertising directed at persons qualified to prescribe or supply medicinal products (Articles 87(2) *et seq.* and 91 *et seq.*).

Whereas the AVMSD prohibits teleshopping on television for medicinal products that are subject to a marketing authorisation, the code, in principle, permits distance selling of non-prescription medicines to customers (Art. 85c(1) of the code). However, such an offer for sale “at a distance of medicinal products to the public by means of information society services” is linked to numerous specific conditions that the provider must meet (Art. 85c (1) and (3) of the code). Teleshopping for such medicinal products is therefore equally acceptable in a non-linear audiovisual media service as in other audiovisual and Internet services.

#### c) Measures for the labelling of advertising

In other cases also, it may seem questionable whether the fact that the AVMSD applies to a particular service creates significant differences in terms of consumer protection levels. We will investigate this below in relation, firstly, to **labelling** and separation requirements and product placement (d) and, secondly, to the protection of minors in advertising (e). The E-Commerce and UCP Directives are relevant here, as well as the AVMSD.

In principle, all commercial communications must be at least recognisable as such (as mentioned, on television, advertising and teleshopping must, in principle, also be distinguishable from editorial content). This rule is enshrined in Article 9(1)(a) sentence 1 AVMSD, as well as in Article 6(a) of the E-Commerce Directive and in the UCP Directive. The latter prohibits unfair commercial practices, particularly those that are misleading (Art. 5(1) and (4)(a) of the UCP Directive). An omission can be considered misleading if, for example, a trader “fails to identify the commercial intent of the commercial practice if not already apparent from the context” (Art. 7(2) of the UCP Directive).<sup>19</sup> A further condition, according to the same provision, is that this “causes or is likely to cause the

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15) However, see the CJEU’s judgment of 6 September 2012, C-544/10, *Deutsches Weinkontor*, on the application of Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ 2006 L 404/9, 30 December 2006) to the description of a particular wine as “easily digestible” for marketing purposes.

16) See, for example, [www.easa-alliance.org/Issues/issues-2/page.aspx/78](http://www.easa-alliance.org/Issues/issues-2/page.aspx/78)

17) Regarding sponsorship and product placement, see Articles 10(2) and 11(4)(a) AVMSD.

18) Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ EC L 311/67 of 28 November 2001, last amended by Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 amending Directive 2001/83/EC as regards pharmacovigilance, OJ EU L 299/1 of 27 October 2012 (“the code”).

19) According to Article 7(1), (2) and (5) of the UCP Directive in conjunction with Article 6(b) of the E-Commerce Directive, a misleading omission can include the inadequate identification of the natural or legal person on whose behalf a commercial communication (which is part of, or constitutes, an information society service) is made.



average consumer to take a transactional decision that he would not have taken otherwise". For the purposes of the Directive, "trader" means any natural or legal person who is acting for purposes relating to his trade, business, craft or profession – including advertisers – and anyone acting in the name of or on behalf of a trader, such as media agencies and media that sell advertising space.<sup>20</sup>

The UCP Directive and the AVMSD therefore differ in two ways: firstly, the wording of Article 9(1)(a) AVMSD does not suggest that, in order to be recognisable, it is sufficient that the context of a statement alone should point to its character as a commercial communication. Secondly, this provision is breached if a commercial communication is not labelled as such. In contrast, according to Article 7(2) of the UCP Directive, there is only a violation if the omission causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise.

However, it seems doubtful whether these differences are actually relevant when on-demand audiovisual media services<sup>21</sup> are compared with other information society services, since all these on-demand services are subject to the E-Commerce Directive and Article 6(a) of the latter requires the commercial communication to be clearly identifiable "as such". Even though this puts the differences between the AVMSD and the UCP Directive into perspective, it remains the case, as described above, that without prejudice to the use of new advertising techniques, television advertising and teleshopping must be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means (Art. 19(1) AVMSD).<sup>22</sup>

#### d) Example of the regulation of media-integrated advertising content

The AVMSD prohibits **product placement** on television and in on-demand audiovisual media, but permits it under certain conditions, unless a member state decides otherwise (Art. 11(2) and (3) AVMSD). Article 1(1)(m) AVMSD defines product placement as "any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration". According to Article 5(5) in conjunction with Annex I no. 11 of the UCP Directive, "using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)" is unfair and, therefore, prohibited in all circumstances.

In this respect, there is therefore no significant difference between the regulatory instruments. However, the AVMSD contains additional provisions in relation to the programme genres in which product placement is permissible, the form it may take and the relationship between the advertiser and the media service provider. Such restrictions are not contained in the UCP Directive. In contrast, the product-specific measures of the AVMSD are more or less identical to those of the Community code relating to medicinal products for human use and the Tobacco Advertising Directive. Both of these instruments also apply to media covered by the UCP Directive; there is therefore no real difference between the regulation of audiovisual media services on the one hand and information society services on the other.

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20) With regard to this and, in general, the relationship between the UCP Directive and the AVMSD, see Jan Kabel, "Audiovisual Media Services and the Unfair Commercial Practices Directive", Susanne Nikoltchev (ed.), IRIS *plus* 2008-8, European Audiovisual Observatory, Strasbourg 2008, which stresses, *inter alia*, that the providers of media or information society services – as well as advertisers – can be liable for breaches of the UCP Directive.

21) Of course, specific rules apply to the labelling of sponsored programmes in non-linear (and linear) audiovisual media services (Art. 10(1)(c) AVMSD). See below regarding product placement.

22) Compliance with the separation principle in the context of watching television on a convergent device can be particularly problematic in the following situation: while the user is watching the channel of a linear audiovisual media service, a commercial communication distributed in a different way (i.e. not an advertisement designed to interrupt a news broadcast or film, for example) appears on the screen, partially or completely overlapping the television picture in that section of the screen. The TV provider should not, depending on the circumstances, interrupt the programme concerned with advertising either at all or at least not at that moment, partly in order to protect the interests of the right holders (see Art. 20 AVMSD). Its own interest in its journalistic, editorial or cultural performance being respected in such a situation would need to be considered when determining whether such an overlap is appropriate.

If Article 6(a) of the E-Commerce Directive, which requires commercial communication to be clearly identifiable as such, is understood to include the use of “advertorials” and therefore to apply the corresponding ban to all electronic information and communications services not covered by the AVMSD, the UCP Directive cannot apply in this context anyway.

The AVMSD also extends these product placement rules to cover **production props**,<sup>23</sup> as long as the goods or services concerned are of significant value. Without this condition, the precedence<sup>24</sup> of the AVMSD over the UCP Directive would have no effect. In this case, the following question, which should be asked generally anyway, would become even more pressing: since the definition of “advertorial” contained in the UCP Directive requires the trader to have “paid” for the promotion, does it apply if no money changes hands, but – as is common with production aid – “only” the claim for payment for the (temporary) transfer of usage rights is waived? Such an interpretation is called into question by the argument that the EU legislator, in order to include such arrangements in other cases, uses the phrase “or similar consideration”. If it were adopted, rules on product placement, including (free) production props, would differ according to whether they concerned audiovisual media services or other information society services.

#### e) Protection of minors in commercial communications

To conclude this subsection, we will examine whether measures for the protection of minors in advertising differ according to whether media content is classified as an audiovisual media service or as another (audiovisual) information and communications service. The AVMSD lays down detailed standard requirements for the **protection of the interests of minors** in audiovisual commercial communications (Art. 9(1)(g) and (2) AVMSD). The UCP Directive, however, does not contain any stand-alone regulations on advertising in relation to minors. Nevertheless, the benchmark used under the Directive for determining whether a commercial practice is unfair is different if the advertising is aimed at a clearly identifiable group of consumers who, on account of their age and/or credulity, for example, need particular protection.<sup>25</sup> In such cases, it is no longer the usual benchmark of the “average consumer”, but the perspective of the average member of the group that is assessed (Art. 5(3) of the UCP Directive). One commercial practice that is prohibited under the Directive because it is deemed unfair in all circumstances is “including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them” (Art. 5(5) in conjunction with Annex I no. 28 of the UCP Directive).

The AVMSD therefore contains a number of more extensive provisions on the protection of minors in advertising. In addition, only audiovisual media service providers are subject to Article 9(2) AVMSD, which encourages them to develop codes of conduct regarding audiovisual commercial communications for specific foods and beverages if these communications accompany or are part of children’s programmes.<sup>26</sup>

#### f) Conclusions regarding advertising regulations

To quote an old advertising slogan for a German brandy: “The differences are not huge, but subtle!” The overall package of advertising regulations certainly includes plenty of variation between the different services that can be accessed via convergent devices. However, this mainly concerns the quantitative advertising restrictions that apply only to television. In its qualitative provisions on advertising, the AVMSD itself creates significant differences in the levels of regulation, with less stringent rules for non-linear audiovisual media services. In many cases, the regulatory system

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23) According to recital 91 of the AVMSD, this includes “the provision of goods or services free of charge, such as production props or prizes”.

24) In his article, which readers are strongly urged to (re-)read, Jan Kabel, *op. cit.* (footnote 20), using general observations and numerous fascinating examples relevant to this topic, sets out good reasons why this idea, which is found in recital 82 of the AVMSD, should be treated with caution.

25) See recitals 18 and 19 of the UCP Directive.

26) See Alexander Scheuer, “Germany: Selected Aspects of Commercial Communications Regulation as regards On-demand Audiovisual Services”, in: Susanne Nikoltchev (ed.), *The Regulation of On-demand Audiovisual Services: Chaos or Coherence?*, IRIS Special 2011, European Audiovisual Observatory, Strasbourg 2011, pp. 69 *et seq.* (72, 78).

applicable to non-linear services – although there are differences regarding individual questions – is similar to that which applies to other information and communications services. Whether these differences are justified is a question for political evaluation, and therefore one that does not need answering here. However, it should be borne in mind that the more extensive range of obligations that apply to television providers in particular is based not least on the classification of their service as important for culture, society and democracy. If they are to continue fulfilling this public remit in future, the suitability of existing restrictions of access to funding sources (and the limits on the sums available) automatically comes under the microscope. It should also be remembered that there can be differences between the way in which the relevant regulators apply national provisions adopted to implement EU law, which in practice can lead to television service providers being dealt with more strictly than providers of other services. Media regulators in European states have a comparatively long tradition of regulating television providers; for various reasons, providers of on-demand (audiovisual) services come under less scrutiny, partly because, in some countries, even though there is no licence obligation, no instruments are in place or used to cover such providers.

## 2.2. Regulation of technology

The main EU regulations currently applicable to questions relating to convergent devices, platforms and services for audiovisual media<sup>27</sup> are fragmented: the legal framework can be divided<sup>28</sup> into provisions on (1) media content (for which the AVMSD is fundamental, as described above),<sup>29</sup> (2) transmission services (including the intermediaries dealt with in the E-Commerce Directive),<sup>30</sup> (3) electronic communications services and networks (governed by the so-called Telecoms Package)<sup>31</sup> and (4) end devices (partly contained in the Telecoms Package and the Directive on radio equipment and telecommunications terminal equipment<sup>32</sup> and apart from that laid down in general, horizontal provisions).

At the same time, the Telecoms Package in particular stresses that the necessary separation between the regulation of transmission and the regulation of content “does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media

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27) We are referring to secondary EU legislation here. For the purposes of this article, other aspects, such as data protection and copyright law, and the support (including financing and production) of audiovisual works, are left to one side. Regarding these and other elements of the debate, see the European Commission Green Paper, *op. cit.* (footnote 3).

28) These principles are enshrined, *inter alia*, in recital 18 of the AVMSD and Article 1(3) and recitals 5 *et seq.*, 8–10 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ EC L 108/33 of 24 April 2002, last amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ EC L 337/37 of 18 December 2009.

29) According to recitals 21 to 26, the AVMSD does not apply, for example, to platforms for user-generated content (such as YouTube) and private websites (such as Facebook); search engines (Google, etc.); stand-alone (i.e. not accompanying programmes) electronic programme guides; content of on-demand audiovisual services that – even based on a dynamic concept of “programme” – are not “television-like”; the activities of service providers who merely transmit programmes for which the editorial responsibility lies with third parties. Therefore, alternative (media-related) regulation by the E-Commerce Directive may be taken into consideration, or reference made to rules in the Telecoms Package that may be applicable in such cases. However, this does not apply to the simple offer for sale of a package of radio or television broadcasting content via electronic communications networks and services, see recital 2 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ EC L 108/7 of 24 April 2002, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ EC L 337/37 of 18 December 2009, and recital 45 sentence 1 of Directive 2002/22/EC of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive), OJ EC L 108/51 of 24 April 2002, as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, OJ EC L 337/11 of 18 December 2009.

30) Services that consist wholly or mainly in the conveyance of signals on electronic communications networks are subject to the Telecoms Package (Art. 2(c) of the Framework Directive); these include e-mail transmission and Internet access, according to recital 10 of the Framework Directive.

31) As well as the Framework Directive, this mainly concerns the Access Directive and the Universal Service Directive (footnote 29).

32) Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity, OJ EC L 91/10 of 7 April 1999.

pluralism, cultural diversity and consumer protection” (recital 5 of the Framework Directive). The Telecoms Package therefore makes provision for “interfaces” (in the non-technical sense), which either regulate specific aspects of content services such as television, their means of transmission and the devices required to receive them, or lay down exceptions to general provisions. For example, the basic requirement for technologically neutral regulation can be bypassed in order to promote certain services; recital 18 of the Framework Directive mentions digital television as an example.

Below, we will briefly examine whether any regulatory provisions are in place to deal with the challenges linked to convergent devices in particular. We will also look for ways in which the exemption clauses in the Telecoms Package enable the member states or their national regulatory authorities (NRAs) to introduce additional legislation in order to pursue media regulation objectives.

### *2.2.1. Measures on consumer equipment*

Article 24 in conjunction with Annex VI of the Universal Service Directive comes closer than any other provision to regulating consumer equipment. It lays down various conditions that digital television receivers must meet. All devices suitable for the reception of conventional<sup>33</sup> digital television signals must allow the descrambling of such signals according to the common European **scrambling** algorithm and display signals that have been transmitted in clear (para. 1). It should be assumed that a convergent device is a digital television set, since it can at least descramble the signals mentioned in this provision. So-called second-screen devices are also covered if they are capable of receiving and descrambling terrestrial broadcast signals intended for stationary use (DVB-T).

Any digital television set with an integral screen of visible diagonal greater than 30 cm must be fitted with at least one **open interface socket** permitting simple connection of peripherals, and “able to pass all the elements of a digital television signal, including information relating to interactive and conditionally accessed services” (para. 2).<sup>34</sup> Since no smartphones, very few tablets and netbooks and only some laptops have such a large screen, these devices are not subject to this obligation, in contrast to modern television sets, which are becoming ever larger.

The second relevant aspect relating to the openness of “enhanced digital television equipment”<sup>35</sup> is the requirement to encourage providers of such equipment “deployed for the reception of digital interactive television services on interactive digital television platforms<sup>36</sup> to comply with an open API [**application programming interface**]<sup>37</sup> in accordance with the minimum requirements of the relevant standards or specifications” (Art. 18(1)(b) of the Framework Directive). Hybrid televisions should be considered as such devices. Blu-ray players and games consoles could also be classified as enhanced digital television equipment if they – like a set-top box – are connected to a television set and are capable of receiving digital interactive television. This measure represents an example of the interaction between standardisation and the promotion of interoperability by the member states: the objective is to promote the free flow of information, media pluralism and cultural diversity (Art. 18(1) of the Framework Directive). However, such a measure taken by the member states must be strictly necessary to ensure interoperability of services and to improve freedom of

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33) According to the provision, this includes the terrestrial, cable or satellite transmission of broadcast signals primarily for fixed reception and possibly IPTV signals transmitted via cable or VDSL networks and satellite.

34) The Directive seeks to ensure that “the functionality of the open interface for digital television sets is not limited by network operators, service providers or equipment manufacturers and continues to evolve in line with technological developments” (recital 33 of the Universal Service Directive).

35) Defined in Article 2(o) of the Framework Directive as “set-top boxes intended for connection to television sets or integrated digital television sets, able to receive digital interactive television services”.

36) The Telecoms Package does not define this concept, which is only otherwise mentioned in recital 31 of the Framework Directive. It appears to mainly refer to technical platforms; see the above reference to sales platforms (footnote 29).

37) According to Article 2(p) of the Framework Directive, API means the software interfaces that service or content providers (such as broadcasters) control with their applications or on the basis of which they programme their services so that the operating system, other software and (hardware) components can interact smoothly in enhanced digital television equipment.

choice for users (Article 17(2) of the Framework Directive). Member states should also encourage “proprietors of APIs”, including manufacturers of convergent devices and, if applicable, providers of portals carried on such devices, to make available on fair, reasonable and non-discriminatory terms, and against appropriate remuneration, all such information as is necessary to enable providers of digital interactive television services to provide all services supported by the API in a fully functional form (Art. 18(2) of the Framework Directive).

With the same objective in mind, NRAs are given the opportunity to regulate access to APIs (Art. 5(1)(2)(b) in conjunction with Annex I Part II of the Access Directive). If the member states define relevant broadcasting services to which consumers should be given access, API operators can be forced to grant access to content providers subject to the aforementioned conditions.<sup>38</sup>

### 2.2.2. Regulation of other connected TV functionalities and infrastructure

Since, as described above, device-specific regulation is limited to individual aspects, we will now consider the functions that play a particular role in convergent devices. This is difficult, firstly because these functions – whether made available directly by the device manufacturer or made possible by the fact that third parties can offer their services on the device<sup>39</sup> – cannot always be compared with those that were important in connection with digital interactive and/or conditionally accessed television services and to which the regulations in the Telecoms Package are therefore largely tailored. Secondly, it remains unclear what actually constitutes a **platform**<sup>40</sup> or a portal, and which functions each offers – and whether, in the convergence era, there can be any meaningful distinction between these concepts. Describing the regulatory situation using these terms is therefore unlikely to contribute to transparency, especially since convergent devices can contain a whole variety of different platforms/portals.

The user interface in convergent devices is, as mentioned above (in section 1.2.), the fundamental selection point for users. It is, so to speak, the main menu of the connected platform. Secondary user interfaces are often found in the different portals, and they in turn can have their own sub-levels. For example, the provider of a sales platform for different TV channels may offer a navigation tool, possibly in the form of an electronic programme guide. However, such a tool may also be provided by the device manufacturer itself or by (specialist) third parties. The secondary user interfaces that audiovisual media service providers develop themselves for their channels or programme catalogues are also relevant.<sup>41</sup> These include, for example, providers’ own EPGs or modern video-/teletext. Finally, the user interfaces of other information service content providers are also relevant.

All these navigation tools are therefore, essentially, *services that direct access to and the presentation of audiovisual media services and other information and communications services in convergent devices (themselves) or services made available so that such content services can be provided on such devices*. They particularly include user interfaces, together with portals and search

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38) See Article 2(c) of the Access Directive (the concept of operator includes providers of “associated facilities”) in conjunction with Article 2(e) of the Framework Directive (definition of “associated facilities”), and Article 2(e) in conjunction with Article 2(ea) of the Framework Directive (definition of “associated services” as an element of the aforementioned characteristic of the facility).

39) The European Commission Green Paper contains the following explanation: “Platforms can be integrated in the device by manufacturers or provided by other players such as electronic communications and cable operators, over-the-top (OTT) players or broadcasters”, *op. cit.* (footnote 3), p. 5, footnote 19.

40) We have already referred to the distinction made in the EU regulations between (pure) sales platforms and technical platforms (footnote 36). In the context of digital (pay-)TV, the difference appears virtually redundant, since it is typically the combination of these two activities that constitutes a platform for (digital interactive) pay-TV. The essential functions include descrambling and scrambling systems, APIs, EPGs and conditional access systems (CAS), defined in Article 2(f) of the Framework Directive. See Alexander Scheuer/Michael Knopp, “Digital Television Glossary”, in: Susanne Nikoltchev (ed.), *Regulating Access to Digital Television, IRIS Special 2004*, European Audiovisual Observatory, Strasbourg 2004 (supplement), p. 4 with further references.

41) As noted above (footnote 29), the concept of audiovisual media service can, according to Article 1(1)(a)(i) AVMSD, also include (text-based) electronic programme guides that accompany programmes, which must therefore comply with the relevant provisions of this Directive.

functions. The application of the EU legislative framework to search engines (for audiovisual content) was the subject of an IRIS Special, to which reference may be made.<sup>42</sup>

It is unclear whether all the aforementioned user navigation tools are covered by the term **electronic programme guide** (EPG), as it is used in the Telecoms Package.<sup>43</sup> However, if its provisions are applicable, the Telecoms Package does contain regulations on technical access: Article 5(1)(b) of the Access Directive enables NRAs, in parallel with the situation described above for APIs (see section 2.2.1.), to order that television service providers be granted access to EPGs.

However, it is certain that EU member states can, in principle, introduce national legislation in relation to the presentational aspects<sup>44</sup> of EPGs and “similar listing and navigation facilities” (Art. 6(4) of the Access Directive). A primary concern for content providers, particularly those of linear and non-linear audiovisual media services, is the ease with which content can be found in an environment that – similar to the Internet – is characterised, including on convergent devices, by its multiple services and methods of access to those services. For example, it can seem unsatisfactory if a television broadcaster’s catch-up TV service is listed only on page 20 of the menu item (similar to an EPG) or the “digital video library” portal, on which it principally operates. Discussion is therefore focusing on the need for criteria to determine what kind of services (or service groups) should be displayed in what form by the navigators of device and/or platform operators. For example, the need to establish a “must be found” principle for media of particular relevance to society is being debated.<sup>45</sup> Importance is sometimes attached to users’ ability to install additional listing facilities designed by third parties alongside the EPGs or similar navigation tools provided by the manufacturer or platform operator. Another point under consideration is whether and, if so, to what extent users should be able to amend listings. Both suggestions are based on the idea that, although a manufacturer’s or platform operator’s own navigator may give precedence to certain services (belonging to vertically integrated companies or given prominence on the basis of contractual agreements), this could, in cases of doubt, be tempered if users could find alternatives or set their own preferences themselves.

The aforementioned discussion points also apply to the inclusion of **apps** – e.g. the app of a film distributor that runs a pay-VoD service enabling viewers to rent or buy audiovisual works – on the home screen of the user interface or in a portal for the relevant service category. An important (preliminary) issue here is the method of deciding which content services can access the platforms/portals. Device manufacturers and platform operators lay down mainly technical criteria that must be met before an application can be made accessible. Are there any additional requirements? If so, who controls their basic legitimacy and practical application, and according to which regulations? In the case of paid-for apps, the principles of **conditional access systems** (CAS) could be applied. These are particularly set out in Article 6(1) in conjunction with Annex I, Part I of the Access Directive, which obliges providers of CAS for digital television firstly to offer their technical services “on a fair, reasonable and non-

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42) Peggy Valcke, “In Search of the Audiovisual Search Tools in the EU Regulatory Frameworks”, in: Susanne Nikoltchev (ed.), *Searching for Audiovisual Content*, IRIS *Special* 2008-2, European Audiovisual Observatory, Strasbourg 2008, pp. 73 *et seq.* Here and particularly in Nico van Eijk, “Search Engines: Seek and Ye Shall Find? The Position of Search Engines in Law”, in: Susanne Nikoltchev (ed.), IRIS *plus* 2006-2, European Audiovisual Observatory, Strasbourg 2006, there are many accurate references to the similarity between search engines and electronic programme guides and the fact that many EPGs include search functions.

43) The relevant Directives also do not contain a definition of this concept, nor even a more detailed description in their recitals. However, it appears from the regulatory context (of the system) in which EPGs are found (Art. 5(1)(b) of the Access Directive) that these are navigators that control access for viewers and listeners to broadcasting services.

44) See Natali Helberger, “Comments on Directive 2002/19/EC: Access Regulation”, in: Castendyk, O./ Dommering, E./Scheuer, A. (eds), *European Media Law*, Alphen a/d Rijn 2008, p. 1139 (para. 42), regarding the various possible presentational aspects.

45) The European Parliament’s own-initiative draft report on Connected TV (rapporteur: Petra Kammerevert), 2012/2300(INI) of 31 January 2013 focuses particularly on these issues. Proposed amendments, submitted on 21 March 2013, were voted on by the responsible Culture and Education Committee on 28 May and are scheduled for vote at the European Parliament plenary sitting on 1 July 2013.

discriminatory basis compatible with Community competition law<sup>46</sup> to all broadcasters and, secondly, to keep separate financial accounts regarding their activity as CAS providers.

NRAs can also lay down additional **interoperability obligations**<sup>47</sup> (Art. 5(1)(ab) of the Access Directive), although these must satisfy the proportionality principle. Such measures must be aimed at companies that control access to end-users. Article 2(a) of the Access Directive defines “access” in detail as “the making available of facilities and/or services to another undertaking [...] for the purpose of providing electronic communications services, including when they are used for the delivery of information society services or broadcast content services”. It also appears conceivable that the European Commission will make use of the power granted to it under Article 6(2) of the Access Directive to amend Annex I of the Directive “in the light of market and technological developments”. As mentioned above, the Annex describes the measures for CAS and lists other facilities to which certain conditions may be applied by NRAs (currently APIs and EPGs).

Finally, in the context of convergent devices, platforms and services for audiovisual media, two related aspects are relevant in relation to electronic communications networks and services: must carry regulations and network neutrality obligations. The member states can require operators of networks used to distribute television broadcasts to carry certain programmes and additional services, provided a significant number of end-users of such networks use them as their principal means to receive such broadcasts (Article 31(1) of the Universal Service Directive).<sup>48</sup> The aforementioned introduction of “must be found” rules to ensure that audiovisual media services are easy to find represents a theoretical extension of this obligation.

The debate over **network neutrality** involves two main questions:

Firstly, should the “all bits are equal” principle, which has played a crucial role in shaping the Internet to date, continue to apply? In other words, does the so-called “best effort” principle, under which data transmitted via the Internet is neither prioritised nor discriminated against, for example on the basis of its type, content, sender or recipient, still apply? Or are network operators (and, if appropriate, platform providers) better equipped than in the past to go beyond simple traffic management in bottleneck situations by differentiating in terms of data transportation and limiting accessible applications?

Secondly, are users and providers generally able to offer or use any kind of (lawful) service or application?

Audiovisual content is very bandwidth-intensive and uses a comparatively high level of network capacity. If it is delivered to convergent devices via the “open” Internet, Internet Service Providers (ISPs) may want to charge higher prices for their services and/or the use of such OTT content, or to slow down (throttle) transmission and download rates. At the same time, ISPs that also market their own content or a particular partner’s platform can distribute these services separately from general Internet traffic (so-called “managed networks”). In order to avoid hold-ups in content delivery, service quality is improved.<sup>49</sup>

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46) This lead article does not deal with general EU competition law. However, it should be noted, for example, that Article 102 TFEU prohibits the abuse of a dominant market position. Regarding the definition of a relevant market, which is necessary in order to examine whether a provider holds a dominant market position, it is currently being debated whether the portal on a manufacturer’s convergent device is a possible point of reference. This discussion has arisen from the fact that it is crucial (in future) for content providers to be represented on all of these user interfaces, and the usual possibility for users to access the service concerned via the Internet instead of via the app is not a suitable alternative.

47) Examples of relevant interoperability questions are contained in the European Commission Green Paper, *op. cit.* (footnote 3), pp. 10 *et seq.*

48) See, in detail, Nico van Eijk, “Must-carry Regulation: a Must or a Burden?”, in: Susanne Nikoltchev (ed.), *Must-Carry: Renaissance or Reformation?*, IRIS *plus* 2012-5, European Audiovisual Observatory, Strasbourg 2012.

49) The technical and economic background to this discussion (and the current legislative framework) is described in Nico van Eijk, “Net Neutrality and Audiovisual Services”, in: Susanne Nikoltchev (ed.), *Why Discuss Network Neutrality?*, IRIS *plus* 2011-5, European Audiovisual Observatory, Strasbourg 2011, pp. 8 *et seq.* Regarding the relevant provisions of the Telecoms Package, see also Sebastian Schweda, “The ‘Telecoms Review’: New Impetus for Audiovisual Media?”, in: Susanne Nikoltchev (ed.), *Communications Regulation: Between Infrastructure and Content*, IRIS *plus* 2009-10, European Audiovisual Observatory, Strasbourg 2009, pp. 18 *et seq.*

With connected TV, the aforementioned capacity issues are not relevant, since the television signal can be received via a traditional broadcast transmission system. They are relevant, however, if linear or on-demand (media) services are provided via the Internet. Audiovisual media service providers in particular do not feel it is in their interests simply to turn away from the transport model of the non-managed Internet. They do not want to have to pay their ISP to distribute their content under a so-called service class model in which, in return, the ISP promises not to slow down content transmission and guarantees a minimum quality of service. However, this goes against the interests of network operators/ISPs to develop new ways of funding the expansion of available capacities – not least in view of the expectation that (including on mobile networks) audiovisual content will be responsible for the lion's share of the increasing need for bandwidth. Another approach to raising additional income from users is to abandon the usual flat-rate model in favour of usage-based pricing. Customers who use large quantities of data will either have to accept the throttling of their download speeds or pay to maintain service quality for their additional usage. Here, the criteria used by a network and service provider to devise different usage volume models will be important: for example, there will be a particular risk of discrimination against other audiovisual media service providers if an ISP excludes its own IPTV package when calculating the maximum allowable data throughput rate. Users could then feel compelled to use third-party services less frequently or not at all. It remains to be seen whether the NRAs in particular will respond to such eventualities. The ability to set “minimum quality of service requirements” on undertakings providing public communications networks is relevant here. According to Article 22(3)(1) of the Universal Service Directive, such requirements are designed “to prevent the degradation of service and the hindering or slowing down of traffic over networks”.

### *2.2.3. Conclusions regarding technical regulation*

At the beginning of this section, it was suggested that the relevant regulatory provisions contained in the EU Telecoms Package – from their conception onwards – did not show a high level of technological neutrality. This is true firstly in view of the fact that the specific rules for reception equipment are tied to its status as “digital television equipment”. Secondly, this focus on aspects that are important for broadcasting and its distribution can be seen in the provisions concerning infrastructure regulations that are advantageous to television (transmission and platform services as well as networks and access to them). Most of these pay as little attention to non-linear audiovisual media services as to other, sometimes comparable content that is relevant to the formation of opinion and/or culturally valuable, and that is offered on demand through other audiovisual or information and communications services.

## **3. Summary**

The debate on convergent devices, platforms and services for audiovisual media has noticeably intensified in the last five years at least, even though many of the aspects involved are not necessarily limited specifically to what is sometimes described, at least for now, as the high point of convergence development in the ICT sector. One of the key objectives of this article was to use a selection of interesting themes to convey a sense of the complexity of the task of evaluating the possible need to reform the current EU legislative framework. This topic is increasingly attracting the attention not only of the EU legislature, but also of national media policy-makers; however, there does not appear to be particular pressure for reform at the present time. We can therefore look forward to a fascinating continuation of the debate, which is expected to intensify after the European Parliament elections and the appointment of a new European Commission in 2014.



## Snapshot of Legal Developments in Four Major Markets

The Related Reporting section of this IRIS *plus* presents in respect of four big audiovisual markets in Europe decisions and policy developments relevant to our issue of media convergence. In Germany a court judgment and an administrative decision carved out limits for the services that public service operators may offer. In France two bodies especially established for reflecting entirely or at least also on connected television delivered their reports. Likewise two senators published their evaluation of the results of the reform of the audiovisual public sector. The United Kingdom joined this stock taking with the recent release of a report on media convergence. Furthermore, its communications regulator has clarified some parameters concerning editorial responsibility for on-demand programme services. They matter with regard to determining who is addressed by pertinent regulation. The communications regulator of Italy has adopted guidelines concerning the public service remit of broadcasters. They mention especially their experimenting with new formats and the need to protect minors. The protection of minors is also the final goal of a deliberation that establishes a technical board for the adoption of rules on technical measures in VoD services.

This Related Reporting section deliberately excludes recent developments concerning the definition of the scope of the AVMSD, as this will be the very focus of the next IRIS *plus*.

## Germany

### Federal Cartel Office Expresses Concern over ARD and ZDF Video-on-Demand Platform

Peter Matzneller

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On 11 March 2013, the *Bundeskartellamt* (Federal Cartel Office) announced that it harboured concerns about the compatibility with competition law of the video-on-demand platform operated by the two public service television broadcasters ARD and ZDF. The broadcasters, together with other production and distribution rights companies, had founded an online platform called "Germany's Gold" in April 2012.

After an initial examination, the *Bundeskartellamt* had approved the merger on which the plan was based, on the grounds that it would not create or strengthen a dominant market position.

However, the *Bundeskartellamt* thought that the joint marketing of pay-per-view videos on the Internet by commercial subsidiaries of ARD and ZDF would lead to coordination of the prices and availability of the videos. It also feared that other platforms would have no, or only restricted, access to the videos.

According to the *Bundeskartellamt*, the companies have already indicated that they would be prepared to give certain undertakings. In this respect, the *Bundeskartellamt* hinted at the kind of undertakings that should be given. The broadcasters concerned could allay all competition-related concerns by, for example, abandoning the business model based on joint marketing and limiting the plans to the operation of a purely technical platform.

The *Bundeskartellamt* had raised similar concerns in 2011 regarding an online platform being planned by ProSiebenSat.1 and RTL (see IRIS 2011-5/15). However, an appeal lodged by the two broadcasters with the *Oberlandesgericht Düsseldorf* (Düsseldorf Appeal Court) against the decision of the *Bundeskartellamt* was rejected (see IRIS 2012-8/16).

- *Pressemitteilung des Bundeskartellamts vom 11. März 2013*  
(Press release of the Federal Cartel Office of 11 March 2013)  
<http://merlin.obs.coe.int/redirect.php?id=16434>

IRIS 2013-5/17

### Cologne District Court Bans Version of Tagesschau App

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On 27 September 2012, the *Landgericht Köln* (Cologne District Court) banned the ARD and one of its members, NDR, from distributing a particular version of the Tagesschau app. A total of 11 newspaper publishers that offer electronically accessible services had complained that the version of the application dated 15 June 2011 broke competition regulations.

The court rejected the plaintiff's initial argument that the Tagesschau app had not been granted the necessary approval. Rather, the application, as a telemedium, had passed the three-step test under Article 11f of the *Rundfunkstaatsvertrag* (Inter-State Agreement on Broadcasting – RStV)

and had therefore been approved. A general ban on the application could therefore be ruled out. The provision of telemedia, as well as radio and TV services, was part of public service broadcasters' legal remit.

However, whether and in what form public service broadcasters were allowed to offer telemedia as well as radio and television services was determined in this case by Article 11d(2)(3) RStV. Under this provision, "press-like services not related to a programme" are forbidden. As for whether the disputed application was a "press-like service", the LG Köln said that it depended whether, from the user's point of view, it could function as a substitute for the press (in the form of newspapers or magazines), although for this to be the case it was not necessary for it to replace press publications completely. In the case at hand, the level of detail provided was similar to that of most newspapers and magazines. The fact that many of the articles were merely written versions of content originally broadcast as television or radio reports did not mean that the service was not "press-like". Users would only read the text in the form in which it was provided. The same applied to the inclusion of links and video clips in the text, which users would, at best, classify as additional services. It did not make the text any "less press-like".

The Tagesschau app, in its version of 15 June 2011, could also not be considered to be "related to a programme". The reports did not prompt a desire for further information, nor did they simply touch on the topics dealt with or refer the reader to additional information. Rather, the level of detail meant that the press-like texts were visually dominant, giving users the impression that they were complete articles. The court expressly pointed out that its ruling did not contain any general benchmarks as to how much detail should be allowed in such reports. Rather, its decision related only to the aforementioned version of the app that had been the subject of the complaint.

Nevertheless, the ruling may be considered to have more general significance, since in it the court explained its interpretation of the term "press-like".

- *Urteil des Landgerichts Köln vom 27 September 2012 (Az.: 31 O 360/11)*  
(Ruling of the Cologne District Court of 27 September 2012 (case no.: 31 O 360/11))  
<http://merlin.obs.coe.int/redirect.php?id=16151>

IRIS 2012-10/8

## France

### First Report by the Commission for Monitoring the Use made of Connected Television

*Amélie Blocman*  
*Légipresse*

The "Commission for Monitoring the Use Made of Connected Television", launched in February 2012 and headed by Emmanuel Gabla, a member of the national audiovisual regulatory authority (*Conseil supérieur de l'audiovisuel* – CSA), brings together about 80 professionals in the sector. On 5 December 2012 it reported on the first stage of its work. "It is obviously not a question of aligning regulation of the new services with regulation of audiovisual services. On the other hand, there is no thought of massively deregulating the audiovisual sector," according to CSA Chairman Michel Boyon. He also said that three of the 14 proposals made by the Commission could be introduced very quickly.

Firstly, the proposal to set up an observatory of the use made of connected television, with a view to improving knowledge of the use made of the technologies concerned in terms of both quality and

quantity, since this knowledge is “still fragmentary”. The second priority proposal would involve drawing up general recommendations and good practices regarding personal data, in collaboration with the national commission on information technology and liberties (*Commission nationale de l’informatique et des libertés – CNIL*), the CSA and the competent organisations. The third proposal would call for the “launch of inter-professional discussion on revising certain obligations contained in the regulations”. For example, regarding media chronology, the different schemes to which the traditional stakeholders in the television and Internet sectors are currently subject, in France and elsewhere, are deemed uneven and in some cases discriminatory. Similarly, the Commission feels there should be concertation among professionals on what tidying-up is necessary in connection with convergence, obligations in respect of catch-up TV, and the thresholds for obligations imposed on on-demand audiovisual media services.

The proposals put forward include adopting tax measures aimed at limiting imbalances in competition in respect of the new stakeholders, and maintaining the effects of the mechanisms for financing creation. One of the methods suggested for achieving this is to extend the tax supplying the fund supporting the programme industry (*Compte de soutien à l’industrie des programmes – COSIP*) to all companies that earn their income via advertising revenue, from the exposure of audiovisual or cinematographic content. Another topic of major importance is the Commission’s recommendation to relax some of the provisions on audiovisual advertising, since it will not be possible to transpose all of them to connected television (authorised time limits for advertising, ban on advertising in favour of certain sectors of the economy, etc.). The Commission will therefore continue its work in 2013 and look to the implementation of its initial proposals.

- *Présentation des travaux de la Commission de suivi des usages de la télévision connectée, conférence de presse du CSA du 5 décembre 2012* (Presentation of the work of the Commission for Monitoring the Use Made of Connected Television, CSA press conference held on 5 December 2012)  
<http://merlin.obs.coe.int/redirect.php?id=16279>

IRIS 2013-2/24

## First Stages of “Culture Act II” Mission

*Amélie Blocman*  
*Légipresse*

Launched on 25 September 2012, the “mission of concertation on digital content and cultural policy in the digital age” (“Culture Act II”) headed by Pierre Lescure drew up its first interim report on 5 December 2012. The mission is scheduled to send its final report to the government on 15 March 2013, and in December it proceeded to hear sixty bodies, companies and individuals out of the hundred or so that are to be heard.

Its work focuses on the following three topics: public access to cultural works and development of the legal offer; remuneration for creators and the financing of creation; the protection and adaptation of intellectual property rights.

After drawing up a report on the legal offer, sector by sector, this interim report points the finger at media chronology as one of the barriers to its development. Rather than a total makeover, which would render the system for financing cinema fragile, a pragmatic approach would envisage more flexibility and experimentation in order to produce a dynamic that would favour the development of the legal offer. Competition from the Internet giants (Google, iTunes, Amazon, etc.) is deemed inequitable. Apart from the tax issue, they also avoid specific regulations: in the video distribution sector, a stakeholder such as YouTube is treated as a host, whereas the French VoD platforms are subject to the same obligations of investment and exposure as television editors.

Regarding intellectual property rights, the idea of legalising non-commercial exchanges (via a “global licence” or a “creative contribution licence”) is fairly generally rejected, although there are some exceptions. There has been much criticism of the “graduated response” implemented by the HADOPI scheme; its effectiveness is difficult to evaluate. The mission points the finger at the fact that too little emphasis has been placed on combating commercial infringement of copyright aimed at the real culprits, namely the Internet sites (sites for streaming or downloading, hosts, torrent directories, etc.). To redirect repression towards these stakeholders, which are often based outside France and by their nature are more difficult to apprehend, the parties heard referred to a number of possible methods:

- increasing responsibility on the part of hosts by obliging them to withdraw illegal content promptly and prevent its reappearance, and by reinforcing international judicial cooperation in order to punish recalcitrant sites;
- reducing the visibility of the illegal offer by acting on browser referencing, if necessary with the assistance of the public authorities;
- drying up the sources of income from sites that infringe copyright by increasing responsibility on the part of the intermediaries (advertisers, advertising agencies, on-line payment services, etc.).

To promote the development of new uses and content, the mission is considering ways of facilitating the use of free licences for those creators who so wish, and their recognition in the world of creation.

On the remuneration of creators and the financing of creation, the mission notes a high degree of inequality, varying from one sector to another, in the proportion of remuneration represented by digital media. It also notes the unsuitability of aid for creation and the increasingly fragile state of the mechanisms for remuneration and financing. For example, the cinema and the audiovisual sector, through the fund supporting the programme industry (*Compte de soutien à l'industrie des programmes* – COSIP) and investment obligations, have the benefit of support arrangements financed by all the stakeholders involved in circulating the works in question. The television channels, which make a large contribution (tax on television services paid by editors, investment obligations), could be threatened by fragmentation of audiences and competition on the part of new stakeholders contributing little (DTV channels, connected television). Furthermore, the contribution of the IAP (tax on television services paid by distributors) is currently under threat, in terms of yield and even in terms of principle, as the result of a problem of compatibility with Community law. Lastly, neither the VoD platforms based outside France (such as iTunes) nor the new circulation stakeholders (such as YouTube) make any contribution to the support fund, although some are beginning to set up mechanisms for contributing to the financing of creation on a voluntary basis (the “YouTube Original Programming” project, for example). In conclusion, the hearings noted that many of the topics have a Community dimension, with medium- to long-term negotiation schedules. It is therefore important to identify, by 15 March 2013, more short-term measures that could be deployed at the national level.

- *Auditions retransmises en différé en format audio ou vidéo, et accompagnées d'une synthèse écrite* (Hearings in deferred format (audio or video), accompanied by a written summary)  
<http://merlin.obs.coe.int/redirect.php?id=16280>

IRIS 2013-2/25

## Results of Application of the Act of 5 March 2009 Reforming the Public-Sector Audiovisual Scene

*Amélie Blocman  
Légipresse*

Three years after the adoption of the Act of 5 March 2009 on audiovisual communication, and with France's new Government announcing reform of the public-sector audiovisual scene, it is worth noting the publication of a report by Senators David Assouline and Jacques Legendre on behalf of the commission for supervising application of legislation. On the basis of the preparatory work for the Act, and after hours of debate and hearings, the rapporteurs have highlighted the objectives set out in the 2009 Act and compared them with the results actually achieved. There are comments on nearly all the measures concerned, presented in thematic form. The results of the application of the Act are in fact equivocal. The key measure – the abolition of advertising – was at the heart of the debate. According to Mr Assouline, however, "it is emblematic above all in its failure". It has to be said that it has only been partially applied: advertising during the evening was supposed to be abolished by the end of 2011 but this did not happen, for financial reasons. Indeed the present Government will have to settle the matter quickly.

The report also highlights a cultural model that swings between audience figures and programme quality, even though the type of programme has not changed, contrary to the intention of the reform. The rapporteurs believe the new governance of France Télévisions has had a number of positive effects, such as the reorganised administrative board, while other results are more questionable, as for example the appointment of the chairmen of the public-sector audiovisual undertakings by France's President, which the new President François Hollande has announced he wants to reform. The part of the reform concerning which application is the most worrying, according to the rapporteurs, involves financing – the yield of the taxes introduced to compensate for the abolition of advertising has not reached the anticipated amount, thus costing the State 180 million euros per year. What is more, there is a serious risk that the European authorities will cancel the "telecoms" tax (250 million euros per year) and require the repayment of the tax received from the operators (a billion euros!). "The financing of the reform by introducing new taxes has thus been a failure". The transposition into national law of the Directive on Audiovisual Media Services is also analysed at length. The rapporteurs consider this has been applied fairly satisfactorily and relatively comprehensively, particularly with regard to promoting French diversity and the accessibility of programmes. It has also made it possible to bring catch-up TV and video on demand – which are already part of our everyday lives – within the scope of French law. In conclusion, the rapporteurs note that the modernisation of audiovisual law, particularly with regard to the digital revolution, is under way, and that the reform of the public-sector audiovisual scene is still in hand.

- *Communication audiovisuelle et nouveau service public de la télévision : la loi du 5 mars 2009 à l'heure du bilan, Rapport d'information de MM. David Assouline et Jacques Legendre* (Audiovisual communication and new public-sector television service: taking stock of the Act of 5 March 2009, an information report by David Assouline and Jacques Legendre)  
<http://merlin.obs.coe.int/redirect.php?id=15971>

IRIS 2012-7/23

## United Kingdom

### Media Convergence and Broadcasting Impartiality

*Oliver O'Callaghan*

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The House of Lords Communications Committee released its report on Media Convergence on 19 March 2013. The report focused on the increasing convergence of different media including television and broadcasting, and the traditional print media, in large part due to technological advances, particularly the Internet. The report highlighted the fact that the lines that had previously delineated these areas, to some extent, are becoming increasingly blurred. Newspapers through video content, and broadcasters through written, are using the Internet to encroach upon the traditional territories of each other. The Committee noted that this evolution is creating a plethora of new challenges and opportunities for content creators, audiences and regulators.

The Committee, in the report, touches on a number of different issues and makes several important recommendations, but perhaps the most notable is the observation that at some point in the future it may be necessary to reassess or abandon the requirements of impartiality currently incumbent upon all news broadcasters in the United Kingdom. It has been a requirement since the advent of broadcasting in this jurisdiction that news content is delivered in a way that is impartial and accurate; this is currently enshrined in both the Ofcom (The Office of Communications) Broadcasting Code and, separately for the State broadcaster, the BBC Charter and Agreement. This requirement is in stark contrast to that relating to the print media who are allowed, and in fact expected, to take a critical, partisan and provocative approach to matters of politics and public interest.

In the past, and as things stand at the moment, the mixture of approaches works to provide consumers with news sources originating from differing motivational standpoints. Equally, and crucially, the Committee noted that media audiences are still able quite easily to discern the difference in content production standards between the impartial and the partisan. However, it may be the case in future that the blurring of boundaries between news sources, caused by media convergence, may change the way news consumers approach sources of content. In this light, a change to the impartiality requirement may be appropriate for non-public service broadcasters. To this effect the report states at paragraph 114:

“In future, we think that non-PSB broadcast news and current affairs should be treated in the same way as non-broadcast news and current affairs as far as impartiality is concerned.”

The report goes on to suggest the possibility of an alternative mechanism of voluntary compliance with the Broadcasting Code. This change would not be without controversy and would have a profound effect on the role and duties of non-public service broadcasting in the UK.

- House of Lords Communications Committee Report on Media Convergence  
<http://merlin.obs.coe.int/redirect.php?id=16420>

IRIS 2013-5/30

## Regulator Clarifies Meaning of Editorial Responsibility for On-Demand Programme Services

*Tony Prosser*

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The UK communications regulator (Ofcom) has asked the co-regulatory Authority for Television on Demand (ATVOD) to reconsider a decision relating to editorial responsibility for on-demand programme services. The Communications Act 2003, as amended to implement the Audiovisual Media Services Directive, requires that there be a person with editorial responsibility for such services, who must notify ATVOD and pay a fee. Editorial responsibility is defined in terms of "general control" over what programmes are included in the service and over the manner in which such programmes are organised, although it is not necessary to have control of the content of individual programmes nor of the broadcasting and distribution of the service.

ATVOD was designated as the appropriate regulatory authority by Ofcom and had decided that British Sky Broadcasting Ltd (BSkyB) had editorial control over, and was the provider of, services provided by MTV, Nickelodeon and Comedy Central. The Act made it clear that only one person could have editorial responsibility. BSkyB had the final say on the selection of programmes for inclusion in the service, and the programmes comprising the service were not organised in any respect other than the placement given them by BSkyB within the service.

BSkyB appealed to Ofcom against the decision, claiming that ATVOD had not taken appropriate account of the intentions of the parties and that its decision was flawed. Ofcom noted other recent decisions that it had taken stating that it was entirely proper for the parties themselves to settle ambiguity about editorial responsibility by contract so long as this did not frustrate the purposes of the Act or of the Directive. In this case, ATVOD had not sufficiently addressed whether contractual provisions purporting to allocate regulatory responsibilities between the parties settled the ambiguity as to the allocation of editorial responsibility. Nor had it properly applied its own Guidance, which merely provides a guide to the approach it is likely to take but is not legally binding. Ofcom however decided to remit the decision for ATVOD to take it again, rather than simply substituting its own decision, as ATVOD is the appropriate authority to decide in the light of Ofcom's earlier decisions.

- Ofcom, "Appeal by BSkyB Against a Notice of Determination by ATVOD", published on 12 July 2012 <http://merlin.obs.coe.int/redirect.php?id=16093>

IRIS 2012-9/24

## Italy

### AGCOM Adopts Guidelines for PSB Obligations for Years 2013-2015

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Following the public consultation launched with Deliberation no. 130/12/CONS (see IRIS 2012-6/23) which led in October 2012 to the approval of a draft sent for comments to the Ministry of Economic Development, on 29th November 2012 AGCOM (the Italian Communications Authority) approved Deliberation no. 587/12/CONS. With this deliberation, adopted pursuant to Article 45, para 4, of the Italian AVMS Code, AGCOM approved the guidelines for the contract of public service



broadcasting, subscribed every three years by RAI Radiotelevisione Italiana spa (Italian public service broadcaster) and the Ministry of Economic Development.

The aforementioned article 45 creates a series of obligations the contract of service must comply with, and prescribes that every renewal of the contract has to be preceded by guidelines adopted by AGCOM with the opinion of the Ministry, defining further obligations deemed necessary by considering market development, technological progress and changing needs of a cultural nature, both at a national and local level.

The guidelines, adopted for years 2013-2015, identify their goals in ensuring a higher quality of both entertainment and information programmes, experimenting with new formats, improving the social and cultural commitment, taking into the utmost consideration the protection of minors, developing audiovisual productions suitable to uphold a positive image of Italian culture and identity, by promoting new audiovisual works but also by spreading to the public the excellent material stored by RAI in its historical archives.

On a more technical side, the public service broadcaster needs to compel to the principle of technological neutrality, guarantee a technical improvement of the service quality, also helping to improve the level of media literacy in Italy and enlarging the offer of online content.

With regard to the financing issue, according to the Protocol on the system of public service broadcasting in the member states, annex to the Treaty of Lisbon, public financing to public service broadcaster is allowed only to comply with PSB obligations and in such a way not to impact on the competition in the internal market. AGCOM, consequently, prescribes more transparency in using public funds, specifying for what obligations these are used.

- *Delibera n. 587/12/CONS "Approvazione delle linee-guida sul contenuto degli ulteriori obblighi del servizio pubblico generale radiotelevisivo ai sensi dell'articolo 45, comma 4, del Testo unico dei servizi di media audiovisivi e radiofonici (triennio 2013-2015)" (Deliberation no. 587/12/CONS "Guidelines for further obligations of public service broadcasting pursuant article 45, para 4, of AVMS Code (for the years 2013-2015)", 29 November 2012)*  
<http://merlin.obs.coe.int/redirect.php?id=16267>

IRIS 2013-2/30

## **AGCOM Technical Board for the Protection of Minors in on Demand Services**

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Following the amendments to the Italian AVMS Code introduced in July 2012 by the Legislative Decree no. 120/2012 (see IRIS 2012-8/32) and pursuant to the new Article 34 of the Code, regarding the protection of minors, Agcom adopted on 4 October 2012 a deliberation establishing a technical board to adopt, through co-regulation procedures, the technical measures regarding the protection of minors on VoD services, to prevent them from viewing content that "might seriously impair" the physical, mental or moral development of minors; these are considered to be, in particular, programmes that involve pornography or programmes with scenes of gratuitous, insistent or brutal violence, including cinematographic works classified as unsuitable for minors under 18.

Among the measures technically feasible, Article 34, para 5, of the Code envisages the employment of a personal identification number (PIN) to be applied by default, but which can be deactivated by the use of a secret code. The technical measures need to be implemented according to the following general criteria:

- a) adult content may be offered with a parental control feature that prevents access to the content. The user may disable the parental control by entering a special secret code;
- b) the secret code must be communicated confidentially to the adult signing the contract for receiving the content or the service, along with a warning about its responsible use and storage.

The aim of the technical board is to detect the possible procedures to communicate personal identification numbers (PIN) and to use filtering or identification systems, in order to agree upon solutions involving all interested stakeholders (e.g. industry, audiovisual media services providers, associations of citizens, and associations for children rights).

The technical board should conclude its work and adopt a definitive regulation within 30 days starting from the publication of the aforementioned deliberation no. 224/12/CSP on the Italian Official Journal.

- *Delibera n. 224/12/CSP "Costituzione del Tavolo tecnico per l'adozione della disciplina di dettaglio sugli accorgimenti tecnici da adottare per l'esclusione della visione e dell'ascolto da parte dei minori di trasmissioni rese disponibili dai fornitori di servizi di media audiovisivi a richiesta che possono nuocere gravemente al loro sviluppo fisico, mentale o morale ai sensi dell'articolo 34 del Decreto legislativo 31 luglio 2005, n. 177, come modificato e integrato in particolare dal Decreto legislativo 15 marzo 2010, n. 44, come modificato dal Decreto legislativo 28 giugno 2012, n. 120"* (Deliberation no. 224/12/CSP "Establishment of a technical board for the adoption of the implementation rules on the technical measures to be adopted in order to prevent minors from viewing and listening to adult content made available over on-demand audiovisual media services providers, pursuant to Article no 34, legislative decree no. 177/2005, as amended by legislative decrees no. 44/2010 and no. 120/2012")  
<http://merlin.obs.coe.int/redirect.php?id=16143>

IRIS 2012-10/18

## Italian AVMS Code Amended

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On 28th June 2012 the Italian Government adopted Legislative Decree no. 120/2012 amending the Italian AVMS Code (Legislative Decree no. 177/2005, already amended in 2010, when the AVMS Directive was implemented into Italian legislation: see IRIS 2010-2/25 and IRIS 2010-4/31).

This Decree has been adopted with the aim of amending some provisions on the protection of minors and trailers of cinematographic works adopted in 2010 at the time of the implementation of the AVMS Directive and which led to some remarks by the European Commission (see IRIS 2011-5/5). With regard to trailers of cinematographic works of European nationality, the challenged provision did not calculate their duration within the total time allocated to advertising. Concerning the protection of minors, the Italian transposition did not properly take into account the different provisions regarding minors between linear and non-linear media services.

Following the observations received from the Commission, the Italian Government took steps to amend the concerned articles, while taking also the chance to regulate some issues not specifically falling under the scope of the AVMS Directive, but still coherent with its underlying purpose, introducing some new provisions with regard to European works and sanctions against local AVMS providers.

Article no. 1 introduces major changes to Article no. 34 of the AVMS Code, regarding the protection of minors, to ensure a more consistent implementation of the provisions of the Directive and to introduce more restrictive rules for linear services and less severe rules for non-linear ones. It is now clearly stated that audiovisual content that seriously impairs the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence, including cinematographic works classified as unsuitable for minors under 18 years, may never be broadcast on linear services, but can be made available in on demand catalogues in such a way that minors will not normally hear or see such services and in any case provided that a parental control system is activated. AGCOM (the Italian Communications authority) is charged to adopt the implementing measures. As to programmes which are likely to impair the physical, mental or moral development of minors, they may be broadcast when it is ensured that minors in the area of transmission will not see or hear them and in any case together with an informative symbol during the whole transmission time. Cinematographic works classified as not suitable for minors under 14 years or films showing sex or violence may be broadcast only during the night, between 23 and 7, unless appropriate technical measures are available.

Article no. 2 amends Article 38, paragraph 12 of the AVMS Code excluding trailers of cinematographic works of European nationality from the limits on the amount of advertising when they qualify as “promotional messages” instead of “advertising”.

Article 3 amends Article 44, paragraphs 3 and 8 of the AVMS Code and charges the Ministries of Cultural affairs and Economic development to define specific investment sub-quotas, within the general investment quota of 10% of yearly revenues to be destined to independent European works, in relation to the production, financing, pre-purchase or purchase of cinematographic works of Italian expression, independently of the country of production. This Article also charges AGCOM to adopt a regulation, with the opinion of the mentioned Ministries, in order to define the roll-out of the monitoring activity on the provisions related with European productions and programming and the criteria for the concession of exemptions to AVMS providers fulfilling on of the conditions set by the Decree (no revenues in the past two years, less than 1% market share or thematic channels).

Article no. 4 reduces to one tenth the amount of the penalties for violations committed by local broadcasters in the field of audiovisual sports rights, in uniformity with other reductions for other kinds of violations covered by the Code.

- *Decreto legislativo 28 giugno 2012, n. 120 - “Modifiche ed integrazioni al decreto legislativo 15 marzo 2010, n. 44, recante attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l’esercizio delle attività televisive. (GU n. 176 del 30-7-2012 )”* (Legislative Decree 28 June 2012, no. 120 - Amendments to legislative decree 15th march 2010, no. 44, implementing Directive 2007/65/CE on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities)  
<http://merlin.obs.coe.int/redirect.php?id=16064>

IRIS 2012-8/32



# Public Service Media in a Connected Environment

## Different Shades of Using New Opportunities

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For its 37<sup>th</sup> meeting that took place in Kraków on 8-10 May 2013, the European Platform of Regulatory Authorities (EPRA) tabled a plenary discussion on the issue of public service media in a connected environment. This paper served to prepare and stimulate the discussion and especially the exchange on how to ensure quality programming in a connected environment as well as on how to define the role of national regulatory authorities in this process.

*"There is a large difference between the public interest and what interests the public."*  
Cass R. Sunstein, *Television and the Public Interest*, *California Law Review* 88, pp. 327-46,  
quoted in Thomas Gibbons (ed.), *Regulating Audiovisual Services*, 2009

### **1. All roads lead to Rome**

In as much as all roads lead to Rome, regulators dealing with on-demand interactive services will inevitably get down to the issue of quality programming. This paper traces some of the roads, focusing thereby on the regulation of public service media (PSM). While doing so it will mostly refer to the role of public service *broadcasting* given that, in our context, the discussion is largely about to what extent public service broadcasters (PSB) may engage in new media services or are even obliged to do so. This is underlined by the many documents from the Council of Europe (CoE) and the European Union (EU) that address this issue. Where EU law plays a role, the paper may also refer to the term "service of general economic interest" (SGEI) because (especially) the 2009 Broadcasting Communication stresses the EU's preference for this notion over the notion of "public service". This language choice is quite telling in that it corresponds to the economic logic on which EU law is (and has to be) primarily based and it is a point that should be born in mind.

Most European-level approaches to "quality programming" emphasise the content-supply side and aim at fostering the diversity of sources. PSM are in this regard an important measure to promote structural pluralism. This is one of the reasons why they are a focus in the work of the CoE on diversity and pluralism. At the same time, PSM are based on some form of state intervention and therefore can be "suspected" of having the potential to meddle unduly with the logic of a free internal market. Commercial media service providers certainly don't hesitate to stress this point,

thereby challenging the limits of the scope of the public service remit – that is, of what services public service operators may be allowed to offer.

Another path to promote quality programming is to impose measures aimed at achieving a diverse composition of the programmes on offer. However, such diversity of content does not necessarily result in what might possibly matter most: a diversity of choice guaranteed by the real possibility to receive diverse content.

Access to quality content seems less addressed by European and national rules. Various reasons could account for this. Top of the list might be the prohibition of censorship or at least the *de facto* fear to censor content. As Natali Helberger points out, this fear was justified in times of limited content offerings where the state was not meant to interfere with Article 10 of the European Convention on Human Rights (ECHR), which granted the right to receive and impart information.<sup>1</sup> But do we still need to have the same concern when the content on offer has vastly multiplied and information has become abundant? Aren't the real challenges for quality programming affordable access and the ability to identify and receive quality content from a huge and ever-growing assortment of content providers?

Universal access rules and media literacy initiatives are examples of how access to quality content can be facilitated and how this may also involve National Regulatory Authorities (NRAs). To some extent, heightened attention paid to the use of new media services for the fulfilment of the public service remit may also be viewed as an approach to achieving the same purpose of reaching audiences with quality content. The PSM approach pays tribute to new user habits<sup>2</sup> and is nourished by the hope of attracting the younger audience in particular.

From the various angles that matter to NRAs in addressing how PSM can or should be instrumental in making available quality content in a connected environment, this article will focus on the framework set by European bodies for extending the public service remit to include new media services, followed by examples of how countries have or are about to implement this European framework.

## 2. The Council of Europe

In over 30 years the Council of Europe (CoE) has continuously explained and developed its expectations concerning the legal framework for PSB as well as on corresponding engagements envisaged for CoE members.<sup>3</sup> As early as 1975, the Parliamentary Assembly adopted its first "broadcasting" Recommendation, entitled "on the role and management of national broadcasting".<sup>4</sup> The Annex of the Recommendation sets out minimum requirements for national broadcasters,

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1) In this vein, Natali Helberger, *Exposure Diversity as a Policy Goal*, in (2012)4(1) *Journal of Media Law* 65-92, at point 2.1.

2) This reasoning is apparent in Article 6.1. b) 3. of the recent service contract of the Belgian PSB, which reads: "*la RTBF assure, par le biais de tout moyen de communication électronique approprié compte tenu des modes de consommation les plus usuels, en ce compris l'internet et les appareils de réception mobile, l'accès le plus large à ses services audiovisuels et veille à ce que chacun puisse, dans le respect du principe d'égalité entre les usagers, avoir accès, sous forme de 'service universel', à toutes les chaînes généralistes en clair de la RTBF relevant de sa mission de service public visées à l'article 42. 2, a) et b), du présent contrat de gestion au moins par voie hertzienne en radio (FM) et en télévision et par le biais de la distribution par câble en télévision ; en fonction de l'évolution des modes de consommation des publics, ce service universel peut être adapté, à la demande de la RTBF, moyennant l'autorisation du Gouvernement*".

3) For an additional overview of the CoE's approach to PSB, see also Susanne Nikoltchev, *European Backing for Public Service – Council of Europe Rules and Standards*, in *IRIS Special "The Public Service Broadcasting Culture"*, European Audiovisual Observatory 2007, pages 7-15.

4) Recommendation 748 (1975), adopted by the Parliamentary Assembly on 23 January 1975, available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta75/erec748.htm>

Unless noted otherwise, official CoE documents as well as summarising reports are assembled in the following Observatory publications, edited by Susanne Nikoltchev, European Audiovisual Observatory, and Tarlach McGonagle, *IViR*, (02/2012): *Freedom of Expression and the Media: Standard-setting by the Committee of Ministers of the Council of Europe*, available at: [www.obs.coe.int/oea\\_publ/legal/ebook\\_committeeministers-coe.pdf.en](http://www.obs.coe.int/oea_publ/legal/ebook_committeeministers-coe.pdf.en) and *Freedom of Expression and the Media: Standard-setting by the Parliamentary Assembly of the Council of Europe*, available at: [www.obs.coe.int/oea\\_publ/legal/ebook\\_ParliamentaryAssembly.pdf.en](http://www.obs.coe.int/oea_publ/legal/ebook_ParliamentaryAssembly.pdf.en)

among which we already find: "Flexibility to introduce new techniques (such as viewer-selected superimposed subtitling)" [lit. g]. Likewise, the Recommendation on the guarantee of the independence of PSB does not only insist on editorial independence and institutional autonomy of public service broadcasting organisations, but also opens the door for PSB to use new communications technologies.<sup>5</sup> The Recommendation on public service broadcasting underlines the importance of providing an appropriate framework for the upgrade of PSB to the digital era.<sup>6</sup> The Declaration on Public Service Media Governance and the similarly named Recommendation contain the most recent formalised statements in this regard.<sup>7</sup> Both documents take it for granted that in the new media environment PSB have to transform into PSM in order to counter risks that would otherwise challenge "pluralism and diversity in the media and, in consequence... democratic debate and engagement" [point 14 of the Declaration].

*Accordingly, the question is not whether to widen the scope of PSB activities but rather to what extent and to what end.*

The Recommendation on the remit of public service media in the information society<sup>8</sup> adapts the public service remit (as it had originally been determined for PSB by the Recommendation on public service broadcasting) to "fit" PSM. As was the case for PSB, "the remits of individual PSM may vary within each member state". It is up to the member states to decide which of the Recommendation's principles they wish to adopt. The basic approach envisaged by the CoE is, however, to maintain the key elements already established for the public service remit but to extend them to cover the provision of appropriate content also via new communication platforms [points 1 and 2 guiding principles]. The Recommendation stresses that it is crucial to "ensure that PSM can be present on significant platforms and have the necessary resources for this purpose" [point 4 guiding principles].<sup>9</sup> It also underlines in several of the guiding principles, especially in point 1, the expectation that PSM will be able to use "state-of-the-art technology appropriate for the purpose", a notion that other principles outline to include new digital and online technologies, and interactive services. Member states are asked to establish the necessary legal framework in order to enable PSM "to exercise, as effectively as possible, their specific function in the information society and, in particular, [to allow] them to develop new communication services" [point 26 guiding principles].

Other parts of the guiding principles of the Recommendation on the remit of public service media in the information society recall the traditional view that PSM are there to compensate for market failures and that member states shall maintain this tradition in the new digital environment [point 9] and that PSM are charged with promoting "digital inclusion" [point 11].

With regard to **quality programming**, PSM continue to be expected to provide added public value by offering news, information, educational, cultural, sport and entertainment programmes and content aimed at the different groups of society [point 3 guiding principles]. These goals (as well as the necessary means) shall be clearly defined, for example, in order to allow regular evaluation and review by "relevant bodies" [point 6 guiding principles].

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5) Committee of Ministers' Recommendation No. R (96) 10 on the guarantee of the independence of PSB of 11 September 1996. See in particular points 70-73 (VII. Access by public service broadcasting organisations to new communications technologies) of the Explanatory Memorandum to the Recommendation. The Memorandum thereby follows up on the Prague Resolution No. 1 on the future of PSB (of 1994). It is available at: [www.coe.int/t/dghl/standardsetting/media/doc/CM/Rec%281996%29010&ExpMem\\_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/doc/CM/Rec%281996%29010&ExpMem_en.asp#TopOfPage)

6) Recommendation 1641 (2004) of the Parliamentary Assembly on public service broadcasting of 30 September 2004.

7) The Declaration of the Committee of Ministers on public service media governance and Recommendation CM/Rec(2012)1 on public service media governance, both of 15 February 2012, available at : <https://wcd.coe.int/ViewDoc.jsp?id=1908241> and <https://wcd.coe.int/ViewDoc.jsp?id=1908265>

8) Recommendation CM/Rec(2007)3 on the remit of public service media in the information society of 31 January 2007.

9) Similar concerns about establishing the necessary conditions for new public services were already voiced in Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting of 28 May 2003, where the Committee of Ministers recommends that PSB obtain the financial support as well as legal, economic, technical and other conditions necessary to be present on the different digital platforms.

PSM are also expected to contribute actively to audiovisual creation and production and the preservation of cultural heritage [points 19-24 guiding principles]. In the digital context, this translates in particular into an “obligation” to generate content in formats suitable for the new communication services, to digitise archives and where feasible to make them accessible online.

The Appendix to the Recommendation on measures to promote the public service value of the Internet<sup>10</sup> adds another goal, namely to encourage PSM to use user- and community-generated content.

These are the pillars on which member states shall ideally build the public service remit and formulate specific goals for PSM. They also indicate what roles regulators may play in ensuring that PSM serve the public interest.

Additional expectations towards regulators are linked to the **management of the transition** from PSB to PSM for which the Committee of Ministers lays the main responsibility on member states. They shall accompany the switch by adapting legislation/regulations for the remit of PSM with regard to the new communication services with a view to “enabling these media to make full use of their potential”.<sup>11</sup> Appropriate governance is a key concept in this regard.

According to the Declaration on public service media governance **an appropriate system of governance** should (also) include

- the legal frameworks through which the State ensures an appropriate balance between independence and accountability of public service media;
- the regulations and practices through which public service media ensure that their processes and culture are the most appropriate to fulfil their remit and best serve the public interest;
- an active and meaningful dialogue with its wider stakeholders including new levels of interaction, engagement and participation [point 11 of the Declaration].

While the first point clearly comes within the **responsibilities** of legislators and/or regulators, the other two imply an active role of the PSM organisations. The *Guiding principles for public service media governance* appended to the similarly named Recommendation expand on the particular challenges PSM organisations face in the transformation process. They are expected to “look afresh at their public purpose and determine, within their remit, the correct balance of broadcast and other services that will best match audience need with available resources” [point 5 of the Guiding principles]. The Guiding principles [point 8] also note that PSM organisations are under increasing scrutiny as to where they strike this balance, not least because of EU and national law requirements of ex ante control that again point to the responsibility of regulators.

### 3. European Union

While the Amsterdam Protocol<sup>12</sup> clearly states the EU’s acknowledgement of the importance of PSB in relation to “the democratic, social and cultural needs of each society and to the need to preserve media pluralism”, the EU’s tools to regulate these aspects of PSM are severely limited. Its strongest set of rules applicable to PSM is competition law, whose state aid rules have been very relevant for PSB. Competition law, however, aims to guard against unfair competition and market imbalances and has therefore very limited value for the challenge of “positively designing” a specific legal framework and of providing the necessary conditions for PSM. As the recent Mediadem

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10) Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet of 7 November 2007.

11) Recommendation CM/Rec(2012)1 on public service media governance.

12) Protocol on the system of public broadcasting in the Member States of the Treaty of Amsterdam amending the Treaty on the European Union, the Treaties Establishing the European Communities and Related Acts (OJ C 340 of 10 November 1997).



report stressed, it is also reactive because of its ex post nature and therefore hardly suited to cope with the fast pace of change of new media markets.<sup>13</sup>

In contrast, the AVMS Directive<sup>14</sup> prescribes obligations and limits related to media content (such as quotas and provisions aiming at protecting minors) but is applicable to audiovisual media services *irrespective of* whether or not they are offered with a view to serving public service interests.

Despite these shortcomings for our context, both legal areas foresee in a connected environment a potential role for regulators to assist/monitor/control PSM – as the case may be under the transposition into national law. Furthermore, the EU has already “upgraded” both areas to meet the new realities of how nowadays digitised audiovisual content can be communicated and become the centre of interactive services.

### 3.1. State aid rules

The 2009 Broadcasting Communication<sup>15</sup> seeks to provide guidance concerning the extent to which Services of General Economic Interest (SGEI) provided by PSM are covered by the public service mandate and therefore do not constitute undue state aid. It integrates existing case law on state aid and expressly addresses issues regarding the scope of public service activities that have arisen because of the development of new digital technologies and Internet-based services [point 7]. It points to the limited power of the Commission to interfere with member states’ definitions of the public service mandate of broadcasters. Only manifest errors in defining this mandate and a lack of clarity of the remit that threatens to impede meaningful supervision could justify Commission action.

Whereas the 2009 Broadcasting Communication largely adopts the principles of the preceding 2001 Broadcasting Communication,<sup>16</sup> it additionally stresses the requirement that a precisely defined public service mandate must be balanced with the need for editorial independence for PSB. The public service remit as such may be broadly defined, go beyond classical broadcasting and include all types of new audiovisual services on all kinds of platforms, provided that it be based upon qualitative requirements.<sup>17</sup> The definition must be covered by an official act of “entrustment”, which shall at the same time specify the conditions for providing compensation and handling potential overcompensation.

Broadcasters must be subject to a national mechanism that guarantees effective and transparent supervision of compliance with the remit and especially an assessment (*ex officio* or complaints-based) that broadcasters respect the qualitative and transparency requirements. Effective supervision implies that the appointed body operates independently from the PSB. It additionally has to have the powers and necessary means to regularly carry out the supervision and to impose appropriate remedies if necessary for the respect of the public service obligations [points 53-54]. Regular (preferably yearly) effective control by an external independent body is also required regarding the use of public funding. The control shall safeguard against cross-subsidisation and overcompensation. It shall also serve to ensure the required level and use of “public service reserves” [points 78-79].

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13) See Policy recommendation for the European Union and the Council of Europe for media freedom and independence and a matrix of media regulation across the Mediadem countries, September 2012, point 4.

14) 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).

15) Communication from the Commission on the application of State aid rules to public service broadcasting of 27 October 2009, OJ C 257/01.

16) OJ C 320, 15 November 2001, p.1.

17) See points 47 and 81 of the 2009 Broadcasting Communication.

If a broadcaster wishes to introduce “significant new audiovisual services”, it must pass the so-called “Amsterdam test”, which takes care of the legitimate interests of commercial media.<sup>18</sup> Prior to the launching and based on a public consultation, the envisaged services must be evaluated as to whether “they serve the democratic, social and cultural needs of the society, while duly taking into account its [sic] potential effects on trading conditions and competition” [point 84]. A service satisfies this test if it adds value for society by catering to the aforesaid needs and provided this added value outweighs the service’s potential (negative) impact on the market. Again, the assessment has to be made by a national body that is effectively independent of the management of the PSB.

Interactive services provide the opportunity to introduce pay-for-service elements, and therefore the 2009 Broadcasting Communication addresses under what conditions they may still come within the public service remit. As explained in point 83 of the Broadcasting Communication, not every remuneration element of a service provided by a PSM takes the service outside the public mandate. This holds true at least for as long as the pay element does “not compromise the distinctive character of the public service in terms of serving the social, democratic and cultural needs of citizens, which distinguishes public services from purely commercial activities.” What this requirement means in practice is left to case by case decisions.

The formal conditions of the 2009 Broadcasting Communication were first applied on 28 October 2009, when the Commission finally signalled approval for the financing regime of Austria’s public service broadcaster *Österreichischer Rundfunk* (ORF). Before that, Austria had made the concession that it would introduce additional criteria to clarify the public service remit with regard to new media activities and establish a new media authority to have the remit supervised according to a further specified procedure that includes all stakeholders.<sup>19</sup>

In June 2010, Austria kept this promise by amending its relevant law as follows:

“In order to guarantee ORF’s (core) public service remit, Article 4a ORF-G provides for an internal quality assurance system involving the ORF Director-General, *Stiftungsrat* and *Publikumsrat*. Under Article 4a paragraph 2 ORF-G, an external council of experts will evaluate the overall performance of the quality assurance system and decide whether the quality criteria are being met in key areas. KommAustria will ensure compliance with the provisions of the quality assurance system (Article 4a paragraph 8 ORF-G). ORF’s public service remit must be clarified with regard to online services (Articles 4e and 4f ORF-G) and special interest channels (Articles 4b, 4c and 4d ORF-G). To this end, ORF must draw up ‘service concepts’, which should provide more concrete definitions (Article 5a ORF-G). KommAustria is also required to evaluate new ORF services in advance (Articles 6 ff. ORF-G), particularly by determining whether they meet the social, democratic and cultural needs of the Austrian population and help ORF to fulfil its core public service remit effectively.”<sup>20</sup>

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18) The importance of taking these interests into consideration has been demonstrated in Germany, where in 2003 the Private Broadcasting and Telecommunications Union (VPRT) filed a complaint against the public service broadcasters for using anti-competitive practices (financed by public means) and thus triggered Commission investigations in the compatibility of the public service remit and funding of PSB. The procedure was discontinued after Germany assured that it would clarify the public service remit and establish a suitable and effective system of supervision. The *12. Rundfunkänderungsstaatsvertrag* (12<sup>th</sup> Inter-State Broadcasting Agreement – RÄStV), which entered into force on 1 June 2009, implemented this system. In particular, *telemédia* services (online-offers) will have to satisfy a three-step-test in order to be launched. For more details see §11f RÄStV ([www.dvtm.net/fileadmin/pdf/gesetze/13.\\_RStV.pdf](http://www.dvtm.net/fileadmin/pdf/gesetze/13._RStV.pdf)) and also Alexander Scheuer, Agreement on 12<sup>th</sup> Inter-State Broadcasting Agreement Prepared, in IRIS 2008-10:9/13, available at: <http://merlin.obs.coe.int/iris/2008/10/article13.en.html>

19) [http://europa.eu/rapid/press-release\\_IP-09-1603\\_en.htm](http://europa.eu/rapid/press-release_IP-09-1603_en.htm)

20) Christian M. Bron, Comprehensive Media Rights Reforms Adopted, in IRIS 2010-8/11, available at: <http://merlin.obs.coe.int/iris/2010/8/article11.en.html>

### 3.2. Audiovisual Media Services Directive

Within the limits of meanwhile familiar uncertainties and national differences linked to the definition of scope, the AVMS Directive shapes the legal framework for all audiovisual media services in a connected environment, including that of PSM. The Directive sets certain goals with regard to quality programming that NRAs ought to monitor and possibly enforce according to their transposition into national rules.

Article 13 AVMS Directive contains the key requirement for quality content in non-linear services, irrespective of whether they are offered by PSM or commercial providers. According to this provision the production of and access to European works should be promoted where practicable and by appropriate means. The Directive mentions financial contributions (for the purchase of rights or to promote production) as well as quota and prominence rules as potential options for implementing policies. Recital 69 of the AVMS Directive gives further guidance as to how the provision might be transposed into national law, for example by an attractive presentation of European works in EPGs or a minimum share of European works in on-demand catalogues. Regular re-examination of the requirement is recommended and opens the door wide for the involvement of regulators. Recital 74 underlines that the objective of supporting audiovisual production in Europe may also be pursued through the definition of the remit or specific requirements for PSM.

As a recent workshop on promotion of European works revealed,<sup>21</sup> the transposition of Article 13 has visibly advanced only in a few countries and the national solutions differ significantly. In some countries (e. g. French-speaking Community of Belgium, the Netherlands, France), regulatory authorities are at the forefront of the developments while in others (e. g. Slovakia) the Commission was the driving force behind the change (not the result!) to take place. Many countries tend to simply adapt the solution they already apply for linear services to non-linear offers and enforcement seems not to be (yet) on the agenda.

A major difference in the tasks of NRAs with regard to the promotion of audiovisual works results from a fundamental difference in the related national policies. If a country works on the premise that promotion of European works will benefit everybody from the producers to the service providers to the public, it might try to join all forces in a voluntary scheme. In this scenario, the NRA has a crucial role to play in convincing and motivating all stakeholders to participate in that common effort.<sup>22</sup> The prevailing measure will be prominence rather than quotas because it leaves more room for innovative ideas and tailor-made solutions. At the other end of the spectrum, a country whose industry does not really buy into the usefulness or feasibility of promotion might tend to impose "hard" requirements whose fulfilment it can measure.<sup>23</sup> Here the NRA takes on a role close to that of a monitoring and enforcement agent.

In the context of media diversity, Article 5 AVMS Directive also deserves being mentioned because of its requirements for the provision of easy, direct and permanent access to information on the media service provider (lit. a to c). Whereas the availability of this information contributes to more transparency, it alone seems hardly enough for consumers to make better-informed choices with regard to the quality of content.<sup>24</sup> At the same time, Article 5 lit. d AVMS Directive also recalls the potential role of NRAs insofar as "where applicable, the competent regulatory or supervisory bodies" shall be indicated.

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21) The expert workshop on "Promoting European Works in On-demand Audiovisual Services", co-organised by the Observatory and IViR with the support of EMR, took place in mid-March 2013. The results will be published in the IRIS *Special-series* and become available at the end of 2013.

22) This is the case in Belgium. For a presentation of their system, see <http://prezi.com/z0x71vd00m1n/promotion-of-eur-works-in-vod-for-obs/>

23) This is the case in Slovakia, see Juraj, Polak, Promotion of EU Works in On-demand Audiovisual Media Services, IRIS 2013-2/36, available at: <http://merlin.obs.coe.int/iris/2013/2/article36.en.html>

24) See also Helberger, op. cit. page 83.

## 4. Specific issues under national law

### 4.1. Recent developments

In many countries, we can witness reviews of the PSB remit or even the system of PSB as such. The developments relate often (but not only) to public service broadcasters' engagement in new media services. Programme quality considerations are almost always addressed. In most cases these developments go hand in hand with some form of adapting the structure of governing, monitoring, and/or supervising PSB.

For example, the Italian AGCOM has issued guidelines for PSB obligations covering the period 2013-2015. Among the measures identified by AGCOM several may potentially impact on the quality of content in new services: *Radiotelevisione Italiana* (RAI) shall (i) ensure a higher quality of programmes and experiment with new formats; (ii) engage in developing audiovisual production that fosters a positive image of Italian culture and identity; (iii) promote new audiovisual works and (iv) offer to the public material from its historical archives.<sup>25</sup>

The Government of the French-speaking Community of Belgium has entered into a new five-year service contract with PSB *Radio Télévision Belge Francophone* (RTBF), in which it now addresses the online presence of RTBF (also with regard to social networks), while maintaining already existing requirements as to the quality of content. The contract expressly asks the RTBF to encourage the offer of new media services, especially with regard to their complementary and interactive potential (see Article 6.1. f)).<sup>26</sup>

In Switzerland the Federal Council has communicated its decision to allow the PSB *Société suisse de radiodiffusion et télévision* (SSR) more flexibility in its online offer, while safeguarding the interests of competing private services by prohibiting the SSR from advertising on its Internet site.<sup>27</sup> In the same communication the Federal Council launches the idea of setting up an extra-parliamentary commission on the media that would monitor the evolution and importance of Switzerland's media marketplace and public sector. This commission would further assess public needs and advise the Federal Council.

The Portuguese Government followed a commitment to rethink the concept of PSB in light of technological changes. It established a Working Group of media professionals that drafted a report on the definition of a concept for PSB. Among others the report recommends improving news programmes and abolishing the state media regulator *Entidade Reguladora para Comunicação Social*.<sup>28</sup>

In the UK, the BBC is at the centre of a debate about the future of prominence regulation, a regulation originally designed to benefit PSB in a multi-channel linear broadcasting environment. It is largely based on privileged access to DTT capacity and appropriate EPG prominence.<sup>29</sup> The existing rules are, however, difficult to reconcile with today's patterns of content delivery and consumption that include, for example, catch-up and on-demand services, and that involve new actors and new content gateways.<sup>30</sup> Therefore the DCMS is reflecting on how to adapt it with a view to maintaining

25) Francesca Pellicanò, AGCOM Adopts Guidelines for PSB Obligations for Years 2013-2015, in IRIS 2013-2/30, available at: <http://merlin.obs.coe.int/iris/2013/2/article30.en.html>

26) The RTBF service contract is available at <http://csa.be/documents/1703>

27) Patrice Aubry, No Advertising on Internet for Public-Service Radio and Television, but More Freedom Regarding Content of On-line Offer, in IRIS 2012-9/13, available at: <http://merlin.obs.coe.int/iris/2012/9/article13.en.html>

28) Mariana Lameiras & Helena Susa, Portuguese Government Orders a Report on the Definition of the Concept of Public Service Broadcasting, in IRIS 2012-1/37, available at: <http://merlin.obs.coe.int/iris/2012/1/article37.en.html>

29) See Ofcom, Driving investment and growth in the UK's TV content industries, Response to Department for Culture, Media and Sport discussion paper, especially points 4.1-4.10, available at: [http://stakeholders.ofcom.org.uk/binaries/consultations/ofcomresponses/Response\\_to\\_DCMS.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/ofcomresponses/Response_to_DCMS.pdf)

30) See Report by the BBC, The Economic Value of the BBC: 2011/12, January 2013, and Robin Foster and Tom Broughton, PSB prominence in a converged media world, December 2012.

the high quality output of PSB. Ofcom, author of the current EPG code,<sup>31</sup> feeds the actual discussion alongside the BBC and other stakeholders.

In response to practical problems in the co-functioning of the bodies of the Croatian PSB *Hrvatska radiotelevizija* (HRT), namely the Programme Council, the Management Board and the Supervisory Board, a recent amendment to the Croatian Radio-Television Act restructured the management of HRT as to the election procedures (now in the hands of the government) and generally the distribution of competences.<sup>32</sup>

Changes in the functioning of public service broadcasters may also occur as a result of the way they are funded. In Slovakia, for instance, the PSB Radio and Television of Slovakia (RTS) is funded since January 2013 by an annual contribution from the state budget, which may be used solely to cover the net costs of the public service mission. While this change might help to secure and regularise the budget it also means a more direct link to the government. Both aspects have been used as arguments that RTS may better fulfil its public service mission. Yet the political opposition views the new funding scheme as potentially inviting government interference with RTS's editorial independence.<sup>33</sup>

#### 4.2. Public value tests

In order to ensure respect of the Amsterdam requirements set by the Commission with regard to the public service remit, countries have introduced corresponding procedures.

Prominent examples, already introduced at EPRA meetings, are Germany, Norway and the UK with their ex ante public value tests and market assessments for new services offered by PSB. Spain too has – at least in theory – introduced a public value test. The test has not yet been applied because, on the one hand, the RTVE Corporation has not launched significant new services and, on the other hand, the authority responsible for conducting the test (CEMA) is not yet operational. Other countries, for example Hungary and Italy, have introduced systems where new services are examined on the basis of technical, economic and media policy considerations before they may be green-lighted. Public service objectives seem to enter into these considerations/evaluations without this being expressly labelled as a public value test. Switzerland runs a co-regulation system where the public service broadcasters define their quality criteria and policies and OFCOM imposes (external) auditing.<sup>34</sup>

Gradually, case law is emerging, in which these systems are applied to concrete services. Among the first examples of the application of a public value test was the BBC Trust's approval of several new on-demand services. These comprised a seven-day catch-up TV service over cable, including "series stacking" by which an entire series could be stored and viewed within seven days of the final episode, a similar service over the Internet, and a service for simulcast TV broadcasting over the Internet.<sup>35</sup> As a result of its Market Impact Assessment, Ofcom had expressed concerns as to the series stacking being close to becoming a substitute for commercial services and likewise as to the impact the length of catch-up services over the Internet might have on the market. The BBC Trust addressed these concerns by proposing to adopt a narrower definition of series available for stacking and to shorten the storage windows for catch up over the Internet. Some years later,

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31) The Code was drafted following an obligation under section 310 of the Communications Act and is available at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/epgcode.pdf>

32) Nives, Zvonaric, Parliament Adopts Amendment to the Croatian Radio-Television Act, in IRIS 2012-9/27, available at: <http://merlin.obs.coe.int/iris/2012/9/article27.en.html>

33) Juraj Polak, Amendments to the Radio and Television Act, in IRIS 2012-1/42, available at: <http://merlin.obs.coe.int/iris/2012/1/article42.en.html>

34) See EPRA working paper, presented in 2010 in Belgrade and available at: [http://epra3-production.s3.amazonaws.com/attachments/files/803/original/WG3\\_PSB\\_assessment\\_OFCOM\\_CH.pdf?1323685469](http://epra3-production.s3.amazonaws.com/attachments/files/803/original/WG3_PSB_assessment_OFCOM_CH.pdf?1323685469)

35) Tony Prosser, First Market Assessment of New BBC On-Demand Proposals, in IRIS 2007-3/23, available at: <http://merlin.obs.coe.int/iris/2007/3/article23.en.html>

the BBC Trust approved Project Canvas<sup>36</sup> in light of the results of the public value (as well as a market impact) assessment. The Trust highlighted among others that the Project would increase the range of content and services on digital terrestrial television.

A recent decision of the *Landgericht Köln* (Cologne District Court) addressed the question of whether the version of 15 June 2011 of the “Tagesschau app” (a daily news service of the German PSB, the ARD) was still covered by the public service remit or fell under the prohibition of Article 11d(2)(3) *Rundfunkstaatsvertrag* (Inter-State Agreement on Broadcasting – RStV). According to the court, the specific app, if viewed from the perspective of a user, had the capacity to substitute the press because of the very detailed content that resembled that of most newspapers and magazines. Therefore, the version of 15 June 2011 fulfilled the elements of “press-like services not related to a programme” and was banned. At the same time, the court confirmed that the Tagesschau app as such had passed the three-step test under Article 11f RStV and generally came within the PSB legal remit.<sup>37</sup>

The first application of the Norwegian public service remit ex ante test concerned the inclusion of a new travel and route planner. The Norwegian King in Council found that this service could be included in the public service remit of the Norwegian PSB (NRK). The Competition Authority’s assessment, however, had pointed the other way when it found that the new service would have a substantial negative impact on existing commercial actors that developed similar services and would weaken the reasons to develop such services. Likewise the Media Authority was of the opinion that the new service was clearly not justified within the democratic, social and cultural needs of society defined by NRK’s public service remit. The King in Council nevertheless cleared the new service, though subjecting it to conditions of equal access to public data and to commercial aspects. It found that the traffic and route planner could be justified within NRK’s Statutes and that its added public value outweighed potential effects on competitors.<sup>38</sup>

An Austrian constitutional case, currently pending before the *Verfassungsgerichtshof*, might possibly relate new aspects to the question of where countries might draw the line as to permissible new services (with or without public value test). The case concerns an appeal of the ORF, the Austrian PSB, against the NRA’s interpretation of the ORF Act, according to which the ORF shall be banned from co-operating with social networking sites because such activities are thought not to be covered by the ORF’s public service remit (except in connection with the ORF’s own daily online news extracts).<sup>39</sup>

#### 4.3. Additional competition law aspects<sup>40</sup>

Currently, an online platform project involving several companies of the German PSB ARD and ZDF as well as other production and licensing companies is being assessed by the *Bundeskartellamt*, the German Antitrust Authority. The companies jointly set up a video-on-demand platform, called “Germany’s Gold”, to make digitised content from the past 60 years of German and international film and television history available to viewers via satellite, cable, terrestrial broadcasting, the Internet and other technologies. Individual on-demand payments, subscriptions and advertising would finance the service. The President of the *Bundeskartellamt* expressed the concern that “the joint online platform would mean that the prices and choice of videos, in particular, would be coordinated between the two broadcasters.” In his view: “The problems arising under competition

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36) Tony Prosser, BBC Trust Approves Project for On-Demand and Internet Services to be Made Available on TV Sets, in IRIS 2010-2/22, available at: <http://merlin.obs.coe.int/iris/2010/2/article22.en.html>

37) For more details, see Tobias Raab, Cologne District Court Bans Version of Tagesschau App, in IRIS 2012-10:1/8, available at: <http://merlin.obs.coe.int/iris/2012/10/article8.en.html>

38) For further details, see Marie Therese Lilleborge, The First Ex Ante Test Completed, in IRIS 2013-1/13, available at: <http://merlin.obs.coe.int/iris/2013/1/article31.en.html>

39) Martin Lengyel, Administrative Court Confirms “Facebook Ban” for the ORF, in IRIS 2013-1/6, available at: <http://merlin.obs.coe.int/iris/2013/1/article6.en.html>

40) For more information on competition law aspects in the context of PSM, see also Susanne Nikoltchev (ed.), IRIS *Special* “Converged Markets – Converged Power? Regulation and Case Law”, (European Audiovisual Observatory, 2012).

law are obvious. In addition, the media libraries and the production of content are financed by user fees and therefore already distort competition to a considerable degree on the video-on-demand market. Further-reaching restrictions of competition by the commercial subsidiaries of the broadcasters cannot be accepted. The general question whether it is justified to demand payment for the use of content which has already been financed by user fees is not an issue under competition law.<sup>41</sup> The *Bundeskartellamt* is now discussing with the companies whether and how commitments by the PSB could mitigate the impact of the project on competitors.

The *Bundeskartellamt* had also examined the merger aspects of the case but found no danger of a dominant position. In this context, it is interesting to note that if a PSB were to hold a dominant position, this would not only be an obstacle to a proposed merger but could possibly also lead the competition law authority, in exceptional circumstances, to impose an obligation to open its archives to competitors.<sup>42</sup> This points in the same direction as the commitment that Germany made in the context of the Commission's review of the German financing scheme for PSB. Germany, at the time, promised that sports rights not used by the PSB would be offered in a transparent procedure to third parties for sub-licensing.<sup>43</sup>

#### 4.4. Archives

PSB archives dispose of a wealth of European works<sup>44</sup> and therefore an asset for quality programming. Within the limits of copyright law, public service broadcasters are in a position to use these archives for their own on-demand services. To the extent that they hold/own intellectual property rights, a further question would be whether public service broadcasters should also open their archives to competitors – especially because material will have regularly been produced with the support of public money – and if so, under which conditions. Yet, in reality, copyright will often be a main obstacle to any kind of use.

A short look at Directive 2003/98/EC, which provides a general framework for the conditions of re-use (in terms of licences, charging policies, transparency and competition rules) of any content whatever its medium (including in electronic form or as an audiovisual recording) of “public service bodies”, shows that EU law does not state such an obligation. This follows from the fact that Article 1 paragraph 2 lit. d of the Directive excludes PSB from the scope of the Directive. The revised Directive (whose adoption is expected for June 2013) will not change this situation.

Any obligation concerning archives can therefore only be found in national law. It is also the national law that would need to oblige PSM to engage in the digitisation of audiovisual content, the indispensable prerequisite for using archived content in new media services. As a consequence, NRAs might get involved in the policy on PSB archives only to the extent they have competence in copyright clearance, management or licensing or if they are involved in schemes for the digitisation of PSB archives. The latter is, for example, the case for the Broadcasting Authority of Ireland (BAI) that developed and now conducts a funding scheme to support the archiving of broadcast material.<sup>45</sup> The Italian AGCOM has also included in its PSB guidelines [see above] that RAI should make available to the public material contained in its archives. The Norwegian PSM shall undertake efforts to digitise its archives, and to make as many of its TV programmes available on the Internet for simultaneous distribution and as an archive service for download and/or individual playback.<sup>46</sup>

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41) Bundeskartellamt, Press Release of 11 March 2013, ARD/ZDF Online Platform “Germany’s Gold” raises competition concerns, available at: [www.bundeskartellamt.de/wEnglisch/News/press/2013\\_03\\_11.php](http://www.bundeskartellamt.de/wEnglisch/News/press/2013_03_11.php)

42) See Kim de Beer, Summary of the Discussion, in Susanne Nikoltchev (ed.), *IRIS Special “Digitisation and Online Exploitation of Broadcasters’ Archives”*, (European Audiovisual Observatory, 2010), page 72.

43) See European Commission, letter to the German Foreign Minister of 24 April 2007 concerning state aid, E 3/2005, K(2007) 1761 endg., para. 355., available at: [http://ec.europa.eu/eu\\_law/state\\_aids/comp-2005/e003-05.pdf](http://ec.europa.eu/eu_law/state_aids/comp-2005/e003-05.pdf)

44) The EBU estimated that 28 million hours of broadcasting content were available. See Pranvera Këllezi, A Competition Law and Policy Perspective, in *IRIS Special “Digitisation and Online Exploitation of Broadcasters’ Archives”*, page 43.

45) See Damien McCallig, Ireland Approval of Funding Scheme for Broadcast Archiving, in *IRIS 2012-4/29*, available at <http://merlin.obs.coe.int/iris/2012/4/article29.en.html>

46) Marita Bergtun, Norway, in *IRIS Special “Converged Markets – Converged Powers? Regulation and Case Law”*, page 140.

## 5. Wrapping up: the trunk roads to Rome

The Council of Europe has firmly established the idea that PSM should use the newest technology available at any given time to fulfil their public service obligations. That PSM develop public media services based on the opportunities of a connected environment falls squarely within this logic. According to the CoE, it is the responsibility of member states to guide PSB in their transition to PSM and to enable them to continue catering to essential societal and policy needs for quality content. The EU seconds the CoE policy though with a more economic mindset.

Through participation in European standard setting and as creators of the national legal frameworks, countries regularly confirm the paramount importance of PSM for quality content. They do so in general and also specifically regarding new technical possibilities. The concrete results achieved, however, differ significantly across Europe. For example, whereas a travel and route planner is covered by the public service remit in Norway, co-operation with social networks is not in Austria. While Belgium believes in voluntary prominence of European content, Slovakia resorts to imposing monthly quotas. The country-by-country and case-by-case approach means that the “completed” picture of PSM in a connected environment, at which we might look one day, will be largely painted by an array of administrative and court decisions. Different legal areas ranging from specific media legislation to competition law will supply the colouring. And various official bodies will have left their imprints. It will be up to the European institutions to judge whether the European frame proves sturdy enough for the whole.

NRAs occupy a high rank in the process of establishing the PSM remit. As the case may be, they might have to multi-task as regulators, monitors, supervisors, reformers and sometimes cheerleaders. And they will have to grow alongside the technology that will continue to dictate the speed and the direction of all developments.





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