

2013-4

What Is an On-demand Service?

LEAD ARTICLE

On-demand Services: Made in the Likeness of TV?

- The scope of the AVMS Directive
- Transposing the AVMSD
- The unsettled boundaries of the AVMSD
- Recent decisions of national regulatory authorities
 - Newspaper websites providing video
 - Professional channels on UGC platforms
- TV-likeness?

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What Is an On-demand Service?

Foreword

*The slow one now
Will later be fast
As the present now
Will later be past
The order is rapidly fadin'
And the first one now will later be last
For the times they are a-changin'*

Few songwriters have captured the presentiment of change as Bob Dylan in his song “The Times They Are A-Changin’”. Although written in a very particular period of the twentieth Century, its message is universal and therefore can be applied to virtually any moment in time. Indeed, the fight between the Old and the New is a constant in the history of Mankind. In that sense, Dylan’s song perfectly fits the Internet age: while old media giants currently struggle with fast-paced technological developments, new online companies started by teenagers in garages and universities are taking the world by storm. The generational gap evoked by Dylan is also evident, with parents feeling that, paraphrasing the song’s lyrics, their children’s online activities are “beyond their command”.

On-demand services have radically changed the way people communicate, inform and entertain themselves. And as with any important changes, there are always those who try to stall things, those who believe in absolute freedom and finally those who ask for regulation to protect the diverse interests at stake. In Europe, the first discussions concerning how to deal with new on-demand audiovisual services took place in the early 2000s. At that time, the EU’s Television without Frontiers Directive only covered traditional television, but with the development of new services providing content similar to that offered on TV it was felt that a review of the regulatory framework was needed. This was achieved in 2007 with the adoption of the Audiovisual Media Services (AVMS) Directive, which contains the set of specific rules applying to traditional broadcasting and to those on-demand services considered to be in competition with traditional television.

Given its “TV-centric” approach, the AVMS Directive did not aim at regulating all the audiovisual content available online. However, with the exponential development of video offerings on the Internet and their growing impact on minors and the public at large (YouTube being its most obvious example), it has become fashionable to criticise the rationale of regulating on-demand services in such a narrow way.

This IRIS *plus* aims at discussing the notion of an on-demand audiovisual service. The Lead Article analyses whether or not on-demand AVMS really resemble traditional broadcasting and to what extent the two compete with each other. It explains the scope of the AVMS Directive and provides examples of its implementation in the national legislation of some EU member states. Furthermore it discusses cases in which the scope of the AVMS Directive seems unclear and describes relevant decisions taken by national regulatory authorities. In this regard, the Related Reporting section complements the Lead Article by focusing on some additional decisions of national regulatory authorities regarding the definition of on-demand AVMS.

The Zoom section presents an overview of the market for on-demand audiovisual services. In doing this it uses a definition of on-demand audiovisual service that is wider than the one provided by the AVMS Directive. This goes back to a methodological decision taken by the Observatory's Department for Information on Markets and Financing for pragmatic reasons and with the aim to produce an overview of the strategic options taken by market players in Europe.

Strasbourg, August 2013

Susanne Nikoltchev
Executive Director
European Audiovisual Observatory

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On-demand Services: Made in the Likeness of TV?

*Francisco Javier Cabrera Blázquez**
European Audiovisual Observatory

Introduction

Music videos are an essential part of today's popular culture. Originally a simple promotional tool for songs, music videos have become an art form in themselves. Recording companies invest huge amounts of money in each music video and famous film directors are attracted to this medium.¹ Music videos are often used by artists to raise political and social issues, some of them creating scandals and even being censored.²

For many years, music videos were only shown on TV, a medium that was heavily regulated and relatively easy to control for parents. Now music videos, like any other type of audiovisual content, are also available on the Internet. In an online environment, controlling access to content that might impair the development of minors or incite to hatred is a much more difficult task for both regulators and parents. Such damaging content will in most cases be available on the Internet without any restrictions, and children will be able to access it from their personal computers, smart phones and tablets.

A recent example of how audiovisual content escapes the reach of audiovisual regulators is "College boy", a music video made by film director Xavier Dolan for the French band Indochine. In the video clip very explicit images show a college boy being violently mistreated by his classmates. The video clip finishes with the boy being crucified and shot, with bystanders looking the other way. In a press release published in May 2013, the members of the French CSA expressed their intention to take action if violent excerpts of the video clip were to be broadcast.³ However, they recalled that the CSA is only responsible for regulating content broadcast on TV channels or made available through on-demand audiovisual media services. Unsurprisingly, the video is currently available on multiple Internet platforms without any age restriction.⁴

The CSA press release sparked controversy about the filming of explicit violence in a music video. The artists responsible for the video replied to the CSA, explaining that the violent images of the music video have an educational value and aim at raising the issue of violence in school and in

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1) Think of Michael Jackson's "Thriller", which was directed by John Landis and had a budget of USD 500,000... in 1983!

2) Madonna's video for her song "Like a prayer" is probably the best-known example of this.

See http://en.wikipedia.org/wiki/Like_a_Prayer_%28song%29

3) Le CSA débat de la diffusion de la vidéomusique « College Boy » du groupe Indochine. Communiqué du mardi 07 mai 2013, available at: www.csa.fr/Espace-Presse/Communiqués-de-presse/Le-CSA-debat-de-la-diffusion-de-la-vidéomusique-College-Boy-du-groupe-Indochine

4) See e.g. www.vevo.com/watch/indochine/college-boy/FRA081300480

society at large. It has also been suggested that this provoking music video is nothing more than a marketing stunt aimed at winning over a younger generation to Indochine's music.⁵ Indeed, it could be argued that the CSA decision has been counterproductive, making more people curious about this video clip. Knowing that the younger generations are "digital natives" and are used to accessing audiovisual content through Internet platforms, the question may be raised as to the effectiveness of the CSA decision.

This case exemplifies the difficulty of regulating audiovisual content when it goes beyond the limits of traditional broadcasting. At EU level, the Audiovisual Media Services Directive (AVMSD)⁶ provides a set of rules applying to traditional broadcasting and to certain on-demand services that are considered to be "TV-like". With this approach, the Directive leaves outside of its scope most of the audiovisual content currently available on the Internet. This article explores why this is so. It thereby also gives an update on how various EU member states have meanwhile defined the kind of services to which the AVMSD shall or has already been applied in practice.

The article begins by explaining the rules contained in the AVMSD determining which services fall under its scope (I.). It continues by providing some examples of the national implementation of those rules (II.). It then presents three cases in which the scope of the AVMSD seems unclear (III.), and provides a description of relevant decisions of national regulatory authorities (IV.). Finally, it discusses the concept of TV-likeness and its application to on-demand audiovisual media services (V.).⁷

I. The scope of the AVMS Directive

The AVMSD governs the EU-wide co-ordination of national legislation on both traditional television and on-demand audiovisual services. It aims to ensure that basic principles of the internal market such as free competition and equal treatment be respected in order to provide transparency and predictability in markets for audiovisual media services and to achieve low barriers to entry. In order to fulfill this aim, the AVMSD introduces a basic tier of co-ordinated rules applying to all audiovisual media services.⁸ These common rules are deemed necessary to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area. On top of this, the AVMSD introduces a set of more stringent rules for television ("linear services" in the language of the AVMSD), which makes it crucial to further classify the services that are covered by the Directive.

The common rules for all AVMS are contained in Chapter III AVMSD and concern the obligation of media service providers to identify themselves (Article 5), a prohibition of any incitement to hatred based on race, sex, religion or nationality (Article 6), an encouragement for media service providers to make services accessible to people with a visual or hearing disability (Article 7), a prohibition of transmitting cinematographic works outside periods agreed with rightsholders (Article 8), and general rules concerning audiovisual commercial communications (Article 9), sponsoring (Article 10) and product placement (Article 11).

Television broadcasts⁹ have to comply with stricter rules on the protection of minors (Chapter VIII) and on the promotion and distribution of European television programmes (Chapter VI), whereas on these two aspects on-demand AVMS have to abide by "softer" rules (Chapter IV). Furthermore,

5) See e.g. www.lexpress.fr/culture/musique/college-boy-le-nouveau-clip-d-indochine-est-il-trop-violent_1245847.html

6) 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), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010L0013:EN:NOT>

7) The European Audiovisual Observatory has published a significant number of publications dealing with the regulation of on-demand AVMS. You will find a complete list at our website www.obs.coe.int (some of them are also quoted in this article).

8) Recital 11 AVMSD.

9) "Television broadcasts" are AVMS "provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule" (Article 1(1)(e) AVMSD).

television broadcasts have to comply with time limits for TV advertising and teleshopping,¹⁰ as well as with rules on events of major importance and short news reporting¹¹ and on the right of reply.¹² This lighter approach for on-demand AVMS is justified by the difference in choice and control that users can exercise, as well as in the different impact they have on society.¹³

The AVMSD provides in its Article 1 a list of definitions that clarify to a certain extent the scope of the Directive. The recitals of the Directive further explain the meaning of the definition of AVMS. Article 1(1)(a) AVMSD defines an “audiovisual media service” as either one of the two following cases:

- (i) a service as defined by Articles 56 and 57 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;
- (ii) audiovisual commercial communication;”

According to Article 1(1)(g) AVMSD, on-demand AVMS (i.e. non-linear AVMS) are “provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider”. The AVMSD does not provide further guidance as to what is a catalogue or what is meant by at the moment chosen by the user and at his individual request.

The definition of an on-demand AVMS contains the following seven cumulative criteria:

1. service
2. editorial responsibility of a media service provider
3. principal purpose
4. provision of programmes
5. to inform, entertain or educate
6. general public
7. electronic communications networks.

1. Service

Article 57 of the Treaty on the Functioning of the European Union (TFEU) defines a “service” as “normally provided for remuneration”. Recital 21 AVMSD recalls that this definition covers any form of economic activity, including that of public service enterprises, but does not cover activities which are primarily non-economic and which are not in competition with television broadcasting. This excludes on-demand offerings of a private nature and with no commercial relevance, such as private websites and blogs, as well as user-generated content hosted on dedicated platforms such as YouTube.

2. Editorial responsibility¹⁴

According to Article 1(1)(c) AVMSD “editorial responsibility” means, in the case of on-demand audiovisual media services, the exercise of effective control both over the selection of the

10) Chapter VII AVMSD.

11) Chapter V AVMSD.

12) Chapter IX AVMSD.

13) Recital 58 AVMSD.

14) For more information on the concept of “editorial responsibility” in the framework of the AVMSD see Susanne Nikoltchev, Ed., *IRIS Special, Editorial Responsibility* (Strasbourg, European Audiovisual Observatory, 2008).

programmes and over their organisation in a catalogue. A “media service provider” is the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised (Article 1(1)(d) AVMSD). This definition excludes natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties, such as UGC platforms.¹⁵

3. Principal purpose

Recital 22 AVMSD explains the notion of “provision of programmes as principal purpose” by excluding all services where the audiovisual content provided is merely incidental to the service and not its principal purpose. Examples of this are websites that contain animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. The definition excludes games of chance involving a stake representing a sum of money as well as online games and search engines, but not broadcasts devoted to gambling or games of chance. The definition also excludes any form of private correspondence, such as e-mails sent to a limited number of recipients.

4. Provision of programmes

According to Article 1(1)(b) AVMSD, a “programme” is “a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting”. The examples of programmes listed are “feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama.” According to Recital 23 AVMSD the term “audiovisual” includes silent films but excludes radio services or other types of audio transmission. The definition also covers text-based content which accompanies programmes, such as subtitles and EPGs, but excludes stand-alone text-based services like teletext.

An important aspect of the definition of on-demand AVMS is found in Recital 24 AVMSD, which explains that on-demand AVMS are “television-like”. According to this, on-demand AVMS “compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive”. According to Recital 24 AVMSD, the concept of “programme” has to be interpreted in a dynamic way taking into account developments in television broadcasting in order to prevent disparities as regards free movement and competition.

5. To inform, entertain or educate

The AVMSD does not provide any guidance as to the definition of these concepts. They are so vague and general that they can apply to virtually any type of audiovisual content.

6. General public

According to Recital 21 AVMSD, the AVMSD covers audiovisual media services (television broadcasting and on-demand services) that are “mass media”, that is, intended for reception by a significant proportion of the general public and able to have a clear impact on it.

15) Recital 26 AVMSD.

7. Electronic communications networks

These networks are defined in Article 2(a) of Directive 2002/21/EC¹⁶ as “transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed”. This definition excludes certain traditional forms of distributing audiovisual works such as exhibition in cinemas and selling and renting of DVDs or BluRays (even if the sale or rental is done through a website).

II. Transposing the AVMSD

The vagueness of the abovementioned provisions has forced member states to find individual solutions to many unsolved questions when transposing the AVMSD into national law.¹⁷ Moreover, some national regulatory authorities (NRAs) have felt it necessary to adopt regulations and release guidelines and recommendations to explain how they will interpret the rules included in their national legislation. In many cases, they have relied on the guidance provided by the recitals of the AVMSD (sometimes reproducing them literally), even if the recitals of EU directives are not legally binding.

This section presents six examples of national transposition (United Kingdom, Italy, the French-speaking Community of Belgium, Slovakia, the Netherlands and Austria) of the rules concerning the scope of the AVMSD with special consideration given to the regulations, guidelines and recommendations issued by NRAs in these countries. These examples show how the vagueness of the AVMSD allows for imaginative and varied solutions at national level. In the case of the United Kingdom, Austria and Slovakia, they also serve as background information to better understand the decisions of NRAs explained in section IV.

1. Examples of national transposition

1. *United Kingdom*

Section 368A(1) of the Communications Act 2003¹⁸ defines an “on-demand programme service” (ODPS) as a service with the following characteristics:

- a) its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;
- b) access to it is on-demand;
- c) there is a person who has editorial responsibility for it;
- d) it is made available by that person for use by members of the public; and
- e) that person is under the jurisdiction of the United Kingdom for the purposes of the AVMSD.

16) 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), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0021:EN:NOT>

17) For a list of national measures transposing the AVMSD see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72007L0065:EN:NOT>

18) Communications Act 2003, as amended by the Audiovisual Media Services Regulations 2009 and the Audiovisual Media Services Regulations 2010 which came into force on 19 December 2009 and 18 March 2010 respectively. Available at: www.legislation.gov.uk/ukpga/2003/21

The UK has an interesting co-regulatory system for non-linear AVMS. Although the Communications Act 2003 confers upon the Office of Communications (Ofcom) the power to regulate ODPS, it allows Ofcom to entrust certain powers to an appropriate regulatory authority. On 18 March 2010, Ofcom delegated some of its functions and powers in relation to the regulation of ODPS to The Authority for Television On Demand (ATVOD),¹⁹ which is since then the independent co-regulator for the editorial content of UK VoD services that come within the statutory definition of ODPS.²⁰

Although ATVOD is in principle responsible for determining whether a service qualifies as an ODPS, Ofcom retains the final say in these matters, so that ATVOD's decisions can be appealed with Ofcom.

ATVOD has published a guidance paper²¹ to aid interpretation of the types of services that may fall within the definition of ODPS. It also helps assess who is the provider of a relevant service. This paper is not legally enforceable and only provides non-determinative, interpretative guidance as to how ATVOD is likely to apply the legislation on this matter. It is subject to review and may be revised from time to time in light of experience. It provides guidance on the following questions:

- a) Is the service an "on-demand programme service" within the meaning set out in section 368A of the Act? (Section 2 of the paper);
- b) Who has "editorial responsibility" for that service within the meaning of section 368A(4) of the Act? (Section 4 of the paper); and
- c) Does that person fall within the jurisdiction of the UK for these purposes? (Section 6 of the paper).

The service will be an ODPS if it meets all of the following criteria:

- a) It includes TV-like programmes
- b) It is a VoD service
- c) There is editorial responsibility
- d) It is made available to the public.

For ATVOD the decision as to whether programmes are TV-like has to be taken in consideration of all relevant information, including the availability of comparable programmes in linear broadcast services and the nature of the service as a whole. A programme will not be viewed as TV-like if it is clearly distinguishable from those which are normally included in television programme services.

A programme which has been shown on linear TV will normally be considered "TV like" unless its broadcast was entirely exceptional, but prior broadcast is not a pre-condition of TV-likeness. Programmes which have not been broadcast on linear TV, but which match the form and content of programmes shown on linear TV, will be considered TV-like unless such linear broadcast(s) are entirely exceptional. With regard to the duration of audiovisual content in a service, it should not, on its own, determine whether that content is TV-like (e.g. short music videos may satisfy the test).

With regard to the on-demand aspect of the service, ATVOD takes into consideration all relevant materials available including, for example, the way the service is marketed and presented to users.

19) www.atvod.co.uk

20) ATVOD's designation included provision for a review of the arrangements after two years. Further to a review conducted in 2012, Ofcom confirmed ATVOD's designation on 15 August 2012 with amendments that slightly extended ATVOD's operational freedom. The amended Designation came into force on 14 September 2012, see: www.atvod.co.uk/uploads/files/amended-designation140912.pdf

21) ATVOD Guidance on who needs to notify – Application and Scope of the Regulations for Video On Demand (VOD) services. Edition 3.3. Published 23 May 2013, available at: http://atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed_3.3_May_2013.pdf

The “principal purpose” of the service is fundamental in this regard, and in particular in cases where services form part of a broader consumer offering. These services may be considered to be one single on-demand service if they are “grouped together in a distinct area and presented as a catalogue of viewing options” (e.g. an online newspaper with a distinct section of its website providing TV-like programmes which have no clear and direct link to the newspaper). This will not be the case if the audiovisual content is included as an “integral and ancillary element of the broader offering” (e.g. video used to provide additional material relevant to a text-based news story).

Another side of the on-demand criterion is the means of delivery. For example, a DVD sent by mail having been ordered online, would not be seen as an ODPS, but the selection, downloading and viewing of a movie via the Internet, paid for using a voucher bought over the counter in a shop, would be an ODPS.

ATVOD excludes UGC platforms from the definition of ODPS since they do not exercise editorial responsibility on the selection of programmes. However, if UGC platforms are used by commercial entities as a means of distributing relevant content then such content might come within the meaning of an ODPS.²²

The “general public” criterion includes subscription services, provided that the subscription is open to members of the public, as well as services that are made available only to the general public located in a particular geographic area.

ATVOD provides a non-exhaustive list of types of service which are likely to be considered to be ODPS:

- a) a “catch-up service” for a broadcast television channel whether programmes are made available from the broadcaster’s own branded website, an online aggregated media player service, or through a “television platform” to a set top box linked to a television (whether using broadcast “push” technology, or “pull” VoD);
- b) a television programme archive service comprising less recent television programmes from a variety of broadcasters and/or production companies, made available by a content aggregator exercising “editorial responsibility” over all the programmes, whether via a dedicated website, online aggregated media player service, or through a television platform; and
- c) an on-demand movie service, provided online via a website or using other delivery technology by a provider exercising “editorial responsibility” over the content.

ATVOD also provides a list of types of service that are not likely to be considered to be ODPS:

- a) services that are primarily non-economic, and which are therefore not in competition with television broadcasting. In this context, “economic” is interpreted in the widest sense to encompass all forms of economic activity, however funded, and may include public service material, free-to-view content, as well as advertising-funded, subscription, pay-per-view and other transactional business models;
- b) services comprising on-demand content that are not “mass media in their function to inform, entertain and educate the general public”;
- c) “games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services”, “on-line games” and “search engines”, all of which are excluded on the grounds that their principle purpose is not the provision of “TV-like” programmes; and
- d) electronic versions of newspapers and magazines (excluding any on-demand programme services offered by newspapers and magazines).

22) For relevant decisions of NRAs see section IV *infra*.

Finally, ATVOD gives a list of services that may not be considered to be ODPS, depending on the particular circumstances:

- a) video content posted by private individuals onto video sharing sites (where the content has been self-generated and is not posted as part of an “economic” purpose on the part of the individual);
- b) video content produced by professional bodies, trade unions, political parties, or religious organisations, where the content is very narrowly focused and is primarily about the dissemination of information about the organisation to members, rather than for consumption by the general public;
- c) video content embedded within a text-based editorial article, such as a written news story on a website that contains an illustrative video clip; and
- d) video content on corporate websites, where the purpose is to disseminate information about the company’s own operations, products or financial performance (e.g. a video of an AGM, but excluding a stand-alone service providing access to videos of many companies’ AGMs on a commercial basis, which could fall within the scope of an ODPS).

2. Italy

The AVMSD was transposed into Italian law by Legislative Decree no. 44/2010 (hereinafter “Decree”).²³ The Decree reproduces literally the definition of on-demand AVMS included in the AVMSD. On 25 November 2010 the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority – Agcom) adopted a regulation on the authorisation of non-linear audiovisual media services (deliberation no. 607/10/CONS), which further explains how Agcom interprets the Decree.²⁴

According to the regulation, the scope of on-demand AVMS is limited to catalogues accessible to the general public, excluding catch-up TV or archive services of content already broadcast on a linear basis, which are considered as ancillary to linear services. Moreover, only services with yearly revenues above EUR 100,000 are considered to be on-demand AVMS. This threshold is introduced in order to determine presumptively which economic activity is in real competition with broadcasting. Only revenues deriving from typical television activities are taken into consideration. These are:

- all revenues, excluding discounts and agency fees, incoming from any commercial communication, including advertising, sponsorship, teleshopping and product placement;
- revenues from the public service broadcasting fee;
- revenues from pay-TV subscriptions or pay-per-view offers.

Providers of on-demand media services have one year from the start of their activities to verify if their yearly revenues exceed EUR 100,000.

According to Agcom, the following services are excluded from the scope of the regulations:

- any form of private correspondence, such as e-mails sent to a limited number of recipients;
- all services whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose;
- all activities which are primarily non-economic and which are not in competition with television broadcasting;
- services based on the upload of audiovisual content generated by private users, as long as there is no editorial responsibility exercised by the media service provider on the selection of the

23) Decreto Legislativo 15 marzo 2010, n. 44 “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” pubblicato nella Gazzetta Ufficiale del 29 marzo 2010, n. 73, available at: www.camera.it/parlam/leggi/deleghe/10044dl.htm

24) Delibera N. 607/10/CONS, Regolamento in materia di fornitura di servizi di media audiovisivi a richiesta ai sensi dell’articolo 22-bis del Testo unico dei servizi di media audiovisivi e radiofonici, available at: www.agcom.it/default.aspx?DocID=5417

content, but only aggregation activity of content uploaded by private users for the purposes of sharing and exchange within communities of interest;

- on-demand catalogues composed only of programmes already offered on a linear basis, such as catch-up TV or archive services, and catalogues that are not autonomously accessible by the general public, such as those inserted inside a catalogue accessible only from a bouquet offered by a different provider;
- online and electronic versions of newspapers and magazines, websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as online games and search engines, but not broadcasts devoted to gambling or games of chance.

3. Belgium (Federation Wallonia-Brussels)

In the French-speaking Community of Belgium, the AVMSD is transposed by the *Décret coordonné sur les services de médias audiovisuels* (the Decree).²⁵ In March 2012, the Belgian *Conseil Supérieur de l'Audiovisuel* (CSA), as the NRA responsible for the regulation of the audiovisual sector in the Federation Wallonia-Brussels, published a Recommendation concerning the scope of AVMS.²⁶

One of the most interesting regulatory innovations introduced by the Decree is the distinction between on-demand AVMS provided on an open platform (*plateforme ouverte*) and those provided on a closed platform (*plateforme fermée*). An open platform is freely accessible (e.g. the Internet) whereas a closed platform is accessible only with the permission of the distributor of the said platform (e.g. cable networks). Services offered through an open platform are regulated by the Decree in a lighter way than those offered on closed platforms. This is justified by the fact that the choice of services available on open platforms is much wider than the choice provided by closed platforms. More pluralism lightens the necessity of control.

The Recommendation gives guidance on the kind of activities that are considered to be of an economic nature. The concept of "remuneration" is interpreted in a broad way (*contrepartie*), and it is not restricted to pecuniary payment (the provision of a service in return would also qualify as remuneration). The Recommendation lists the persons (both natural and legal) that can provide this remuneration:

- The public: pays a subscription, through a pay-per-view system or by providing personal data that can be reused by the service provider;
- Advertisers: pay advertisement space (advertising, sponsorship, teleshopping and product placement);
- Donors and fans: they provide funds for the production or transmission of an audiovisual work;
- Government: provides funding for public service media.

In cases where this remuneration is not evident, the service may be considered an AVMS if it shows an ambition to compete with other AVMS.

With regard to editorial responsibility, the Recommendation provides a list of services for which the CSA assumes, in principle, a lack of editorial responsibility and thus an exclusion from the AVMSD. These services are namely:

- UGC platforms (e.g. YouTube, Dailymotion) because these platforms exercise only a control ex post. However, a platform does not necessarily offer a single service and if they provide services that form a coherent and independent catalogue of content which is selected and organised by the publisher (e.g. "branded channels" hosted on YouTube), these services may be considered on-demand AVMS.

25) A consolidated version is available at: www.csa.be/documents/1440

26) Recommendation relative au périmètre de la régulation des services de médias audiovisuels, available at: <http://csa.be/documents/1713>

- Services providing a VoD database through a search engine (e.g. Google video).
- Services offering simultaneous and unaltered retransmission of video and/or audio without any editorial intervention (e.g. broadcasting of surveillance cameras).

In the case of “hybrid” services, that is, where both audiovisual and non-audiovisual content is available, the CSA takes into consideration the following criteria:

- The proportion of audiovisual content: this will be only taken into account when audiovisual content is obviously preponderant (or the contrary).
- The ergonomics of the service: how content is presented and whether some content is privileged in its presentation.
- The purpose of the service, its business model or “core business”.

With regard to the “mass media” criterion, the CSA explains that the number of real users of a service has no impact on its classification as an AVMS; it is rather the number of potential users that matters, the provider’s intention to offer the service to the general public and its ambition to be in competition with other AVMS. A service will be deemed to target the general public according to its content and mode of distribution (e.g. services accessible through a code/decoder that anyone can obtain through registration and/or payment).

The CSA interprets the notion of “programme” in a broad way. Content might not be considered a programme if it is not aimed at the general public (e.g. videos of private holidays or videos made for the training purposes of a company).

With regard to providers offering similar content via different means of transmission, the Recommendation lays down the following rules:

- if the content is provided on both a linear and a non-linear basis, there will be two separate services.
- if the content is provided on both an open and a closed platform, there will be two separate services.
- if the essence of the service is the same and the only difference is the mode of transmission, there might be only one service (e.g. an app for a smartphone and another for a tablet might be the same service).

4. Slovakia

The AVMSD was transposed in Slovak law through an amendment (No. 498/2009 Coll.)²⁷ to the Act No. 308/2000 Coll. on Broadcasting and Retransmission (the Act).²⁸

The definitions are very similar to the ones in the AVMSD. However, the Act does not contain a definition of AVMS but rather two separate concepts: “on-demand AVMS” and “programme service” (the latter being the definition of a linear AVMS). The Act defines an on-demand AVMS in section 3(b) as a “service of primarily economic nature for the viewing of programmes at the moment chosen by the user and at his individual request provided through electronic communications networks on the basis of a catalogue of programmes selected by the service provider the principal purpose of which is the provision of programmes in order to inform, entertain or educate the general public; the provision of audio recordings shall not be deemed an on-demand audiovisual media service”.

27) Zákon č. 498/2009 Z. z., ktorým sa mení a dopĺňa zákon č. 308/2000 Z. z. o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách v znení neskorších predpisov a o zmene a doplnení niektorých zákonov.

28) Zákon č. 308 zo 14. septembra 2000 o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách. A consolidated version is available at: www.culture.gov.sk/legdoc/11/

The Council for Broadcasting and Retransmission of the Slovak Republic (the Council) has issued guidelines concerning the scope of AVMS.²⁹ First, it may be worth pointing out that the expression “of primarily economic nature” was contested by the European Commission in the review of Slovakia’s transposition of the AVMSD. In its answer, the Council explained to the Commission that this wording simply reflects the interpretation of a “service as defined by Articles 56 and 57...” provided by the jurisprudence of the ECJ. It also reflects Recital 21 AVMSD. The adverb “primarily” only enables the Council to rule out services where the economic activity is purely marginal and ancillary. However the Council for instance considers services that contain any commercial communication or offer advertisement space to be services of primarily economic nature. Services clearly connected to a broader service which is clearly of economic nature (e.g. specific TV section, or Internet archives of linear services) are also considered of primarily economic nature. The Commission was satisfied with this explanation and did not discuss the matter further.

The Council considers that editorial responsibility is a criterion difficult to apply in the case of UGC services. It considers such services to be outside the scope of the AVMSD unless there is a very clear indication that a considerable (majority or more) amount of content is added by the service provider himself.

As for the decision on who possess the editorial responsibility in cases of shared duties (choosing the content and its organisation), the Council prefers the “choosing aspect” over the “organisational” one. The Council believes that without any content nothing can be organised. However, without proper organisation you can still have an on-demand service.

The biggest challenge faced by the Council so far concerned the video sections of the Internet version of newspapers.³⁰ The Council assesses these services with regard to the following questions:

- How is the section organised? Does the provider himself present or promote this section as an independent service or does it appear to the user as an integral part of the whole e-version of the newspaper?
- What is the correlation between the video and the written text? Does the video accompany a written article or is it a stand-alone video? Does it simply show the facts that are reported in the written article or are there some new facts that the user is able to receive only through the video?
- What is the nature of the videos? Is the content of the videos related to common journalistic topics? How professional do these videos seem to the viewer (do the creators, hosts, moderator try to identify themselves with the service – logos, labeled mikes, equipment etc.)?
- Is there a special section for the videos? If yes, does it simply collect videos from all sections or are all videos exclusively available in this section?

5. *The Netherlands*

In the Netherlands, the Act of 10 December 2009 amending the Media Act 2008 and the Tobacco Act for the implementation of the Audiovisual Media Services Directive transposed the AVMSD into Dutch law.³¹

Section 1.1, paragraph 1, of the Media Act 2008 defines an on-demand AVMS as a “media service consisting of a media offer which is delivered upon individual request and can be watched at a moment freely chosen by the user”. An on-demand AVMS has to fulfill the following criteria:

- it is distributed via a public electronic communication network;
- it is based on a catalogue;

29) Rozsah posobnosti zakona č. 308/2000 Z. z. v súvislosti so zmenami zakona účinnými od 15. decembra 2009, available at: <http://tinyurl.com/3egura2>

30) See section IV for an explanation of decisions of NRAs on this matter.

31) Wet van 10 december 2009 tot wijziging van de Mediawet 2008 en de Tabakswet ter implementatie van de richtlijn Audiovisuele mediadiensten, available at: <https://zoek.officielebekendmakingen.nl/stb-2009-552.html>

- it consists of videos and has the principal purpose of offering videos;
- it falls under the editorial responsibility of the provider (with regard to selection and organisation of the video content);
- it has a mass media character;
- it can be seen as an economic service.

In September 2011, the Dutch *Commissariaat voor de Media* (Media Authority – CvdM) published a Regulation containing guidelines for the definition of “commercial media on-demand services” under the Dutch Media Act.³² The CvdM does not focus on the “TV-likeness” of an on-demand service and uses the term “video” instead of “programme”. The reason for this is that the term “programme” in the Media Act 2008 applies to TV broadcasting services. The main distinction between “video” and “programme” is that the former is offered as part of a catalogue, while the latter is included in a schedule. With regard to the “principal purpose” criterion, the CvdM takes into account the functionality and presentation of a service and its prominence in the case of hybrid services (the CvdM classifies e.g. a stand-alone video service of a newspaper or a magazine as an on-demand audiovisual media service if it meets all criteria of the definition). Also the CvdM suggests that audiovisual services offered by private persons will not be considered as an economic service unless they are offered for payment or are of a clear commercial nature.³³ If multiple providers carry out effective control over the choice of video content and its organisation, the CvdM considers that the selection of the programmes is the most decisive criterion to identify who exercises the editorial responsibility.

6. Austria

The *Audiovisuelle Mediendienste-Gesetz* (Audiovisual Media Services Act – AMD G)³⁴ regulates AVMS in Austria. The Act basically reproduces the definitions found in the AVMSD. An AVMS is “a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks (§ 3(11) of the Telecommunications Act 2003). Audiovisual media services include television channels and on-demand audiovisual media services”. An on-demand AVMS is defined as “an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at the user’s individual request on the basis of a catalogue of programmes selected by the media service provider (on-demand service)”. A programme is “an individual, self-contained part of a television channel or an on-demand audiovisual media service which consists of a set of moving images with or without sound which is limited in terms of time and constitutes an item within a programme schedule or a catalogue prepared by a media service provider”, which is “the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is designed”.

The *Kommunikationsbehörde Austria* (KommAustria) is the Austrian regulator for audiovisual media services, and receives operational support from *Rundfunk und Telekom Regulierungs-GmbH* (the Austrian Regulatory Authority for Broadcasting and Telecommunications – RTR).³⁵ KommAustria has published a short paper explaining the main lines of the regulation of AVMS.³⁶

32) Regeling van het Commissariaat voor de Media van 22 september 2011 houdende beleidsregels omtrent de classificatie van commerciële mediadiensten op aanvraag zoals bedoeld in artikel 1.1, eerste lid, van de Mediawet 2008 (Beleidsregels classificatie commerciële mediadiensten op aanvraag 2011), available at: www.cvdM.nl/dsresource?objectid=12335&type=org. Information in English available at: www.cvdM.nl/dsresource?objectid=11318&type=org

33) The CvdM publishes on its website an on line register of notified and registered commercial media on-demand services.

34) Bundesgesetz über audiovisuelle Mediendienste (Audiovisuelle Mediendienste-Gesetz - AMD-G), BGBl. I Nr. 84/2001 in der Fassung BGBl. I Nr. 50/2010, available at: www.rtr.at/de/m/AMDG. An English translation is available at: www.ris.bka.gv.at/Dokumente/ErV/ERV_2001_1_84/ERV_2001_1_84.pdf

35) <https://www.rtr.at/de/rtr/OrganeKommAustria>

36) Informationen für audiovisuelle Mediendienste auf Abruf (Version 03/2013), available at: www.rtr.at/en/m/InfoMDA/Merkblatt_Abrufdienste_03-2013.pdf

The decisions of KommAustria can be appealed before the *Bundeskommunikationssenat* (Federal Communications Senate - BKS), an independent body with quasi-judicial functions.³⁷ BKS decisions can be appealed before the Constitutional Court and the Administrative Court.

2. Overview

Since Plato's times we know that necessity is the mother of invention. As we have seen, both national legislators and regulators had to find ways to make up for the broad rules of the AVMSD. And indeed, some of the examples mentioned supra show a great deal of legislative creativity. See for instance the Italian solution to introduce a threshold of EUR 100,000 for classifying services as on-demand AVMS. It could be argued that this threshold is rather subjective (why EUR 100,000 and not e.g. 75,000 or 150,000?), but it is at least a way of setting a clear frontier between services that are considered to be in competition with traditional broadcasting and those which are not. Another example of interpreting the rules of the AVMSD in a creative way is the Belgian distinction between on-demand AVMS provided on an open platform and those provided on a closed platform. And other decisions surprise as well: for example, the Italian exclusion from the scope of the AVMSD of catch-up TV or archive services of content already broadcast. The same applies for the fixation that some regulators have with regard to particular aspects of the AVMS definition (e.g. TV-likeness in the UK and Slovakia). But despite all these "colourful" solutions, there are still grey areas in the rules of the AVMSD that seem to pose problems. What these areas are and how they are dealt with in concrete cases is the subject of the next sections.

III. The unsettled boundaries of the AVMSD

It was Albert Einstein's view that "In theory, theory and practice are the same. In practice, they are not." Indeed, the real problems arise when legislation is applied to real-life cases. Indeed, NRAs are often confronted with audiovisual offerings that are difficult to classify. That is why the European Platform of Regulatory Authorities (EPRA)³⁸ has dedicated a lot of interest to the question of the scope of the AVMSD. In its background document for its 35th meeting at Portorož (30 May - 1 June 2012),³⁹ EPRA identified a number of services that are considered as particularly difficult to classify by NRAs. With regard to on-demand AVMS,⁴⁰ the following types of services seem to pose classification problems:

1. Newspaper websites providing video

Most newspapers offer their readers an electronic version available online (either ad-supported or on a subscription basis). On top of the usual text-based journalistic reporting and commenting, these services are often enhanced with audiovisual content. The difficulty in these cases lies in assessing whether the provision of such audiovisual content is the principal purpose of the service or not, and whether a video section of a newspaper is a service different from the text-based service offered by the newspaper.

37) See <https://www.rtr.at/en/m/BKS>

38) Set up in April 1995 in Malta, the European Platform of Regulatory Authorities (EPRA) aims at providing a forum for informal discussion and exchange of views between regulatory authorities in the broadcasting field, for exchange of information about common issues of national and European broadcasting regulation and for discussion of practical solutions to legal problems regarding the interpretation and application of broadcasting regulation. For more information on EPRA and its activities see: www.epra.org

39) Comparative Background paper (EPRA/2012/02a) prepared by Emmanuelle Machet, EPRA Secretariat for the Plenary session: "New Services and Scope: What's in, What's out Revisited", 35th EPRA Meeting, Portorož, 30 May - 1 June 2012. (Public version), available at: [epra3-production.s3.amazonaws.com/attachments/files/2011/original/Plenary1_overview_responses_questionnaire_publicversion.pdf](https://s3.amazonaws.com/epra3-production.s3.amazonaws.com/attachments/files/2011/original/Plenary1_overview_responses_questionnaire_publicversion.pdf)

40) Other services considered difficult to classify by NRAs are OTT TV applications, small-scale services and electronic publications (webportals).

2. UGC platforms/Professional channels on UGC

It is commonly agreed that user-generated content platforms (UGC) are host providers and should therefore be excluded from the scope of the AVMSD.⁴¹ Most user pages cannot be considered services (since they are not provided for remuneration) and therefore are not regulated by the AVMSD either. Professional channels on UGC, however, may in some cases fulfill all criteria in order to be classified as on-demand AVMS.

3. Download-to-own/Download-to-rent services

These services (e.g. iTunes, Canalplay) usually offer the opportunity of downloading a digital audiovisual file that can be watched either on a temporary or on a permanent basis. The EPRA background document notes the divergence of opinions among NRAs concerning the legal classification of these two models, especially with regard to download-to-own services. Only the NRAs of Cyprus, the Czech Republic, Hungary, Luxembourg, the Netherlands, Norway, the Slovak Republic and the Belgian CSA expressed the view that they would tend to classify such services as on-demand AVMS. However, this does not necessarily mean that other NRAs would not classify such services as on-demand AVMS in concrete cases, it just shows that they have not made up their minds on this question yet. The background document also reports that the Italian regulator would probably classify download-to-rent services as on-demand AVMS but exclude download-to-own from this category. Indeed, it can be argued that there is no substantial difference between obtaining a copy of a film via a download and buying a DVD or a BluRay. However, the AVMSD does not make the definition of AVMS dependent on its transmission mode or on whether it is provided on a rental or download-to-own basis. It could also be argued that download-to-own services are not TV-like. This concept, which is a rather subjective concept that allows regulators some interpretative leeway, will be discussed in section V.

IV. Recent decisions of NRAs

Pablo Picasso once said that “one does a whole painting for one peach and people think just the opposite – that particular peach is but a detail.” Judgment is to a great extent a matter of subjective perception, especially in matters that are unclear and where little guidance is offered, like in the case of on-demand AVMS. The following section describes some recent decisions taken by NRAs concerning two of the abovementioned types of services: newspaper websites providing video and professional channels on UGC platforms. These decisions show not only how subjective a classification may be, but also how, as the old saying goes, “the devil is in the detail”...

1. Newspaper websites providing video

Austria

On 9 October 2012, the *Kommunikationsbehörde Austria* (Austrian Communications Authority – KommAustria) decided⁴² that the Internet video section⁴³ of the *Tiroler Tageszeitung* (an Austrian newspaper)⁴⁴ met all the criteria to be considered an on-demand service in the sense of Article 2(4) in conjunction with (3) of the *Audiovisuelles Mediendienste-Gesetz* (Audiovisual Media Act – AMD-G) and had to be notified to the regulatory authority under Article 9 AMD-G.

41) For more information on the classification of UGC as host providers see Francisco Javier Cabrera Blázquez, *User-Generated Content Services and Copyright*, IRIS *plus* 2008-5.

42) KommAustria, Bescheid vom 9. Oktober 2012 (decision of the KommAustria of 9 October 2012), available at: www.rtr.at/de/m/KOA195012048/KOA_1.950-12-048.pdf

43) <http://video.tt.com>

44) www.tt.com

The owner of the *Tiroler Tageszeitung* appealed against this decision to the *Bundeskommunikations-senat* (Federal Communications Senate – BKS). On 13 December 2012, the BKS upheld⁴⁵ the decision of the *KommAustria* because the service in question (*video.tt.com*) fulfilled the six criteria included in the AMD-G.

KommAustria describes *video.tt.com* as having the same look as other parts of the website and the same general navigation elements. It displays the latest video or a video selected by the user together with a brief description of its content. The same page contains a list of the latest videos and the most viewed videos with thumbnail and title. The section “Categories” allows access to the entire catalogue of videos available. This catalogue can be searched in three ways: full-text search, per category or chronologically.

The appellant argued that the videos were just a supplement to the newspaper’s website. *Video.tt.com* could not be considered a non-linear AVMS, because the videos shown did not constitute the primary purpose of the newspaper’s website. Furthermore, because of their short duration, the videos shown could not be considered to be TV-like. Since these two criteria were missing, *video.tt.com* could not be considered to be a non-linear AVMS.

The BKS disagreed with the appellant and ruled that *video.tt.com* is to be considered a non-linear AVMS. Regarding the TV-likeness of the videos included in the catalogue of *video.tt.com*, the BKS saw no difference between the videos shown in *video.tt.com* and programmes shown on linear TV. With regard to the short length of the videos shown in the service in question, the BKS pointed out that the relevant legislation does not impose a “minimum duration” for a TV programme.

As to the assertion that the videos shown did not constitute the primary purpose of the newspaper’s website, the BKS ruled that *video.tt.com*, although being a subdomain of *tt.com*, cannot however be considered as its audiovisual “byproduct”. The videos found on *video.tt.com* are part of an independent, separate offering of exclusively audiovisual content that cannot be considered as an addition to a text-based newspaper.

Slovakia

On 10 July 2012, the Council for Broadcasting and Retransmission of the Slovak Republic (the Council) decided that the service *tvsmc*, which occupies a separate section of the home page of the electronic version of *sme* (a Slovakian newspaper) constitutes an on-demand AVMS.⁴⁶

In a previous assessment of April 2010, the Council had concluded that the service was not an AVMS. At the time, the service comprised all audiovisual content located on the newspaper’s home page.⁴⁷ The text-based journalistic articles were accompanied by related audiovisual content (interviews and short video clips), but the service also contained separate journalistic videos (short news/current affairs programmes) and even some programmes licensed by the BBC. In the 2010 assessment of the service, the Council was unable to clearly determine whether the video content formed an integral part of the electronic version of *sme* or whether it constituted a separate service with the principal purpose of providing audiovisual programmes. Given that such type of services were a new phenomenon and there was no common approach in this matter among other EU countries or any guidance by the European Court of Justice, the Council decided to act in line with the principle of *in dubio mitius* (“where there is doubt, to decide in favour of the defendant”) and declared that the service did not fall within the scope of the AVMSD.

45) Entscheidung des BKS vom 13. Dezember 2012 (GZ 611.191/0005-BKS/2012) (BKS decision of 13 December 2012 (GZ 611.191/0005-BKS/2012)), available at: www.bundeskanzleramt.at/DocView.axd?CobId=49930

46) See *Rada pre vysielanie a retransmisiu, Uznesenie č. 12-14/43.680, 10.07.2012* (Decision of the Council for Broadcasting and Retransmission of the Slovak Republic, No. 12-14/43.680, 10 July 2012).

47) www.sme.sk

In May 2012, the Council decided to open the case again after the service provider announced that the service would be available also on Samsung smart televisions (connected TVs). In its re-assessment of the service, the Council noted that the content offered by tvsmc had changed. It consisted uniquely of professionally looking audiovisual content (e.g. different camera angles, own logo, own microphones, light entertainment shows/news/current affairs/documentary programmes with their own hosts, etc.) without any accompanying text. The Council decided that these changes had turned tvsmc into a separate service with the principal purpose of providing TV-like audiovisual content. Also the fact that the service was offered on connected TV sets supported this conclusion.

The Council also decided that the tvsmc app for connected TV was an on-demand AVMS, despite the fact that the app provided an introduction, in which the seven newest videos were played in automatic flow (users could however fast-forward or rewind within a video and even skip to the next video).⁴⁸

2. Professional channels on UGC platforms

United Kingdom

The UK can be considered a forerunner in the regulation of cases concerning content provided by professionals on UGC platforms. Ofcom has recently taken some interesting appeal decisions overturning the initial assessment made by ATVOD.⁴⁹ This section will present two of them: a first one concerning the British TV show Top Gear and its official YouTube page, and a second one concerning an on-demand service provided by Playboy TV.⁵⁰

1. Top Gear

Top Gear⁵¹ is a TV programme about cars produced by the BBC. It entered the 2013 Guinness book of World Records as the world's most widely watched factual TV programme, having now been broadcast in 212 territories. Among other distinctions, Top Gear provides a YouTube page which it describes as "the most comprehensive collection of official Top Gear clips you'll find anywhere".⁵²

On 3 May 2011, ATVOD issued a decision⁵³ in which it determined that the BBC was contravening or had contravened the Communications Act 2003 by failing both to notify the YouTube-based Top Gear service as an on-demand programme service (ODPS) and to pay the relevant fee. According to ATVOD, the Top Gear service met the definition of an ODPS in section 368A(1) of the Communications Act.

The BBC appealed ATVOD's decision before Ofcom, the independent regulator and competition authority for the UK communications industries. In its decision of 18 January 2013,⁵⁴ Ofcom took the view that the Top Gear service did not at the relevant time meet the definition of an ODPS in section 368A(1)(a) of the Communications Act. Consequently, the BBC, as the provider of the Top Gear service, was not in breach of either the advance notification requirement under section 368BA of the Act, or the requirement to pay a fee under section 368D(3)(za).

48) For a similar Swedish case see Sweden: Radio and Televisions Act Applies to Newspapers' Web TV Services, IRIS 2013-1/35, available at: <http://merlin.obs.coe.int/iris/2013/1/article35.en.html>

49) See United Kingdom: ATVOD's Rulings on What is a "Video-on-Demand" Service Overturned, IRIS 2013-4/14, available at: <http://merlin.obs.coe.int/iris/2013/4/article14.en.html> and Decision of Co-Regulatory Body on Scope of 'On-demand Programme Service' Overturned, IRIS 2013-2/27, available at: <http://merlin.obs.coe.int/iris/2013/2/article27.en.html>

50) A similar case concerning another Playboy service was also dealt with by Ofcom, see United Kingdom: Should the Form and Content of 'Hardcore' Sex Videos Made Available on Websites be Considered 'TV-Like?', IRIS 2011-7/24, available at: <http://merlin.obs.coe.int/iris/2011/7/article24.en.html>

51) See www.topgear.com/ and www.bbc.co.uk/programmes/b006mj59

52) www.youtube.com/TopGear

53) ATVOD Scope Determination of 3 May 2011, available at: www.atvod.co.uk/regulated-services/scope-determinations/top-gear-youtube

54) Ofcom appeal decision of 18 January 2013, available at: www.atvod.co.uk/uploads/files/Top_Gear_Appeal_Decision.pdf

In its decision, Ofcom recalls that the regulatory aim of both the AVMS Directive and the Communications Act is to provide a measure of fair competition between television and on-demand services that are essentially the same, or sufficiently similar, and which compete for viewers and advertisers. Both instruments also aim to provide a level of protection in accordance with that which consumers of on-demand services might expect.

According to Ofcom, the statutory definition included in section 368A(1)(a) of the Communications Act⁵⁵ comprises a two-part cumulative test:

- “principal purpose”: an ODPS must have as its “principal purpose” the provision of audiovisual material;
- “comparability”: the form and content of programmes included in an ODPS have to be comparable with the form and content of programmes normally included in linear broadcast television services.

If nobody disputed the fact that the principal purpose of the Top Gear service was the provision of audiovisual material, the comparability part of the test was a completely different matter. In its decision, ATVOD had concluded that the programmes provided by the Top Gear service, although relatively short (from approximately 2 minutes to 8 minutes long) were TV-like. ATVOD noted a significant presence of short form programming on broadcast television that could be considered as “normally included”, since it constituted nearly one in every thirty programmes on the five main channels. ATVOD took the view that the particular form and content of the programmes on the Top Gear service also resembled linear television programmes, providing in its decision two examples taken from the Top Gear service. Its first example (“Collection of Lancias”) is 8 minutes 5 seconds long (preceded by an advert) and its television-like features include a subject matter familiar from broadcast motoring shows including Top Gear itself; a distinct opening sequence over filtered images of Lancia cars, with Jeremy Clarkson providing a voice-over introduction; Clarkson as on-screen presenter introducing a number of different models of this car, along with Richard Hammond doing the same; their chat is intercut with footage of the cars being driven, with a music soundtrack; rapid cut images separate distinct sections of the programme; the programme culminates in a race between Clarkson and Hammond ending with one car breaking down and a piano falling on it. The second example (“David Tennant Interview & Speed Lap”) is 8 minutes 53 seconds long and its television-like features include an opening introduction (“Ladies and gentlemen, David Tennant”); an interview (Jeremy Clarkson interviewing David Tennant) in front of a studio audience; intercut footage of Tennant driving a car around a track (including long shot footage of the car on the track and footage from a camera inside the car); an ending with studio applause.

Ofcom disagreed with ATVOD’s view that the programmes on the Top Gear service resembled linear television programmes. It considered that the short length of programmes might be typical in the context of some TV genres (e.g. cartoons or adult entertainment), but that the duration of the items on the Top Gear service was not closely comparable to TV programmes of the motoring or general magazine genre. In the context of this genre, the short length of the items provided by the Top Gear service together with the style of editing precluded a full narrative in many cases, in which users had to rely on the text included below the audiovisual material to make sense of it. Also Ofcom stated that while the use of playlists played back in autoplay made the viewing experience significantly longer, it did not link elements in the way a longer TV programme does.

Regarding the quality of the audiovisual content, despite the fact that much of the content proposed by the Top Gear service consisted of previously broadcast material from the “Top Gear” television programme, in terms of form Ofcom found it significant that production elements usually associated with TV formats, such as opening and closing credits were absent. Due to its presentation as disjointed short clips, the content offered by the Top Gear service was not comparable in form and content to television programmes normally found on linear television. This was so despite the

55) In the case at hand, there was no dispute about the fulfillment of characteristics (b) to (e).

fact that much of the audiovisual content had previously appeared on linear television as part of a longer programme.

Furthermore, Ofcom found it necessary to consider in light of all the circumstances:

- whether the relevant audiovisual material was likely to compete for the same audience as linear television broadcasts; and
- whether the nature of that material and the means of access to it would lead users to reasonably expect regulatory protection within the scope of the AVMS Directive.

In Ofcom's view, users would not be likely to regard the Top Gear service as amongst their competing options when they wanted to watch television programmes. This position would likely reflect the expectations of audiences with regard to regulatory protection. Ofcom based this view on the consumer research outlined in its decision.

2. Climax Uncut

ATVOD describes Playboy TV's service Climax Uncut 3 / Climax 3 Mobile Downloads (Climax Uncut)⁵⁶ as a service offering "'adult' programmes to view online or following download to a mobile phone. Although the website also acts as a promotional vehicle for related linear TV channels the videos are not an integral and ancillary element of the broader offering. The on demand programmes are grouped together and presented as a catalogue of viewing options in their own right."⁵⁷

On 21 December 2010, ATVOD decided that Climax Uncut constituted an ODPS under section 368A of the Communications Act, and that Playboy TV had contravened the advance notification requirement under section 368BA.⁵⁸

In its decision, ATVOD explained that the programmes offered by Climax Uncut were comparable in form and content to adult programmes normally included in TV programme services. Despite being more explicit than is currently permitted on linear TV services in the UK, their form and content was nevertheless comparable to adult programmes frequently broadcast on linear TV channels in other EU jurisdictions.

Playboy TV appealed this decision to Ofcom, focusing specifically on the first criterion in section 368A(1)(a) concerning the principal purpose of the service and the TV-likeness of the programmes it offers. Playboy TV explained that the content of its service could not be considered as "normally included in the television programming services" since it was all rated "R18" and therefore strictly forbidden on TV. Moreover, Playboy TV stated that it was "reasonable to suggest that the soft content shown on UK TV cannot possibly compete with R18 content on a website." Interestingly, Playboy TV further argued that since the service was accessible only via the Internet, the user would not expect regulatory protection since "the Internet contains a wealth of unregulated content, and users do not expect sites such as ours to be regulated."

In its appeal decision of 13 May 2011,⁵⁹ Ofcom considered that the principal purpose of the Climax Uncut service was the provision of highly explicit pornographic video content. The real issue was again the TV-likeness of such content. Ofcom recalled that the wording of section 368A(1)(a) of the Act requires the form and content of relevant programmes to be comparable, but not identical. In Ofcom's view, the form of the video material available on Climax Uncut is clearly comparable to the form of programmes normally included in general TV programme services: it is offered in

56) www.climax3.co.uk/uncut

57) The Ofcom decision (see *infra*) includes an in-depth description of the service.

58) Notice of Determination that the provider of the service named below has contravened Section 368ba of the Communications Act 2003: Re: Climax 3 : Climax 3 Uncut / Climax 3 Mobile Downloads, available at: www.atvod.co.uk/regulated-services/scope-determinations/climax-3

59) Ofcom appeal decision of 13 May 2011, available at:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Climax3Uncut.pdf>

self-contained items for selection under individual titles which are of “sustained” durations (as opposed to short clips), the items are arranged into schedules and are further arranged under what the service labels “Channels”. The content features title sequences (often with music), and ends with credit sequences. It also features episodic content and material with dramatic/fictional plots.

With regard to the R18 rating of the content offered at Climax Uncut, Ofcom insisted that the video content remained comparable to adult sexual content which is permitted to be included in UK television programme services and that the stronger and more explicit content offered by Climax Uncut was just “a matter of degree”. Ofcom explained that section 368A(1)(a) refers to the general type of programming normally included in the range of TV programme services but does not necessarily exclude its application to those programmes which would and could “normally” be included on UK television programme services but for their R18 rating. The decision goes on to add: “Were that not the proper construction, then service providers who would otherwise be caught by the criteria in s.368A(1) could simply seek to evade any provisions designed to regulate its programme material by maximising the extremity (e.g. in sex / violence) of its video content.”

In its submission, Playboy TV had relied on the wording of the AVMSD. Therefore, Ofcom made a special mention to the Directive in the final section of its decision. The UK regulator views Climax Uncut as TV-like within the contemplation of Recital 24 AVMSD, since the provision of hardcore content is likely to appeal to, and compete for, the type of audience who likes to watch (and pay for) adult sex material broadcast on UK television channels. It further considers that the content offered by Climax Uncut would indeed be likely to attract this type of audience because it offers more explicit content. On top of this, Ofcom considers that the provision of hardcore content is likely to compete for the same type of audience that likes to watch pornographic TV programmes broadcast in other EU jurisdictions which do not forbid hardcore sexual content on TV. In this respect, Ofcom recalls that the Directive allows member states to introduce more restrictive provisions in their legislation. Finally, Ofcom considers that a user would reasonably be led to expect at least the base level of “regulatory protection” afforded under the AVMS Directive, specifically (for example) in respect of material inciting hatred based on sex/race (Article 6 / section 368E(1)), and particularly the availability of content which might seriously impair the physical, mental or moral development of minors (Article 12 / section 368E(2)).

V. TV-likeness?

The philosophy behind the regulation of on-demand AVMS in the AVMSD comes from a twentieth-century, traditional broadcasting mindset. It is perpetuated in the idea expressed in the AVMSD that the form and content of a programme has to be comparable to the form and content of television broadcasting, and it is understandable to a certain extent given the technological state of the art at the time the AVMSD was negotiated. Moreover, the concept of “programme” should be interpreted in a dynamic way taking into account developments in television broadcasting. This means that the regulation of a twenty-first-century medium depends on how a twentieth-century medium evolves! In theory, this approach could lead to services being classified differently as time goes by, which, as pointed out by Valcke, Lefever and Ausloos, is not conducive to legal certainty.⁶⁰

For example, in the Top Gear case explained above, Ofcom considered that the short length of TV programmes might be typical in the context of some genres (e.g. cartoons or adult entertainment), but not closely comparable to TV programmes of the motoring or general magazine genre. Following this logic, a TV fiction series composed of episodes of a very short length might be considered in certain cases or in certain member states not to be TV-like. An open question is whether this would exclude, for example, an on-demand offering of a French TV series very fittingly called “Bref”⁶¹

60) See Valcke, P., Lefever, K., Ausloos, J. (2012) “Audiovisual Media Services 2.0: (Re)Defining the Scope of European Broadcasting Law in a Converging and Connected Media Environment.” In: Donders, K., Pauwels, C., Loisen, J., Palgrave Handbook on European Media Policy (forthcoming).

61) <http://en.wikipedia.org/wiki/Bref>

("short" in French), which is composed of approximately two-minute long episodes. We would not know until the case would be addressed in court.

The vagueness of the notion of TV-likeness offers regulators a tool to include or exclude a whole bunch of services for pragmatic reasons. When comparing the Climax Uncut decision with the one in the Top Gear case, it becomes apparent that whereas Ofcom makes visible efforts to classify as TV-like a service that could not be shown on British TV because of its hardcore content, it refuses that classification (contrary to ATVOD's view) to another service despite the fact that it basically serves smaller portions of a dish originally cooked for TV audiences. Indeed, there is a great deal of pragmatism in both of Ofcom's decisions: in the regulator's view there is surely a more pressing need to regulate a hardcore pornographic service than to care about Jeremy Clarkson's latest joke.⁶² This difference in treatment could however lead to unwanted conclusions: according to the Climax Uncut decision, "Were that not the proper construction, then service providers who would otherwise be caught by the criteria in s.368A(1) could simply seek to evade any provisions designed to regulate its programme material by maximising the extremity (e.g. in sex / violence) of its video content." Paraphrasing this part of the decision, it could be argued that service providers could simply seek to evade any regulation by tailoring their video offerings according to the way Top Gear has designed its YouTube page. The question remains open as to whether such a change in format would modify the need for regulating those services or change the reasonable expectation for regulatory protection of a user.

But are on-demand services really "TV-like", or are they rather "video store-like"? According to Recital 24 AVMSD, on-demand services compete for the same audience as television broadcasts. However, so far the real competition is taking place between online and physical distribution of audiovisual works. Video rental stores are most affected by this battle and are gradually disappearing from our streets.⁶³ In the meantime, the market share of VoD is rather small in comparison to that of traditional broadcasters.⁶⁴ Also the user experience resembles rather the renting of a DVD to watch it (possibly more than once) at a convenient time rather than the watching of a TV programme. One of the main characteristics of a TV programme is the fact that the user cannot choose when to watch it (there is always the option of videotaping a programme for later viewing, but that is an exception rather than the rule). This leads to a certain standardisation of what people may watch. If this is less and less the case due to the growing amount of TV channels, it is still common to have watched the same TV show at the same time as your colleagues at work, so that you may discuss it the morning after during a coffee break. That is not normally the case for the renting of a film via a video store or a VoD service.

But on-demand services are not simply "video store-like". The interactive nature of web technologies and the technical possibilities available to millions of people through digital devices and software enable a great flexibility in the form and way of publishing audiovisual content, so that the boundaries between commercial and private content are increasingly blurred. The fact that new ways of monetising private content have appeared makes this distinction between commercial and private content even more unclear.

Whatever it may be, the concept of "TV-likeness" is vague and will necessarily evolve with time. It is a concept with strong subjective elements, and may be interpreted by each NRA in a completely different way. For instance, while ATVOD's guidelines give special prominence to this concept, some important decisions by ATVOD have been contradicted by Ofcom based on the TV-likeness of the service in question (see *supra*). In other countries such as the Netherlands, the NRA considers that this concept is too vague and may not be taken too much in consideration.⁶⁵ The expectation of

62) Jeremy Clarkson is a co-presenter of Top Gear, see: http://en.wikipedia.org/wiki/Jeremy_Clarkson

63) See e.g. "Blockbuster joins UK retail casualty list and calls in the administrators", available at: www.guardian.co.uk/business/2013/jan/16/video-chain-blockbuster-falls-into-administration

64) For more information about the market aspects of VoD see the ZOOM section of this publication.

65) See e.g. Marcel Betzel, "Finetuning Classification Criteria for On-demand Audiovisual Media Services: the Dutch Approach", in Susanne Nikoltchev, Ed., *IRIS Special, The Regulation of On-demand Audiovisual Services: Chaos or Coherence?* (Strasbourg, European Audiovisual Observatory, 2011).

users with regard to regulatory protection is also hard to measure and, in any event, most parents won't make much of the difference between services if they catch their children watching images of a hardcore porn or violent film.

Conclusion

In a recent essay, Netflix CEO Reed Hastings wrote: "Over the coming decades and across the world, Internet TV will replace linear TV. Apps will replace channels, remote controls will disappear, and screens will proliferate."⁶⁶ Coming from a major VoD provider, this may sound like an interested view of the future. Nonetheless, this prediction seems to be shared by most people nowadays, and for good reasons. Convergence has finally become a reality: on-demand services are slowly but surely gaining momentum, and connected devices are increasingly blurring the dividing lines between traditional broadcasting and "new" media.

This ongoing development has numerous regulatory implications.⁶⁷ In order to gather intelligence about this matter, the European Commission recently launched a public consultation on the challenges of a converging audiovisual world.⁶⁸ In a Green Paper published as background document,⁶⁹ the Commission enquires, *inter alia*, about the existence of market distortion caused by the regulatory differentiation between linear and non-linear services, and about possible ways to tackle these distortions while protecting relevant values. Furthermore, the Commission asks whether there is a need to adapt the definition of AVMS providers and / or the scope of the AVMSD, in order to make those currently falling outside the scope subject to part or all of the obligations of the AVMSD. It also poses the question of people's expectations with regard to the regulation of TV programmes and Internet content.

Change is what life is made of, and it should be embraced. But certain things never change. When asked about the impact of recent and future market and technological developments on the entertainment industry, George Lucas, the creator of the Star Wars saga, answered: "You still have to tell stories. Some people will want to be in a game... and some people will want to have a story told to them. Those are two different things. But the content always stays the same. The content hasn't changed in 10,000 years."⁷⁰ And in the end, it is the content that really matters, isn't it?

66) R. Hastings, Netflix Long Term View, available at: www.scribd.com/doc/137803318/Netflix-Ir-Letter

67) See A. Scheuer, Convergent Devices, Platforms and Services for Audiovisual Media: Challenges Set by Connected TV for the EU Legislative Framework, IRIS *plus* 2013-3.

68) Stakeholders and the wider public are invited to share their views until the end of August 2013. See http://europa.eu/rapid/press-release_IP-13-358_en.htm

69) Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, COM(2013) 231 final, 24 April 2013, available at: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/convergence_green_paper_en_0.pdf

70) George Lucas & Steven Spielberg: Studios Will Implode; VOD Is the Future, available at: <http://variety.com/2013/digital/news/lucas-spielberg-on-future-of-entertainment-1200496241>

Applying the Rules

This section complements the Lead Article by presenting decisions of national regulatory authorities regarding the definition of what constitutes an on-demand audiovisual media service (AVMS). The fact that most of the articles concern the United Kingdom exemplifies how both The Authority for Television On Demand (ATVOD) and the Office of Communications (Ofcom) can be considered frontrunners in the regulation of on-demand services. In recent times, both bodies had to clarify whether a variety of on-demand audiovisual offerings (ranging from a TV section of a football club's website or the YouTube channels of famous TV programmes to hardcore pornographic services offered online) qualify as on-demand AVMS according to the rules of the AVMS Directive. It becomes obvious that classifying a service as an on-demand AVMS can be a thorny issue indeed. This is also shown by four decisions taken by the Swedish Broadcasting Commission regarding the classification of audiovisual content provided by newspapers on their websites. The last article about the decision of the Council for Broadcasting and Retransmission of the Slovak Republic shows how in certain cases the related question of identifying the provider of an on-demand AVMS can be really tricky.

United Kingdom

Everton TV Is not an On Demand Programme Service

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On 26 June 2013, Ofcom (UK's audiovisual regulatory body) decided that the Everton TV section of Everton Football Club's website was not an on demand programme service (ODPS). Everton had appealed ATVOD's decision to Ofcom, after ATVOD (UK's VoD co-regulatory body) had determined on 11 April 2012 that the Everton TV section constituted an ODPS.

When determining whether a particular website or section of a website is an ODPS, two core criteria had to be fulfilled pursuant to section 368A of the Communications Act, namely:

- The principal purpose is to provide audiovisual material.
- Whether the form and content of the programmes comprising that service is comparable with the form and content of programmes normally included in linear (traditional) broadcast television service.

ATVOD's determination was that the Everton TV's principal purpose was to provide audiovisual material to its audience. ATVOD considered Everton TV was a distinct brand and it provided a service in its own right. Furthermore, Everton met the second part of the criteria whereby the form and content of the material on the site was comparable to traditional TV.

However, Ofcom disagreed relying on two benchmark decisions, Sun Video and Viva TV. These decisions indicate factors determining whether the principal purpose was to provide audiovisual material and that such content was comparable to normal TV output. Such factors included whether the TV site have its own homepage, the presentation/style of material and whether on an overall assessment, the audiovisual material could be said to be integrated into and ancillary to another service. This analysis is consistent with the guide recitals such as recital 22 as contained in the EU Audiovisual Media Services Directive which is enacted in the UK via the Act.

Ofcom considered Everton's material was incidental to the purpose of providing a website/fanzine (a colloquial term to describe a journal dedicated to fans of a particular activity) for Everton supporters. Ofcom acknowledged that the material was at face value audiovisual material, but on their interpretation of the facts the content was ancillary to the wider functions offered by the overall Everton website. Ofcom examined more of Everton TV's output than ATVOD, and whilst acknowledging that it came close to having its principal purpose as providing audiovisual material the cumulative effect of Everton's material was considered incidental to a wider purpose.

Ofcom considered the second part of the test namely whether the site was comparable in form and content to conventional TV. Consideration, for instance, was given to Recital 24 of the Directive: "It is characteristic of an on demand audiovisual service that they are "television like" i.e that they compete for the same audience as television broadcasts....". According to Ofcom, Everton TV's material had no consistent style nor format as compared to established TV programmes such as the BBC's "Match of the Day" and "Football Focus". Everton's material lacked the coherence and consistency of say MUTV (Manchester United Television) who had programmes using presenters and formats akin to a conventional TV presentation.

Ofcom made clear that subject matter and size of audience was not relevant, also factors determining principal purpose and comparability with linear TV were not exhaustive or determinative. "However, Ofcom considered that audiovisual material could evolve from something incidental to another purpose ie not being an ODPS to becoming an ODPS in which case a fee would be due to ATVOD".

- Decision of Ofcom, Everton TV, 26 June 2013
<http://merlin.obs.coe.int/redirect.php?id=16576>
- ATVOD's notice of determination, Everton TV, 11 April 2012
<http://merlin.obs.coe.int/redirect.php?id=16577>

IRIS 2013-7/13

ATVOD's Rulings on What Is a "Video-on-Demand" Service Overturned

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If a service in the United Kingdom constitutes a "video-on-demand" service, it should so notify ATVOD – the Authority for Video on Demand – so as to come under its regulatory jurisdiction regarding editorial content and pay an annual fee.

Interpreting the criteria in concrete cases is, in the first instance, the responsibility of ATVOD; however, it is the UK regulator Ofcom which has the ultimate legal responsibility and so an appeal lies to it.

VOD criteria (in implementing the Audiovisual Media Services Directive) are retrofitted through the Audiovisual Media Services Regulations 2009 and the Audiovisual Media Services Regulations 2010, as Section 368A of the Communications Act 2003. This defines an On Demand Programme Service (ODPS); one of the main characteristics is that ... "its principal purpose is the provision of programmes, the form and content of which are comparable to the form and content of programmes normally included in television programme services." (Section 368A(a)).

Two cases involved BBC Worldwide, in respect of the two YouTube channels. One was Top gear and the other BBC Food. (In fact there is a third, involving ODPSs provided by Channel Flip Media Limited, in which Ofcom overturned ATVOD's ruling as well - see IRIS 2013-2/27).

In determining whether a VOD constitutes an ODPS, Ofcom adopts a two-stage test: (i) what is the principal purpose of the service (i.e., is it to provide programme services?) and (ii) the comparability test (is the material sufficiently comparable to television programme services?).

BBC Worldwide argued that, whilst the relevant content was similar to television programme services, it was "in the form of clips of programmes, not programmes in themselves". Clips were of approximately 5 to 8 minutes (and a maximum of 15 minutes) duration whereas, e.g., BBC iPlayer (regulated by ATVOD) presents "full-length" programmes.

Ofcom, however, stressed that its decision (focusing on duration and production quality) is fact-specific, stating "any service would need to be considered on the basis of its relevant characteristics and all the relevant evidence".

- Ofcom BBC Food Youtube decision, 18 January 2013
<http://merlin.obs.coe.int/redirect.php?id=16357>
- Ofcom BBC Top Gear decision, 18 January 2013
<http://merlin.obs.coe.int/redirect.php?id=16358>

IRIS 2013-4/14

Decision of Co-Regulatory Body on Scope of 'On-demand Programme Service' Overturned

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Ofcom, the UK communications regulator, has overturned a decision of the co-regulatory Authority for Television on Demand (ATVOD) that Channel Flip was an 'on-demand programme service' for the purposes of part 4A of the Communications Act 2003. ATVOD's decision meant that it had to notify ATVOD, pay a fee, and meet a limited number of regulatory requirements. This part of the Act had been added to implement the Audiovisual Media Services Directive. Ofcom had designated ATVOD as the appropriate regulatory authority to carry out functions under this part of the Act, but its decisions were made subject to appeal to Ofcom itself, which can substitute its own decision for that appealed against.

The Act provides that a service is an 'on-demand programme service' if 'its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services.' Channel Flip was a small business with 15 employees; ATVOD decided that the content of some of its audiovisual content was comparable to television comedy programmes, in particular because items had generic opening sequences including a music soundtrack, a linear narrative and plot, and end credits or an end pictorial logo.

To assist in the resolution of this and other appeals, Ofcom commissioned research into consumers' attitudes to different services. Channel Flip marketed itself as 'the UK's finest video shows' and broadcast brief items, normally 3-4 minutes in length but with some of 10 minutes. Some were presented by TV personalities, and some items were arranged into a series. The style was not 'amateur' but the items were professionally made on a limited budget. The research suggested that users considered Channel Flip to be at the lower end of the spectrum of comparability with linear television, and that it felt like a vehicle to sell particular TV personalities. Ofcom considered that, although some of the series shared characteristics with an established genre of linear TV programmes, the items were not so similar as to compete for audience with such services. Users did not consider them to be associated with, or an alternative to, TV programmes. Their short duration made them more comparable to clips on websites such as YouTube. Though some items were more comparable with television programmes, they were not typical of the output as a whole. Ofcom thus decided that the service did not constitute an 'on-demand television service' and allowed the appeal.

- Ofcom: Appeal by ChannelFlip Media Limited, 14 December 2012
<http://merlin.obs.coe.int/redirect.php?id=16259>

IRIS 2013-2/27

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

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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', 12 July 2012
<http://merlin.obs.coe.int/redirect.php?id=16093>

IRIS 2012-9/24

Ofcom Upholds ATVOD Rulings

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On 18 January 2012, Ofcom upheld ATVOD's Determinations that three Viacom companies – Nickelodeon UK Limited, The Paramount Partnership and MTV Networks Europe – were the responsible persons for VOD services featuring their content on the Virgin Media platform.

The issue concerns Section 368A of the Communications Act 2003. This defines 'editorial responsibility' which, in turn, triggers regulatory responsibility.

A service is only an On Demand Programme Service (ODPS) if it satisfies the defining criteria in section 368A of the Act. Key amongst these for the purpose of the appeals are in sections 368A(1) (c) and (d), that,

"a service is an ODPS if (...) (c) there is a person who has editorial responsibility for it; [and] (d) it is made available by that person for use by members of the public".

The concept of editorial responsibility is defined in terms of general control by section 368A(4), which states that "a person has editorial responsibility for a service if that person has general control (a) over what programmes are included in the range of programmes offered to users; and (b) over the manner in which the programmes are organised in that range; and the person need

not have control of the content of individual programmes or of the broadcasting or distribution of the service”.

ATVOD had studied the Agreement between each company and Virgin Media whereby each “(...) had agreed it is the provider of the ODPS comprising the Appellant’s content under the Agreement and has “editorial responsibility” over the same, save in respect of any insertions or advertising placed by Virgin Media in or around the content”.

Further, “in relation to organisation of material in particular, ATVOD pointed out that the Appellant in each case provides the metadata accompanying the programmes”.

- Ofcom Appeal Decision, 18 January 2012
<http://merlin.obs.coe.int/redirect.php?id=15659>

IRIS 2012-3/25

On-Demand Adult Programme Service Censured

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On 1 February 2012, the UK Authority for Television On Demand (ATVOD) published a determination that the web-based on-demand adult programme service Bootybox.tv had breached statutory rules requiring video on demand providers to ensure that under 18s cannot normally access hardcore pornographic content. Bootybox.tv had been notified to the ATVOD as having been available since November 2010. The service provider described its content as “generic and mostly BBFC compliant UK porn available on-line”.

On 26 June 2011, a parent complained that a son had used this service and other web based services to access pornographic videos “ (...) that have no parental control on and are far too strong to be allowed even under UK law (...)”.

The matter is governed by Section 368(E) (2) of the Communications Act 2003. This states that “If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it.” This provision is mirrored in the ATVOD Rules & Guidance, Rule 11.

ATVOD found that “the website broke the statutory rules in two ways. First, it allowed any visitor to the website unrestricted access to a selection of hardcore pornographic video promos/trailers featuring real sex in explicit detail and featured a large still image of explicit sex on the homepage. Secondly, access to the full videos was open to any visitor who paid a fee. As the service accepted payment methods – such as debit cards and prepaid vouchers – that can be used by under 18s, ATVOD ruled that the service had also failed to put in place effective access controls in relation to the full videos”.

ATVOD followed up its ruling with an Enforcement Notification, requiring the provider of Bootybox.tv to either remove the hardcore porn content from the service or put it all behind effective access controls that will ensure that only adults can see it.

The service has now ceased operating.

- ATVOD, Determination that the provider of the on demand programme service “bootybox.tv” was in breach of rule 11, 1 February 2012
<http://merlin.obs.coe.int/redirect.php?id=15660>

IRIS 2012-3/23

Should the Form and Content of ‘Hardcore’ Sex Videos Made Available on Websites be Considered ‘TV-Like’?

David Goldberg
deeJgee Research/Consultancy

On 13 May 2011, the first-ever decisions on appeals against determinations of The Authority for Television On Demand (ATVOD) to Ofcom were made.

The two cases at hand concerned the question of whether two “adult websites” fall within the scope of the Audiovisual Media Services Regulations 2009, as being on-demand programmes (ODPs) comparable to a television programme.

ATVOD concluded that both services met the statutory criteria, including that their “principal purpose is the provision of programmes, the form and content of which are comparable to the form and content of programmes normally included in television programme services”, and so should be considered ODPs.

It was on this point that Playboy TV appealed to Ofcom.

Playboy argued that as the video content on the two sites “features fully explicit sexual images, and was therefore too explicit to be broadcast on UK television, it was not TV-like and was not therefore subject to the new ATVOD rules designed to protect children from video-on-demand content which might cause them serious harm.”

ATVOD had ruled that the videos did carry content that was more explicit than adult programmes shown on UK TV services. However, (a) the videos were “comparable to such programmes”; and (b) they “were essentially the same as ‘adult’ programmes that are frequently broadcast on linear TV channels in other EU jurisdictions”. As such, they were, according to ATVOD, subject to the rules designed to protect children.

Ofcom upheld ATVOD’s determinations. It found that the “the form (and format) of the video material available on the Service [were] clearly ‘comparable’ to the form of programmes normally included on television programme services, and television broadcasting in general.” It also found that the content, whilst not identical to programme content found on UK TV, was “comparable and, therefore, subject to the rules concerning the protection of children.”

- Ofcom decision - “Climax 3 Uncut”, 13 May 2011
<http://merlin.obs.coe.int/redirect.php?id=13315>
- Ofcom decision - “Demand Adult”, 13 May 2011
<http://merlin.obs.coe.int/redirect.php?id=13316>

IRIS 2011-7/24

Sweden

Radio and Televisions Act Applies to Newspapers' Web TV Services

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On 29 October 2012, *Granskningsnämnden för radio och TV* (the Swedish Broadcasting Commission – SBC) delivered four decisions regarding the application of Radio- och TV-lagen (The Radio- and Televisions Act – RTL) in relation to Web TV sections on newspapers' websites. The cases concerned more or less similar circumstances for the websites of the newspapers Aftonbladet, Dagens Nyheter, Helsingborgs Dagblad and Norran.

Firstly the SBC had to decide whether the RTL applied to a Web TV service as such. According to the *travaux préparatoires* of the RTL, which refer to the Audiovisual Media Services Directive 13/2010/EU, the primary objective of a service must be to provide a programme in order for the service in question to fall within the definition of an audiovisual media service. The SBC found that the TV programmes on the websites constituted separate services compared to other content on the newspapers' websites. Moreover, the programmes were made available to the general public at the request and at the time chosen by the user, and programmes were also classified in catalogues such as "Sports" and "News". In light of these facts, SBC established the Web TV sections of the newspaper websites were on-demand TV (non-linear audiovisual media services) and thereby subject to the RTL.

Secondly, as a consequence, the newspapers must follow the rules on unfair promotion of commercial interests and advertisements under the RTL. In this respect all four newspapers were able to successfully defend themselves that they had not breached the rules on unfair promotion of commercial interests.

However, the SBC considered that Aftonbladet had not provided indications that clearly differentiated the advertising from the rest of the content and had accordingly breached the RTL. When it came to sanctions, this time, the SBC found no reason to impose a special fine on Aftonbladet.

The cases are interesting as they clearly state that the scope of the RTL will cover newspapers' Web TV services in many cases. Newspapers must therefore consider and adhere to the RTL's rules on promotion of commercial interests and advertisements.

- *Granskningsnämnden för radio och tvs beslut i Dnr 12/00777 av den 29 oktober 2012* (Swedish Broadcasting Commission's decisions in Case No. 12/00777 of 29 October 2012)
<http://merlin.obs.coe.int/redirect.php?id=16192>
- *Granskningsnämnden för radio och tvs beslut i Dnr 12/00778 av den 29 oktober 2012* (Swedish Broadcasting Commission's decisions in Case No. 12/00778 of 29 October 2012)
<http://merlin.obs.coe.int/redirect.php?id=16193>
- *Granskningsnämnden för radio och tvs beslut i Dnr 12/00779 av den 29 oktober 2012* (Swedish Broadcasting Commission's decisions in Case No. 12/00779 of 29 October 2012)
<http://merlin.obs.coe.int/redirect.php?id=16194>
- *Granskningsnämnden för radio och tvs beslut i Dnr 12/00780 av den 29 oktober 2012* (Swedish Broadcasting Commission's decisions in Case No. 12/00780 of 29 October 2012)
<http://merlin.obs.coe.int/redirect.php?id=16226>

Slovakia

Identifying Media Service Provider

Juraj Polák

Law and License Department, Office of the Council for Broadcasting and Retransmission

On 23 November 2011 the Council for Broadcasting and Retransmission of the Slovak Republic ("Council") issued a decision concerning a complaint against "Internet TV" run at www.tnitv.weebly.com. The given service was labelled as "Internet TV of the city of Trencin" and provided a list of short (on-demand) videos mostly dealing with topics related to the city of Trencin. After a first assessment of this service the Council gained reasonable suspicion that it may be qualified as on-demand audiovisual media service and its provider thus may have failed to meet the statutory obligation to notify the Council of providing such a service. The Council may impose a fine up to EUR 1,000 for a repeated violation of this obligation.

The service itself failed to clearly identify its provider. Nevertheless the official notice about the start of legal investigations was delivered to the legal entity ("participant") listed within the service as "production". In its response the legal representative of the participant stressed that the participant is not the owner of the given Internet domain and he advised the Council to contact the owner of the domain "weebly.com" (USA hosting service). The participant claimed that the provider of this service is an unspecified company established in the USA and it targets Slovaks living in the USA. The content of the service (mostly related to the city of Trencin and only in Slovak language) was "created and supplied" to this US-company by Slovak "volunteers" such as the participant. The participant thus declared that the content of this service is "created" outside the Slovak Republic (and the EU), the service is not run on Slovak (or EU) domain and the server of this service is stationed outside the Slovak Republic (and EU). Therefore this service could not fall under the jurisdiction of the Council.

The Council repeatedly submitted the participant to answer some additional questions (especially to specify the US-company that allegedly runs the service) in person but with no response. Eventually the participant explained over the phone that he is not entitled to deliver any more statement concerning the service since he is not its provider and he already presented all relevant facts to the Council in his written response.

The Council, after evaluation of all available facts, delivered a decision where it stated that the service in question does indeed constitute an on-demand audiovisual media service. The Council stated very clearly in its reasoning that it was completely irrelevant where the server of the service is situated and also who owns the internet domain of the service. For the identification of the media service provider it is necessary to determine who is responsible for choosing and organising the service content, in other words who has the editorial responsibility over it. With regard to the given service the Council stated that the participant failed to identify the US-company which allegedly chooses and organises the service content even though the participant itself is supposed to communicate with this company as well as send video content to this company. The Council also argued that the participant failed to explain why all contacts within the service (labelled e.g. "production", "commerce and marketing", "audiovisual manufacturing") refer to people with Slovak telephone contacts and within the whole service there is no reference to the mentioned US-company.

The Council eventually came to the conclusion that this service despite of the participant's allegations does not target Slovaks living in the USA since all advertising within the service refers to businesses that operate solely in the Slovak Republic (mostly in the region of Trencin e.g. local radio, cafés etc.). All content of this service (editorial and advertising) therefore clearly targets the population of the Slovak Republic. The Council stressed that the participant itself is labelled as "production" whereas this word in Slovak language means "(artistic) creation of the (artistic) works or aggregation of artistic work". The Council stated that under these circumstances it is safe to assume that "production" actually refers to choosing and organising the service's content. It thus

identified the participant as provider of this on-demand audiovisual media service and imposed a sanction – a warning (it was his first violation therefore warning was mandatory) for the failure to notify the Council.

The Council did not receive any appeal to this decision. The Internet site stopped operating very soon. However, it was recently discovered that probably the same service (“Internet TV of the city of Trencin”) is provided on a different site. The contact information refers to a company established in Panama and the participant is clearly identified as a subject that cooperates with this service in the matters of advertising (e.g. selling advertising on this service).

- *Rada pre vysielanie a retransmisiu, Rozhodnutie c. RL/98/2011, 23.11.2011* (Decision of the Council for Broadcasting and Retransmission of the Slovak Republic c. RL/98/2011 of 23 November 2011) <http://merlin.obs.coe.int/redirect.php?id=15760>

IRIS 2012-5/37

On-demand Audiovisual Services in Europe

European Audiovisual Observatory

The European on-demand audiovisual services landscape appears to be more and more complex, fragmented and, in many respects, lacking any transparency. In order to capture this complexity, the European Audiovisual Observatory has further developed its survey work by extending the MAVISE database, which has up to now been limited to television channels and their means of distribution. Apart from over 10,000 TV channels, the database¹ currently contains details of nearly 3,000 on-demand audiovisual services.

Our definition of on-demand audiovisual services is both wider and more pragmatic than the one found in the Audiovisual Media Services Directive. Our aim here is not to set out the law but to present as complete as possible a picture of an extremely complex and rapidly changing market for which few reliable data are available. Put simply, we can say that we are endeavouring to identify on-demand media services as defined by the Directive but have supplemented our analysis by including services that do not from the outset fall within the definition contained in the Directive: video-sharing services; NVoD services and services for storing content on a PVR provided by operators of satellite platforms; pay-DTT packages provided either in the absence of or complementing actual VoD services; services in respect of which it is debatable whether it is right to describe them as on-demand audiovisual services: “branded channels” in the iTunes or Xbox Video catalogue; podcasts and applications for smartphones and tablets that permit access to on-demand catalogues; applications for Smart TV or services on video-sharing platforms like YouTube and Dailymotion.

We believe the reason for widening this definition is clear: the aim is to produce an overview of the strategic options of the various players by trying to show how they stand with regard to the various technical means available. It is interesting to note that for the operators the dividing lines determined by issues of intellectual property rights are more significant than the division between television and on-demand audiovisual media services established by the Directive. The main strategic division is between catch-up television services (operated almost exclusively by television broadcasters) and VoD services that provide catalogues of titles, which constitute a much more open market.

However, the surveys presented here are not yet complete. The services hardest to count are those freely accessible on the internet. We have provided “minimum” figures for VoD services (which offer films, catalogues of television, music videos, documentaries, educational programmes,

1) <http://mavise.obs.coe.int>

etc). Our work to identify online catch-up TV services offered by broadcasters on their own websites, their channel's website or a website specific to catch-up TV is probably incomplete and, for most countries, does not yet include services offered by local TV stations. Finally, we have not included in our surveys either offers the legality of which appears doubtful (web-sites offering the quite clearly unauthorised streaming of films, databases with links to files accessible using peer-to-peer software) or services specialising in adult content, the most popular of which are, incidentally, established in the United States.

As in the case of television services, a statistical description of on-demand audiovisual services requires the provision of two types of data: data on the number of services established in a country and data on the number of services available in a country.

Problems in identifying service providers and their country of establishment

The compilation of statistics on the number of on-demand audiovisual services established in a country presupposes the availability of complete and detailed lists drawn up by the member states, which means that the name and location of the television company are known.

Article 5 of the Audiovisual Media Services Directive requires that "Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:

- a) the name of the media service provider;
- b) the geographical address at which the media service provider is established;
- c) the details of the media service provider, including its electronic mail address or website, which allow it to be contacted rapidly in a direct and effective manner;
- d) where applicable, the competent regulatory or supervisory bodies."

In practice, it has to be said that this minimum level of transparency is not available. As far as online service providers are concerned, they do not systematically supply at their website detailed information on the company with editorial responsibility. In some cases, the operator is clearly identified on the website relating to the service but it may happen that the service has been declared to a regulatory body in another country as having another channel provider. In the case of websites provided by the major international groups established in the United States, the group's affiliation is generally evident but details of whether the channel provider is the parent company or one of its European subsidiaries are not supplied. In some cases, a company is mentioned in the Conditions of Use but is the company mentioned for customer relations purposes necessarily the actual channel provider? The situation is even more opaque when services are distributed by platforms: open platforms like YouTube or Dailymotion, closed platforms such as iTunes, Xbox Video or the platforms of operators of cable networks or IPTV networks. The only information supplied to the consumer or the observer is the name of the studio or the broadcaster operating the service but, once again, it is not possible to establish the legal identity of the actual provider. In this case, the distributors could be a source of information that enables the identity of the providers of services they offer to be precisely established but the Directive does not lay down any obligation for them to disclose that identity. The Observatory's efforts to contact the platform operators generally went unanswered. As it is still easier to engage in other cross-border activities than television, national authorities do not necessarily know that services have been established in their territory for distribution in another country. We estimate that about 40% of film VoD services are established in a country other than that of their reception.

In the case of more than a third of services entered by the Observatory in the MAVISE database, the identification of the provider is purely hypothetical. Our assumptions are as follows:

- as far as catch-up television services and branded channels of broadcasters on open platforms are concerned, we have assumed that the provider is the same company as the one providing the television service;

- with regard to VoD services on distribution platforms, such as Xbox Video, which offer catalogues of the American studios in the main European languages, we have assumed that the services are provided directly by the parent company.

By extending the MAVISE database to include on-demand services, we hope that making available to the public the results of the Observatory's surveys, albeit imperfect, will enable the quality of the information to be gradually increased. As there is no binding regulatory framework, only companies' voluntary co-operation will make it possible gradually to bring about transparency in this area.

Analysis

In April 2013, 2,458 operational services established in the European Union were identified. It appears quite natural that the big countries are those with a large number of services established: the United Kingdom (588 services, or 23.9% of the total), France (358 services, 14.6%), Germany (228 services, 9.3%) and Italy (145 services, 5.9%). Four countries have a relatively high number of services compared with their size: three (Luxembourg, Sweden and the Czech Republic) are very clearly countries of establishment for services targeting other countries. Luxembourg hosts the iTunes Stores operated by iTunes SARL, which target not only the other European countries but also many in Africa, the Middle East and Asia (with the exception of Japan), as well as various language versions of Netflix and, it seems, Microsoft's MSN portals. Sweden hosts various services targeting the Nordic countries (SF Anytime, Canal+ Digital, CDON, etc.), while the Czech Republic hosts various language versions of HBO OD targeting central Europe. The Netherlands is home to a number of pan-European services, such as Europeana and EU Screen, but also many small VoD services and a very large number of broadcasters' catch-up TV websites.

It is also important to note that a significant number of services may be assumed to be established in the United States, although that could give rise to legal debates. Some services available in various language versions, such as Google Play Movies, YouTube movies, MUBI and Eurochannel, clearly indicate providers established in the United States, but the issue is less clear in the case of the services of film studios available in particular on Xbox Video: as no information is supplied, we have assumed that they are established in the United States. In April 2013 the MAVISE database identified a total of 72 services established or assumed to be established in the United States and targeting one or more European markets.

Catch-up TV websites make up more than a third of the range of on-demand audiovisual services established in the European Union. Such services may be extremely varied and diverse (the best European model probably being the BBC iPlayer) and distributed on all types of existing platforms or much more modest, with special-interest channels merely offering a few video clips. Catch-up TV services are usually free of charge but some are included in the subscription to a range of special-interest channels. Some pay catch-up TV services are beginning to emerge.

The second most important category is that of branded channels on open platforms (YouTube, Dailymotion). Our survey of this type of service is definitely far from exhaustive. We have tried to systematically identify the websites of television channels without carrying out a systematic survey of local TV stations, which in some countries readily use the platforms to make their archives available.

The third most important category consists of VoD services offering catalogues of films. There are many players in this market: IT and video game companies such as Apple (with no less than 76 different stores offering a catalogue of films) or Sony; platforms distributing television services (cable, satellite, IPTV), television companies, video publishers and retailers, film producers and distributors and even a few newspapers.

Problems in identifying services available in a given market

The question of the number of services available in a market poses significant problems itself. Many on-demand audiovisual services are distributed via the Internet with no territorial restriction.

This applies in particular to most of the branded channels on open platforms like YouTube or Dailymotion, to web portals or news websites, to a large number of catch-up TV services, to web archives and to a (fairly small) number of VoD services. In each European country, the range of services available could accordingly run into the thousands. As in the case of television services, we have adopted a more restrictive approach: the figures we provide aim to describe the services targeting a specific country. In the case of location-based services, the matter is self-evident, whereas in the case of non-location-based services we have only included the services that “naturally” target a given market, such as services offered by a broadcaster in a particular country or the version of an international brand in the language of the country concerned. Only a few obviously pan-European services have been considered to be available in every European country.

The United Kingdom is the leader in terms of the number of services available. This is due both to the considerable dynamism of the broadcasters concerned (especially the BBC, which, apart from the BBC iPlayer provides a number of branded channels on YouTube) and to the fact that the language similarity makes it easier for the American services to target the British market, which is still at the forefront in Europe. This applies particularly to the offerings of the American studios distributed by the Xbox Video service of Microsoft Luxembourg SARL.

Number of film VoD services available in EU countries (April 2013)

In units

Country code	Services established				Total
	in the country	in one other EU country	in a non-EU European country	outside Europe	
AT	10	12	2	21	45
BE (CFR)	29	5	3	23	60
BE (VLG)	29	7	1	24	61
BG	6	5			11
CY	7	3		4	14
CZ	28	4			32
DE	72	13	2	25	112
DK	13	23		19	55
EE	3	3	1	4	11
ES	26	6	1	26	59
FI	14	24		26	64
FR	110	25	3	38	176
GB	115	4	4	59	182
GR	7	3		3	13
HU	6	12			18
IE	6	13	3	40	62
IT	25	6	3	22	56
LT	4	3	1	3	11
LU	5	5	1	5	16
LV	3	3	1	3	10
MT	2	3		3	8
NL	30	9	1	22	62
PL	30	9	1	4	44
PT	9	4		5	18
RO	4	5		4	13
SE	18	9	1	28	56
SI	10	5		4	19
SK	7	6		4	17
Total EU	628	229	29	419	1 305
	48,1%	17,5%	2,2%	32,1%	

Source: European Audiovisual Observatory / MAVISE database

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Number of on-demand audiovisual services by country of establishment and by genre (April 2013)

Country code	Branded channels on open platforms (1)	Catch up TV services (2)	News / Portals (3)	VoD Generalist (4)	VoD Music	VoD Films	VoD Films + TV fiction
AT		37	4		1	6	1
BA						3	
BE	8	20	7	8	2	13	
BG		12		3		4	
CH	3	9		4	3	27	
CY	1	4		1	1	3	
CZ	6	15	10	7	9	5	19
DE	48	91	5	2		23	10
DK	5	11	3	1		10	
EE	1	4				2	
ES		60	2	3	2	16	
FI	3	4		3		5	
FR	49	152	15	19	6	20	3
GB	232	144	9	12	22	39	1
GR	14	16	1			5	
HR	6	2				5	1
HU	9	51	3			6	
IE	10	7		2	2	1	
IT	62	36	13	1	1	8	
LT	6	4				4	
LU	8	3	14			82	3
LV	2	10				3	
MT	1	4				1	
NL	43	32		1		27	
NO	5	5				3	
PL	33	30	1	5	2	14	
PT	8	16		3	1	3	
RO	15	25		6		3	
SE	3	58	4			32	4
SI	4	6				9	
SK	2	12	1			2	
Total EU	573	864	92	77	49	346	41

- (1) Broadcasters branded channels on Dailymotion, YouTube, etc. established in the country.
- (2) Catch-up TV services or promotional web services by broadcasters of the country or targeting the country.
- (3) Portals such as MSN, Yahoo! and video pages of newspapers websites.
- (4) VoD services accessible in the country providing a mix of films and various categories of TV programmes.
- (5) Services providing access to sport events or archives of sports events.
- (6) Includes only services registered by a regulatory authority or part of the line-up of a distribution platform.

VoD TV fiction	VoD Documen- tary	VoD Children/ Animation	Film/TV archives	Film trailers	Sport (5)	VoD Adult (6)	Various	Total
1		1			4		10	65
								3
2		3	1		1	1	7	73
								19
			2					48
1		1						12
1		4	1		8	2	10	97
20	5	8	1	11	1		3	228
2				9				41
								7
6			1	3				93
2			1					18
17	8	21	8	11		9	20	358
40	17	21	2	5	18	18	8	588
1	1							38
								14
			1				3	73
		1						23
5	3	2	2	4	2		6	145
								14
								110
								15
1								7
		1	3		1			108
			1					14
3					1	1	3	93
1		2						34
					1			50
			1		5	1	2	110
	1	1				1		22
								17
103	35	66	22	43	42	33	72	2 458

Source: European Audiovisual Observatory / MAVISE database

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Number of on-demand audiovisual services available by genre and by country (April 2013)

Only services clearly targeting the country are taken into consideration.

A same service can be counted in two or several countries.

Services established outside of Europe are taken into consideration when clearly targeting mainly one or several European countries.

Country code	Branded channels on open platforms (1)	Catch up TV services (2)	News / Portals (3)	VoD Generalist (4)	VoD Music	VoD Films
AT	42	46	4	1	2	32
BA	n.a.	1				
BE (CFR)	5	23	8	8	4	36
BE (VLG)	6	28	5	8	2	34
BG	n.a.	15		3		6
CH	46	24	1	4	3	42
CY	2	4		1	1	6
CZ	5	16	10	7	5	6
DE	44	98	5	5	1	43
DK	6	34	4	2	1	39
EE	3	6				6
ES	7	62	3	3	4	38
FI	4	12	1	4	1	40
FR	44	145	2	21	1	50
GB	172	53	12	11	7	71
GR	14	18	2			8
HR	7	4				6
HU	12	6	3	1	2	9
IE	14	13	1	2	3	43
IT	68	42	13	1	4	29
LT	8	4				8
LU	3	5			3	8
LV	4	11				7
ME	n.a.					
MK	n.a.	2				
MT	1	4				4
NL	52	27	1	1	1	5
NO	7	19	1	1	1	37
PL	38	39	1	5	4	2
PT	9	22	1	2	2	6
RO	17	3		1		6
SE	7	52	4	1	1	42
SI	4	9				12
SK	2	16	1			6
TR	3	1	1	1		3

(1) Branded channels on Dailymotion, YouTube, etc. related to the country (local broadcasters, services in the language of the country, etc.).

(2) Catch-up TV services or promotional web services by broadcasters of the country or targeting the country.

(3) Portals such as MSN, Yahoo! and video pages of newspapers websites.

(4) VoD services accessible in the country providing a mix of films and various categories of TV programmes.

(5) Services providing access to sport events or archives of sports events.

VoD Films + TV fiction	VoD TV fiction	VoD Documen- tary	VoD Children/ Animation	Film/TV archives	Film trailers	Sport (5)	Various	Total
1	3	1	3	2	1	5	9	152
1								2
	3	1	5	1	4	1	1	100
	3	1	5		2	1	6	101
1								25
		1	1	6	4	3	1	136
	1		1					16
2	2		2	1	1	9	5	71
11	23	6	9	2	11	4	6	268
5	3		2		1	1		98
						1		16
	9	1	3	2	4	1	1	138
4	2		2	1	1	2		74
5	28	1	31	4	13	3	20	368
1	34	18	2	4	4	19	11	419
	1	1			1			45
3								20
2	2		2	1			3	43
		3	5	2	1	2		89
	9	4	3	3	5	2	7	190
						1		21
				1	3	2		25
						1		23
1								1
1								3
	1							10
2	3	1	1	2	1	1		98
4				1		1		72
2	3					1	3	98
	1		2					45
1	2					1		31
4			2	1	1	4	2	121
2		1	1					29
2	1					1		29
								9

Source: European Audiovisual Observatory / MAVISE database

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