IRIS Special

Published by the European Audiovisual Observatory

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

Editorial Responsibility

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

IRIS Special: **Editorial Responsibility**

European Audiovisual Observatory, Strasbourg 2008
ISBN: 978-92-871-6476-6
EUR 75

Director of the Publication:
Wolfgang Closs, Executive Director of the European Audiovisual Observatory
E-mail: wolfgang.closs@coe.int

Editor and Coordinator:
Dr. Susanne Nikoltchev, LL.M. (Florence/Italy, Ann Arbor/MI)
Head of the Department for Legal Information
E-mail: susanne.nikoltchev@coe.int

IRIS Special: **Editorial Responsibility**
Study carried out by:
Dr. Wolfgang Schulz and Stefan Heilmann

HANS-BREDOW-INSTITUT
for Media Research at the University of Hamburg

Editorial Assistant:
Michelle Ganter

Marketing:
Markus Booms
E-mail: markus.booms@coe.int

Translation/Proof-reading:
Caroline Bletterer, Michael Finn, Britta Probol, Nathalie Sturlèse, Candelaria Van Strien-Reney

Typesetting/Print:
Pointillés, Hoenheim (France)

Publisher:
European Audiovisual Observatory
76 Allée de la Robertsau
F-67000 Strasbourg
Tel.: +33 (0)3 88 14 44 00
Fax: +33 (0)3 88 14 44 19
E-mail: obs@obs.coe.int
http://www.obs.coe.int

Please quote this publication as:
Susanne Nikoltchev, Ed., IRIS Special: **Editorial Responsibility** ***(Strasbourg, European Audiovisual Observatory, 2008)***

IRIS *Special*:

Editorial Responsibility

Almost exactly twenty years after the adoption of the "Television without Frontiers" Directive, namely on 19 December 2009, the deadline for transposing the Audiovisual Media Service Directive (AVMSD) will expire. In other words, the national rules that so far served to facilitate cross-border television must be adapted or replaced in order to reflect, among others, the widened scope of application of the Community law framework to non-linear services.

Mastering this changeover will be anything but a purely technical exercise. National legislators will have to tackle issues that might have been too detailed to be dealt with at a European level or too controversial to result in more than textual compromise in the legal instruments involved. They might even have to address future developments that were not yet forecast when the AVMSD was adopted. Last but not least they have to focus on national specificities that might not have been taken into consideration when negotiating the Directive.

While all this takes place, most of the countries which are obliged to pursue legislative activities under the AVMSD are also in the process of negotiating a new version of the European Convention on Transfrontier Television. This Council of Europe legal instrument so far paralleled the "Television without Frontiers" Directive and shall now be aligned with the new premises that the AVMSD sets for the future.

As a result, the following months are likely to bring up many issues that could cause headaches to national legislators. It is the privilege of the European Audiovisual Observatory to make available some preventive medicine in form of relevant information to be used during the legislative process as well as the phase of initial application and interpretation of new rules that will follow thereafter.

Among the manifold aspects that will be relevant for transposing the AVMSD, the notion of editorial responsibility might claim the pole position inasmuch as it is decisive for determining the services to which the new Directive shall apply and hence, for the scope of all other provisions in the Directive. Defining editorial responsibility under the AVMSD might also influence the application of general provisions to audiovisual media services concerning, for example, liability or copyright.

We would like to thank Danilo Leonardi, who until very recently headed the Programme in Comparative Media Law and Policy at the University of Oxford, for supplying the European Audiovisual Observatory with important insight concerning the broad spectrum of legal topics of which editorial responsibility is a cornerstone and initial research on several of them. This work allowed us to determine the scope of the current study which, in our view, considering the many other projects on editorial responsibility that we could have conducted, caters to the most pressing information needs of the audiovisual sector.

We are very grateful to the Hans-Bredow-Institut for having developed this much needed study. Dr. Wolfgang Schulz and Stefan Heilmann, the authors of "Editorial Responsibility: Notes on a Key Concept in the Regulation of Audiovisual Media Services", bring to the fore the many facets, concepts and important consequences that constitute the field of editorial responsibility as well as the grey zones where legislators might have to struggle for workable solutions and from where potential diverging views could emerge. Reading this study, however, should facilitate the legislative task.

As the editorial responsibility for this publication lies with the Observatory, it is only appropriate to express thanks to the translators and proof readers who are essential for its quality. Special thanks go to Britta Probol, whose carefully and intelligent proofing of the original German version helped the authors and the editor to improve the text further before translation.

Hoping that this IRIS Special will, among others, be useful for the difficult task of transposing the AVMSD into national law, we stress that the editorial responsibility for that to happen lies entirely with the national legislators!

Strasbourg, July 2008

Wolfgang Closs
Executive Director

Susanne Nikoltchev
Head of Department for Legal Information

IRIS *Special*:

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Editorial Responsibility

Notes on a Key Concept in the Regulation of Audiovisual Media Services

by Dr. Wolfgang Schulz and Stefan Heilmann, Hans-Bredow-Institut

1. Introduction

The Audiovisual Media Services Directive (AVMSD), which came into force in December 2007,[1] refers in various places to the notion of the "editorial responsibility" of a provider of media services, for example when it defines the terms "audiovisual media service" and "provider of such services". It became clear early on that this is a key concept and that its interpretation will define what services and what service providers have to be regulated by Member States for the effective implementation of the aims of the Directive.[2] At the same time, it became evident that this interpretation is not an easy task.

A crucial element of the AVMSD is the extension of the scope of the "Television without Frontiers" Directive. After the Commission had submitted a more far-reaching proposal, in the legislative procedure that followed the extension was limited to non-linear services in the form of on-demand services. While under the AVMSD providers of linear services continue to offer "television broadcasts" irrespective of the technology employed and their programmes are structured and offered at the time that they specify, on-demand services make programmes available at a time chosen by the user.

Determining what services are covered by the Directive and have to be regulated by Member States in order to implement the Directive's objectives is difficult enough in the case of non-

1) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. Available at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_332/l_33220071218en00270045.pdf
The consolidated version bears the title Directive 89/552/EEC of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0552:EN:HTML

2) See Recital 17 of the original Commission proposal (COM(2005)646 final) and Monica Ariño, "Content Regulation and New Media: A Case Study of Online Video Portals", *Communications Strategies* 66 (2007), pp. 115 *et seq.*; Wolfgang Schulz, "Medienkonvergenz light – Zur neuen europäischen Richtlinie über audiovisuelle Mediendienste", *Europäische Zeitschrift für Wirtschaftsrecht* 2008, p. 107 (109).
For instructive hints about the situation under Austrian, British and Italian law, the authors would like to thank Michael Holoubek and Gregor Ribarov (Wirtschaftsuniversität Wien), Monica Ariño and Jeremy Olivier (Ofcom) as well as Daniela Memmo (Università di Bologna).

linear services. As different companies are involved in production and distribution, one may ask to what extent their offerings can be classed as services according to the terms of the AVMSD.

Questions like this may arise in the case of television when productions are outsourced or when a platform provider creates packages from linear programmes. The situation is even more diverse where on-demand services are concerned. Various forms with different possibilities offered by the provider are conceivable and exist in practice ranging from freely-accessible platforms onto which audiovisual content may be put to fully organised online video libraries.

National legislators in any case face the challenge of properly integrating these forms of service into their media regulations. Within its scope of application, the Directive also provides information on how national media regulations must cover the services mentioned. They must accordingly tailor the scope of application of their national rules on audiovisual media services in such a way that all the services covered by the AVMSD are bound by its objectives.

Against this background, this paper will attempt to analyse what the term "editorial responsibility" comprises and what consequences can be inferred from it for Member States as far as the implementation of the Directive in convergent media environments is concerned.

2. Functional Levels of the Term "Editorial Responsibility"

The term "editorial responsibility" describes the quality of the relationship between an object – the media service – and a subject – the media service provider. From a purely analytical point of view, this relationship can be important in different regulatory contexts.

Four levels need to be distinguished here:

1. The function of editorial responsibility as a defining feature of an audiovisual media service: The mere determination of the scope of the Directive may depend on the extent to which a player influences the actual nature of such a service in a certain way (see 2.1 below).

2. The function of editorial responsibility as a starting-point for the implementation of the aims of the Directive: The relationship between the provider and the service provided may be important as regards the extent to which certain sector-specific obligations affect its subject, i.e. in this case the media service provider. For the implementation of the AVMSD by Member States, this would mean that the Member States at least have to impose an obligation on the media service providers with editorial responsibility to comply with the national rules, provided that these providers are subject to their jurisdiction (see 2.2 below).

3. The function of editorial responsibility as a starting-point for other media-specific provisions: In addition, the concept of editorial responsibility may act as a criterion for the application of other rules – such as provisions relating to the editorial process in general or copyright (see 2.3 below).

4. The function of editorial responsibility as a starting-point for rules on content liability: Finally, this provider-service relationship can be used as a criterion for establishing limits to an entity's liability for content outside its specific responsibility under media law. What is involved here is the prevention of actions by a "passive agent" that cannot be called to account for content in the context of sector-specific responsibility (see 2.4 below).

In the following analysis, these levels will be distinguished from one another since legal rules in Member States may be based on different criteria, although this is not necessarily the case.

2.1. Editorial Responsibility as a Defining Feature of an Audiovisual Media Service

Article 1(a), first indent, of the AVMSD already defines the scope of the Directive in this particular case the audiovisual media service, as a service that is under the editorial responsibility of a media service provider. This makes editorial responsibility a feature of the service, so it is necessary to ask what importance this criterion has at this point, that is to say what services can be removed from the scope of the AVMSD by virtue of the non-compliance with this feature.

On the question of the scope, a distinction can initially be drawn between the two components of the term: "editorial", as a qualification of responsibility, and "responsibility" as such.

2.1.1. The "Responsibility" Criterion

As the definition of "media service provider" in Article 1(d) of the AVMSD already contains the criterion of editorial responsibility, it could be assumed that the inclusion of this criterion in Article 1(a) does not have any additional meaning. Why, then, has it once again been included in the text?

The genesis of the Directive provides indications concerning the possible meaning. The rapporteur of the European Parliament's Committee on Culture and Education, Ruth Hieronymi, made the purpose of this introduction clear:

> "For further clarification your rapporteur proposes adding to this set of criteria that of 'editorial responsibility' and a definition of 'programme', as the Commission has already done in other places in its proposal for a directive. This addition makes it clear that the directive only covers audiovisual media services in which a professional media service provider is responsible for the editorial design and final compilation of a programme for broadcasting in accordance with a fixed programme schedule or for viewing on demand from a catalogue. Services in which the audiovisual element is not the principal purpose of the service, and services which consist merely in the technical transmission of the content, should by way of clarification be expressly excluded from the scope of the directive."[3]

In order to understand the amendments made to the Commission's original proposal for a directive throughout the legislative procedure, it is important to consider one other aspect that is also relevant to the interpretation of this criterion. The Commission's proposal was

3) Report on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)). Available at:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2006-0399+0+DOC+PDF+V0//EN&language=EN , p. 75.

mainly criticised because, in its efforts, in the light of technical convergence, to include new services that now – or at any rate in the future – are used like "television" and should accordingly be subject to co-ordinated provisions for the same reasons, it tried to define these new types of service without reference to their media character.[4] Many proposals, such as those put forward at the Liverpool conference of the British presidency of the Council[5] or those made later in the parliamentary procedure, are characterised by an effort to find criteria that limit the scope of the Directive to media services in a narrower sense. The introduction of the term "editorial responsibility" must be seen in this context, as Ms Hieronymi's statement shows.

It can therefore be considered that it was the EU lawmakers' intention to cover only those services for which a certain classifiable provider bears responsibility in a particular way (to be defined subsequently). However, this criterion has little practical relevance. It is almost impossible to conceive of editorial services that manage without a controlling body, which would have to be defined as a service provider. However, understanding the issue of responsibility influences what falls within the provisions of the Directive as a "service". A platform where journalistic-editorial items are collected one after the other without anybody exerting any influence can not, therefore, be considered an audiovisual media service because there is no entity that bears responsibility. On the other hand, the individual postings can definitely constitute a service, but whether the other criteria would be met cannot be examined here.

This shows that it is not possible to discern any importance for the responsibility criterion that goes beyond the yet to be discussed definition of Article 1(c) of the AVMSD.

2.1.2. The "Editorial" Criterion

As far as the second element, the editorial aspect, is concerned, the question again arises as to whether it has its own, separate meaning in the context of the definition of the service. If this is the case, then that meaning could lie in a particular description of the provider's relationship to the service, in certain professional requirements, for example, which would represent a precondition for the existence of a service. A narrow interpretation might include only those services that are "journalistic-editorial" in the sense of the German Interstate Broadcasting Agreement (*Rundfunkstaatsvertrag*).[6] Moreover, the content of the media service could be examined directly, and unedited audiovisual content, such as that produced by traffic cameras, could accordingly be excluded from the outset.[7] However, the question of what type of activity gives rise to editorial responsibility arises in the same way in the context of Article 1(c) of the AVMSD, so that no additional meaning can be discerned in the definition in Article 1(a) of the AVMSD.

4) The Parliament responds to this in its justification for Amendment 66.
5) See statement by the Confederation of German Industry (BDI) on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)646 final. Available at: http://tinyurl.com/49m5x8
6) See Thorsten Held in *Beck'scher Kommentar zum Rundfunkrecht*, 2nd ed., Munich 2008, section 54 of the Interstate Broadcasting Agreement (RStV), marginal nos. 38 *et seq*.
7) Natasha Good/Stuart Goldberg, "European reaction to the proposed new Audiovisual Services Directive", *Communications Law* Vol. 11 (2006) No. 6, p. 183, with reference to the Commission Note of February 2006.

2.2. Editorial Responsibility as a Starting-point for the Implementation of the Aims of the Directive

The concept of editorial responsibility is also a fundamental component of the definition of a media service provider in Article 1(d) of the AVMSD. The resulting relationship established between a media service and a service provider may have two functions at the level of the AVMSD – in contrast to provisions of national legislation.

First of all, the Directive can imply an obligation on Member States to apply national rules to bind a particular player subject to their jurisdiction to the aims of the Directive. The Directive would thus limit the Member States' scope since at least the entity defined in the Directive as a media service provider must also be obliged to comply with the co-ordinated objectives for a specific media service.

Here, the relevant provisions are embedded in the fundamental rules relating to the country of origin principle and supervision by the State from which a programme is transmitted. Accordingly, no dual regulation may exist, since a service must always meet only the requirements of the legal system of the jurisdiction in which it is established.

Secondly, the term can become important when a media service can be clearly linked to a particular organisation as a media service provider but this organisation possesses operational units in various EU Member States, for example in the form of a group of companies. In this case, the question of which Member State is responsible for the implementation of the objectives with regard to the media service controlled by this particular provider may depend on what organisational unit bears editorial responsibility.

In the following, we discuss whether the term "editorial responsibility" has a particular meaning with regard to the questions concerned and, if so, what that meaning is.

2.2.1. Place of Establishment

With regard to the second question mentioned, the relevant rule is Article 2(3) of the AVMSD. According to this provision, for the purposes of this Directive a media service provider shall be deemed to be established in a Member State when it has its head office in that State and the editorial decisions concerning the audiovisual media service are taken in that State. The consequence according to the aforementioned country of origin principle is that the regulatory responsibility lies with the Member State in whose jurisdiction the media service provider is established.

In this context, the Directive does not refer to responsibility but rather to editorial "decisions". This may be an indication that it is not the formal link to a State that is important in this sense but the place where decisions on points relevant to the nature of the media service are taken in everyday practice. The old "Television without Frontiers" (TVWF) Directive already contained a provision to this effect in its Article 2(3), the purpose of which was to ensure that responsibility for the implementation of the objectives actually lies within the Member State in whose society the "cultural roots" of the service[8] are embedded. The

8) See Karl-Heinz Fezer/Stefan Koos, "Internationales Wirtschaftsrecht", in *Staudinger Kommentar zum BGB*, Munich 2006, marginal nos. 535 f.

Community's audiovisual policy is not a cultural policy but it does recognise that it is the Member States themselves that regulate broadcasting (and comparable new services), in particular due to the importance of radio and television in shaping public opinion. Community provisions that co-ordinate this national legislation – such as the AVMSD and its precursor – thus contain rules for attributing responsibility to the Member States. There is no evidence that the EU legislators wanted to depart from this principle with their amendment to the TVWF Directive, so the place of establishment must be determined for all services covered by the AVMSD.[9]

There is also no fundamental difference here between traditional linear television services and on-demand services.[10] However, Recital 20 of the AVMSD provides assistance for interpreting cases in which on-demand services are subsidiary to traditional television services. Here, according to the recital, when in doubt it should be assumed that the place of establishment is where the programming decisions are taken for the broadcaster. However, if the editorial work is or becomes independent of these decisions, it must be assumed that there are two places of establishment, so that responsibility within the meaning of Article 2(3) of the AVMSD may be split.[11]

In order that a location be defined as the place of establishment, certain decisions have to be taken there by the company or group of companies with regard to the programme. These decisions are also relevant for determining editorial responsibility. As they define the unity of the service, it would be impracticable and inexpedient to separate systematically those criteria that determine what service is assumed to be involved and those that define the connection to a branch operation.

It can thus be established that the provider with editorial responsibility is of crucial importance since its place of establishment determines what Member State is (solely) responsible for the regulation of an audiovisual media service.

2.2.2. Entity Subject to Regulation

The second subject-area in connection with the Member States' obligation to implement the Directive involves the question of whether the Directive informs the Member States what player must be bound by national law with regard to its implementation.

In this context, there is a discrepancy between the wording of the provisions of Article 2(1) and Article 3(6), which oblige Member States to carry out effective supervision: the reference concerns on the one hand media services as entities subject to regulation and on the other their providers, which – when taken literally – can certainly have different legal consequences.

Thus, Article 2(1) of the AVMSD does not require regulations to be specifically tailored to a media service provider. Rather, it merely states that media services have to comply with the rules of the Directive, which leaves Member States the option when implementing the

9) See Egbert Dommering, in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer (eds.), *European Media Law*, Alphen a/d Rijnn, 2008, Article 2 of the AVMSD, marginal no. 3.
10) Ibid.
11) Ibid.

Directive to oblige players other than the media service provider within the meaning of Article 1(d) of the AVMSD to comply with its provisions. At any rate, such considerations are in accordance with the principle of subsidiarity also enshrined in Article 249(3) of the EC Treaty, according to which Member States should retain a certain amount of scope for the implementation of provisions. On the other hand, the implementation requirement in Article 3(6) of the AVMSD is a direct instruction to oblige the media service provider to comply with the rules of the Directive. However, here too, Member States will retain a certain amount of scope because this instruction is qualified by stating that they must employ "appropriate" means. Moreover, the rule only has its own separate relevance for those provisions of the Directive in which there is no direct reference to the media service provider. This is the case, for example, in Article 3a, 3c and 3d of the AVMSD for providers of all audiovisual media services or Articles 3j, 4, 5 and 23(2) AVMSD in the specific case of television broadcasters. On the other hand, in other rules that deal with the protection of minors, incitement to hatred or audiovisual commercial communication the reference is to the media service, the content of which must not breach the relevant rules.

A systematic analysis indicates that it should be primarily assumed that the media service provider has an obligation to comply with the Directive. In the case of the old TVWF Directive, legal scholars[12] and the courts in their case law[13] seem to take it for granted that Member States will ensure the implementation of the objectives by subjecting the broadcasters under their jurisdiction to national rules that transpose the objectives into domestic law and monitor their compliance by taking supervisory measures. Changes in the wording of the provision of Article 3(6) of the AVMSD have been of solely editorial nature, so that there is at any rate no deliberate change to the content. However, as the broadcaster can easily be identified in the case of traditional broadcasting and was the original regulatory starting-point there was little reason to discuss whether the Directive obliges Member States to ensure with respect to every objective that the broadcaster alone complies with its provisions. This is indisputably the case for the rules of the Directive that specifically state that the obligation is on the provider (see 2.2.2 above). In the case of other provisions that refer to the service itself, the question arises as to whether it is possible for Member States to impose an obligation on others, such as platform operators. A precondition for this is, of course, that this ensures that the service is actually offered in a way that meets the requirements of the Directive.

The Directive does not state whether Member States must in some way – such as the licensing of traditional television – formally specify a provider as being responsible for this service and subject it to the relevant rules.[14] For the implementation of the Directive, Article 249(3) of the EC Treaty generally gives Member States some scope regarding the instruments employed to guarantee that the aims of the Directive are actually achieved. As the Directive makes no statement on matters relating to licensing, it is up to Member States to decide how to ensure the necessary effectiveness of the implementation. This also means that, in order to comply with the aims of the Directive and meet their own obligations, Member States must if necessary lay down additional rules beyond the requirements specified for the formal providers if they choose to regulate a broadcaster that de facto has no way of implementing the rules co-ordinated by the Directive and which relate to the audiovisual media service provided.

12) Monica Ariño, op. cit., p. 115 (122).
13) For example, ECHR, Case C-412/93, §§ 30 *et seq*.
14) Tarlach McGonagle/Ad van Loon, "Jurisdiction over Broadcasters in Europe", IRIS Special 2002, European Audiovisual Observatory, p. 15.

2.2.2.1. Measures against Entities other than the Media Service Provider

It is therefore an open question whether Member States can be obliged when implementing the Directive to subject players other than the media service provider to legal requirements – i.e., to enforce, in addition, compliance from platform operators if this is the only way to be able to implement effectively the aims of the Directive with respect to a media service.

This question arose earlier with regard to programmes broadcast in a Member State, which that state cannot effectively supervise because the broadcaster is established in a non-European country, for example. In such cases, a Member State is deemed to have jurisdiction pursuant to Article 2(4) of the AVMSD.[15] According to this rule, the existence of an uplink (primarily) in a Member State leads to the assumption that this State has jurisdiction for the service. At any rate, this is also therefore an audiovisual media service that, as in the example given, cannot be directly obliged by the receiving Member State to comply with the aims of the Directive. The Directive does not go so far as to consider the distributor to be the provider in these cases. However, normally only the latter is left as a subject for regulatory measures in this case. When there are no other ways of effectively implementing the objectives, a Member State will only be able to meet its obligation to put the Directive into practice by exerting its influence on the distributor, at any rate with regard to the aims for which the AVMSD takes the service as the starting-point (see 2.2.2 above). In this context, the Member States provide for differing methods. For example, French law stipulates that Eutelsat has a duty to provide information and provides for possible supervisory measures against the provider.[16] This problem also basically affects on-demand platforms, although in this case the distributor may at the same time be the company that offers the catalogue and thus is actually not only the distributor of the media service but also the provider.

The above considerations relate to traditional means of transmission and operators with the relevant infrastructure, especially satellite operators. It is obvious that comparable problems – and perhaps bigger problems in the future – will arise if we consider the transmission of IP-based media services where no operator takes an active decision on feeding in certain information. In the past, satellites carried the risk that the national broadcasting rules might be undermined by broadcasts from abroad, but today this risk mainly arises from IPTV from abroad. It was possible to respond to satellite transmission in a limited way by making efforts to introduce European regulations, but this otherwise led to a lowering of requirements in domestic legislation. Given the latest developments, the situation will arise that the retransmission of an extra-European programme by satellite is deemed to be an internal European transmission, so that the substantive requirements of the AVMSD apply. The ability to receive the same programmes via IP networks, on the other hand, is not regulated, even though there is no difference as far as the risk is concerned. At any rate, in order to create a level playing field, it will be necessary to impose the same obligations as on satellite operators on IPTV platform operators that actively decide on the content input. This is a fundamental issue and ultimately not a matter of European law: under what conditions should national or European rules to be implemented when the services originate from third countries, and when does the reception of which services have to be guaranteed in order to

15) Wolfgang Schulz, "Das Recht der Fernsehsendungen über Satellit und Internet – Perspektiven". Paper given at the 3rd Franco-German Media dialogue on 29 January 2008. The text is available at: http://lfm-nrw.de/downloads/veranstaltungen/mediendialogbruessel-schulz.pdf

16) Sylvie Clément-Cuzin, "La France : Une pour tous ? Tâches de la régulation par satellite dans « le pays d'origine »". Paper given at the 3rd Franco-German Media dialogue on 29 January 2008. The text is available at: http://lfm-nrw.de/downloads/veranstaltungen/mediendialogbruessel-clementcuzin.pdf

ensure the free flow of information across borders as required under Article 10 of the European Convention on Human Rights?[17] At the same time, the question arises as to whether technical services should also be obliged to help to implement national rules.

These questions go beyond the scope of this paper, but they show that already in the traditional television field the effective implementation of the Directive may force Member States to take measures against an entity other than the provider of a service.

2.2.2.2. Measures in the Case of Several Providers

The Directive refers to a media service provider in the singular, which sometimes leads to the conclusion that it is only possible to have *one* provider with editorial responsibility.[18] In practical terms, there is, of course, a great deal to be said for only one provider to be designated as being responsible in order to avoid any dispersion of this responsibility and to have a clear situation with regard to linking that provider to a particular State, for example for the purpose of carrying out supervisory measures. Article 1 of the AVMSD is accordingly criticised because cases may in practice occur in which responsibility is spread over different entities. This naturally depends on how "editorial responsibility" is actually defined, and the necessity to find a clear point of reference will influence this definition. However, if in a Member State a case arises in which a service is offered for which the editorial responsibility as defined in Article 1(c) of the AVMSD is exercised jointly by different legally independent entities, then the consequence can only be that either no audiovisual media service is involved or that Member States must, in implementation of the Directive, oblige both/all partially responsible entities to ensure compliance as co-providers. As such services can present the same risks as those offered by *one* media service provider and the purposes envisaged by the co-ordination brought about by the Directive also have to be fulfilled in their case, then the effective implementation of the Directive advocates that in such – atypical – cases all providers with partial responsibility be obliged by the Member State concerned to comply with its provisions.[19]

2.3. Starting-point for Other Media-specific Rules of Law

In European law, there are no systematic links between the determination of media service providers under the AVMSD and the definition of entities responsible, for example under copyright law, when it is a question of linking a service to a provider. However, it would be conceivable for editorial responsibility to refer to professional work standards and for a breach of these to entail consequences under press law, for example.

17) See, for example, the judgment of the European Court of Human Rights in the case of Autronic v. Switzerland, judgment of 22 May 1990.

18) See Remy Chavannes, in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer (eds), *European Media Law*, op. cit., 2008, Article 1 of the AVMSD, marginal no. 67.

19) In the unlikely event that there are two or more co-broadcasters with equal status and established in different Member States, then the only – not entirely satisfactory – solution that remains is to make them subject to both jurisdictions. Article 1 (c) AVMSD does not provide any direct assistance with regard to questions of this nature.

2.4. Starting-point for Rules on Content Liability

Irrespective of whether the law links specific requirements to responsibility for a service, this responsibility may be a criterion when determining who is liable, for example as a passive agent, for breaches of the law arising from content – such as violations of personality rights, copyrights or other intellectual property rights. However, the AVMSD does not establish such rules. On the contrary, at the end of Article 1(c) it establishes that editorial responsibility does not imply any liability for content under the law of the Member States. Accordingly the liability of a particular person under the national civil, criminal or public order law does not as such imply their editorial responsibility within the meaning of the Directive but at most only provides indications of this responsibility. It thus becomes clear that the term only relates to the first two levels mentioned above, i.e. the scope of application and the establishment of where the obligations to implement the aims of this Directive lie.

However, certain significance may be drawn from a consideration of exemptions to liability in the E-Commerce Directive (ECD). As reference is made to "responsibility" in both sets of provisions, at least in the German version,[20] it is in principle necessary to ask what is the relationship of the ECD[21] to the AVMSD with regard to the issues of responsibility and content liability to be discussed here.[22] On the one hand, a clear distinction is made since Article 3(8) of the AVMSD states that the provisions of the AVMSD shall prevail over the ECD. On the other hand, in particular concerning the exemptions from liability in Articles 12 *et seq.* of the ECD, Recital 23 of the AVMSD states that those exemptions remain unaffected. It is thus made clear that editorial responsibility in the sense of Article 1(c) of the AVMSD is at least not supposed to suspend exemptions from liability.

However, a glance at the relevant rules of the ECD shows that it is at any rate hard to imagine cases in which a provider bears editorial responsibility but would have to be exempted from liability under Articles 12 *et seq.* of the ECD. On the contrary, a study of the Directives reveals that both advance similar arguments concerning the exclusion or exemption of certain services from liability or editorial responsibility. For example, both Recital 19 of the AVMSD, which says that the mere transmission of programmes should be excluded from the definition of a media service provider, and Recital 42 of the ECD state that the emphasis with regard to the transmission of information and similar services is on the technical and passive aspect. Furthermore, if we consider that the latter recital emphasises that a crucial feature of the services to be exempted from liability is a lack of knowledge of and *control* over the information transmitted, then parallels certainly become apparent: it may at least be an indicator of a lack of editorial responsibility if an activity is exempted from liability for audiovisual content under Articles 12 *et seq.* of the ECD.

20) In English, a clear distinction is drawn between *responsibility* (AVMSD) and *liability* (ECD).
21) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market.
22) See Jan Willem van den Bos, "No Frontiers: the new EU proposal on audiovisual media services", *Entertainment Law Review* 2006, p. 109 (111). He also raises the question of whether the concept of editorial responsibility has additional implications in connection with the providers regulated by the E-Commerce Directive.

3. Definition of the Term "Editorial Responsibility"

The actual interpretation of the definition of editorial responsibility has to answer different questions on the basis of Article 1(c) of the AVMSD:

– What does the "effectiveness" of the control actually mean?

– To what must the control refer (the selection and organisation of the programmes)?

Before these questions are dealt with, we shall first of all look at a number of specific aspects of the interpretation of the term and the genesis of the legal rule, all of which may be important for its application.

3.1. Preliminary Interpretative Considerations

3.1.1. Interpretation of the Wording

It is necessary first of all to draw attention to a number of differences in the various language versions of the Directive – these differences are an unfortunate fact in view of the importance of the editorial responsibility criterion, which is always emphasised in the recitals.

Table 1: Differences in the language versions of Article 1(c) of the AVMSD

German version	English version	French version
„‚redaktionelle Verantwortung' die Ausübung einer wirksamen Kontrolle sowohl hinsichtlich der Zusammenstellung der Sendungen als auch hinsichtlich ihrer ***Bereitstellung*** entweder anhand eines chronologischen Sendeplans im Falle von Fernsehsendungen oder mittels eines Katalogs im Falle von audiovisuellen Mediendiensten auf Abruf. Die redaktionelle Verantwortung begründet nicht zwangsläufig eine rechtliche Haftung nach innerstaatlichem Recht für die bereitgestellten Inhalte oder Dienste;"	"'editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their ***organisation*** either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;"	« "responsabilité éditoriale" : l'exercice d'un contrôle effectif tant sur la sélection des programmes que sur leur ***organisation***, soit sur une grille chronologique, dans le cas d'émissions télévisées, soit sur un catalogue, dans le cas de services de médias audiovisuels à la demande. La responsabilité éditoriale n'a pas nécessairement pour corollaire une responsabilité juridique quelconque en vertu du droit national à l'égard du contenu ou des services fournis ; »

When we compare the language versions we notice in particular that the German word "*Bereitstellung*" (literally "making available") may have different meanings compared with "organisation". The same applies when "organising" is translated into German by "*gestalten*" (literally "to shape") in the context of the definition of a media service provider in Article 1(d) of the AVMSD. It is therefore necessary to ask how such differences should be handled.

If a clear meaning of a word can be established, it determines the interpretation. However, European law states that if there are any differences then a European meaning valid in Community law must be worked out on the basis of the binding language versions in accordance with the autonomous interpretation of that law. Article 314 of the EC Treaty establishes the principle that all language versions are equally authentic.[23] It does not matter how a word is used in the Member States' legal systems because the implementation of the treaty's objectives would otherwise be put at risk.[24]

In view of the genesis of the AVMSD, it should be noted that the work during the legislative procedure was initially carried out on the English version and that an (official) *German* translation did not become available until after the political agreement on a "common position". As far as interpreting individual words is concerned, this does not give the English text any more weight than the other authorised versions. In the light of Article 314 of the EC Treaty, it will not be possible to justify the priority of the "original language", for which some writers are calling[25]. That would violate the principle of the equal authenticity of the language versions and thus could not be reconciled with the view that priority should normally be given to the version that is the basis for most translations.[26]

However, it is possible to assume on the basis of an historical interpretation that the enactors of the legislation referred to the English-language version. This is also underscored by the fact that most of the other language versions, apart from the German, endeavour to provide a relatively literal translation of the English word *organisation*.[27] At any rate, no translation equivalent to the German "Bereitstellung" in relation to programmes could be found.[28] This point will be considered in the following discussion.

3.1.2. Historical Genesis of the Legal Definition

The term editorial responsibility was already used in the now superseded TVWF Directive, namely in the definition of the television broadcaster in Article 1(b). However, that text said nothing about what actually provided grounds for assuming that the responsibility existed. Also, in the Commission's original proposal for an Audiovisual Media Services Directive,[29] there was no plan to define this term, which was nonetheless regarded in Recital 17 as essential

23) Friedrich Müller/Ralph Christensen, *Juristische Methodik*, Vol. 2, Berlin 2003, p. 41.
24) See ECJ, Case 53/81 (Levin/Staatssecretaris van Jusitie); Case 66/85 (Lawrie-Blum/Land Baden-Württemberg); in some detail Stephan M. Grundmann, *Die Auslegung des Gemeinschaftsrechts durch den Europäischen Gerichtshof*, Konstanz 1997, pp. 208 *et seq*.
25) Petra Braselmann, "Übernationales Recht und Mehrsprachigkeit", *Europarecht* 1992, p. 55 (58 *et seq.*).
26) Thomas Bruha, "Spielräume bei der Umsetzung von EG-Richtlinien", p. 28. Available at: http://www.his.de/pdf/34u/bruha-gutachten.pdf
27) It should be pointed out in this connection that in the Romance languages and Greek there was in any case no reason to depart from the common etymological root in the translation.
28) However, it should be noted at this point too that this on no account means that it may be concluded that an original language takes priority. See Jochen Anweiler, *Die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaften*, Frankfurt am Main, etc, 1997, p. 155.
29) COM(2005)646 final.

for establishing the role of the media service provider.[30] It was not until the Council's "General Approach" of 15 November 2006 that an attempt at a definition could be found, although it was limited to one recital (16a).[31]

A legal definition was ultimately inserted into the draft directive when amendments were proposed by the Parliament (Amendment 79), a step which was justified by the considerable importance of this term. Moreover, additional explanations of the term were inserted into Recital 25. The definition finally adopted, however, was not inserted into the text until the final step of the legislative process, namely the drawing up of the "common position" of the Commission and the Council. However, at the instigation of various Member States, this position was not based on the Parliament's proposal but established a link to the Council's General Approach, although the full wording of the latter was not adopted: in particular, it is conspicuous that the word "prior" control contained in Recital 16a was deleted.

Table 2: Chronological development of the legal definition of editorial responsibility

Draft of 13.12.2005	**The Council's General Approach of 15.11.2006**	**First reading in the European Parliament on 13.12.2006**	**Directive 2007/65/EC of 18.12.2007**
No positive definition	**Recital 16a** "[…] Editorial responsibility means the **exercise of prior control** both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided."	**Recital 25** "[…]"Editorial responsibility" means responsibility for the selection and organisation, ***in a professional capacity***, of the content of an audiovisual offer. ***It may be exercised over an individual content or a collection of contents.*** […]" **Article 1(q)** "'editorial responsibility'" means responsibility for the composition of the schedule or the compilation of programmes intended for the general public, ***in a professional capacity, in order to deliver*** the media content within a set time frame or to allow it to be ordered from a catalogue."	"'editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided."

30) However, Thomas Kleist/Alexander Scheuer point out in "Audiovisuelle Mediendienste ohne Grenzen", *Multimedia und Recht* 2006, 127 (132), that the "preliminary drafts" contained a more precise description of the editorial responsibility of a media service provider.
31) Interinstitutional file 2005/0260 (COD).

3.1.3. Taking into Account the Legal Consequences

It is also always necessary to consider what legal consequences are entailed when certain activities are assessed to determine whether they involve editorial responsibility. If editorial responsibility were attributed to the providers of individual services and they were obliged on the one hand to comply with certain aims of the Directive but were unable to do so, that would not seem very helpful. Considerations of this nature can accordingly provide clues regarding the level to which the control applies in the process of producing the audiovisual content and making it public.

Here, it first needs to be pointed out that Article 3h of the AVMSD states that on-demand services must be subject to measures for the protection of minors. It is more difficult to work out the obligations in the area of on-demand services as far as the commercial audiovisual communication regulations contained in the provisions of Article 3e of the AVMSD are concerned. Understanding these obligations is rendered more difficult by the fact that according to Article 1(a), second indent, commercial audiovisual communications themselves constitute an audiovisual media service and accordingly possess their own audiovisual media service provider responsible for this media service. It seems conceivable that audiovisual content constitutes commercial communication at the same time but also forms a programme that is an item in a catalogue of an on-demand service.[32]

3.2. The "Effective Control" Criterion

An important factor for interpreting the effective control criterion is that there may be a difference between the legally granted possibility of exerting influence and actually exerting it. It is therefore necessary to clarify whether Member States have to compel media service providers subject to legal requirements under their domestic legal system to ensure compliance with the aims of the Directive, even if these media service providers do not exercise actual effective control but have left this to another organisation, for example, or whether Member States have to bind the entity that actually exercises the control irrespective of whether it is legally required to do so under the Member State's rules. It is also possible that the Directive leaves this question unanswered and leaves it to Member States to interpret the term.

3.2.1. Effective Control as a Term Harmonised by Community Law

Concerning the question whether the entity that legally or actually exercises the control should be obliged by the national legislature to comply with the Directive, the view must be examined that "editorial responsibility" is not a term that is defined in Community law. This view is supported by the fact that Recital 23 states that is up to Member States to specify in what circumstances they assume effective control is being exercised. This recital is rightly criticised because it may lead to different Member States employing different criteria to define various providers as media service providers with editorial responsibility within the meaning of the Directive, with the result that a provider is no longer clearly linked to one Member State.[33]

32) The assumption that commercial communication can also form a programme which is part of a catalogue of an on-demand service could be questioned if one were to read only the German definition of on-demand services in the AVMSD. Article 1 (g): *"Für die Zwecke dieser Richtlinie bezeichnet der Ausdruck… ‚audiovisueller Mediendienst auf Abruf' (d. h. ein nichtlinearer audiovisueller Mediendienst) einen audiovisuellen Mediendienst, der von einem Mediendiensteanbieter für den Empfang zu dem vom Nutzer gewählten Zeitpunkt und auf dessen individuellen Abruf hin aus einem vom Mediendiensteanbieter festgelegten Programmkatalog bereitgestellt wird;"*

33) Remy Chavannes, in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer, op. cit., Article 1 of the AVMSD, marginal no. 67.

Recital 28 establishes that only *one* Member State should have jurisdiction over a media service provider. Anything else would obviously run counter to the intention of the Directive to link a provider clearly to a Member State with regard to responsibility for implementing the aims of the Directive.[34] The wording of Recital 23 thus contradicts the declared regulatory purpose of the Directive.

As the recitals are not binding parts of the legal act,[35] it will have to be assumed that the definition of editorial responsibility, and therefore of effective control, is not a matter of discretion for Member States but fully harmonised through European law.[36] Any other result would ultimately be contrary to the aim of the 1997 amendment, which, by introducing the establishment principle, was to disallow any double regulation and to bring about the uniform application of the criteria governing the Member States' jurisdiction.[37]

3.2.2. Nature of the Control

In order to clarify what type of control is necessary and sufficient to be considered as a provider of a media service, reference can be made to experience gained with the old TVWF Directive, since Article 1(b) already called for the exercise of effective control in order to determine the television broadcaster.[38] At that time, this criterion was mainly important with regard to the question discussed above concerning what parts of a company exercise the control and what Member State is accordingly responsible for the regulation under the terms of the Directive.[39]

First of all, it will be possible to establish that if a media service provider does not actually exercise the supervision that it could in principle exercise, then this cannot result in its responsibility diminishing to such an extent that it no longer has to be compelled by Member States to comply with the aims of the Directive. The reason for this is that it would mean that, as far as the requirements of the Directive are concerned, a provider that neglects its supervisory duties would be placed in a better position than one that complies with them. As a result of the link with Article 1(a), (c) and (d) of the AVMSD, the – no doubt quite unintended – consequence would be that a service within the meaning of the Directive would no longer be involved. Accordingly, the exercise of control must in principle mean the *possibility* of exercising it rather than whether or not this actually happens in everyday practice.

On the other hand, if a media service provider gives up its right to organise a programme, it may no longer be considered a service provider, in which case there would no longer be a media service either. For example, if the broadcaster of a television programme allocates a production company a timeslot and thus enables it to freely organise this broadcasting slot,[40]

34) Ibid, marginal no. 77.
35) On the (merely) interpretative meaning of the recitals, see Friedrich Müller/Ralph Christensen, op. cit., p. 65.
36) Remy Chavannes, in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer, op. cit., Article 1 of the AVMSD, marginal no. 80.
37) See Recitals 10 to 14 of Directive 97/36/EC and Martina Blasi, *Das Herkunftslandsprinzip der Fernseh- und der E-Commerce-Richtlinie*, Cologne 2004, p. 95.
38) See on the old law Tarlach McGonagle/Ad van Loon, op. cit., p. 12.
39) Remy Chavannes, in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer, op. cit., Article 1 of the AVMSD, marginal no. 66 with reference to RTL 4 and RTL 5 in the Netherlands.
40) A case like this was the basis for a decision of the Celle Court of Appeal, *Zeitschrift für Urheber- und Medienrecht* 2003, pp. 54 *et seq.*: the production company Endemol evidently transmitted an entire series and breached the ban on surreptitious advertising.

the broadcaster no longer exercises editorial responsibility for that slot. It then depends on the Member State's legal system as to whether the broadcaster has to regain the control – because it has a licence for the entire programme – or whether the production company is bound by the aims of the Directive for the programme for which it is responsible.[41]

Effectiveness thus does not mean that the provider always has to make use of the possibilities of exercising control available in an individual case. However, the possibilities to which the terms "selection" and "organisation" refer (see below) will actually have to be exploited for the necessary influence to be exerted on the characteristics of the medium.

The fact that the text of the Directive focuses on the exercise of effective control and, accordingly, on actual control and the fact that linguistically there may be a difference between this and the legal possibility of exercising control raise the question of whether this possibility must be de facto or de jure within the meaning of the Directive.[42]

According to a suggestion made in legal literature, effective control should be interpreted to mean that it refers to the possibility of

> "(authorising) the broadcasting or making available of the programme. In other words, the possession of the broadcasting rights determines an entity's possession of effective control, even if the actual technical transmission is performed by another entity."[43]

In this interpretation, legal and actual possibilities seem to coincide. This evidently means the legally protected possibility of taking the final decision on the service as such, i.e. of determining whether or not the content will be transmitted, which does not have to be the same right as the right to broadcast enshrined in the law of copyright.

Such an interpretation would, for example, be in line with the concept of broadcasting as it is assumed to be defined in German non-constitutional law in section 2(1) of the Interstate Broadcasting Agreement (Rundfunkstaatsvertrag). This definition, which is also accepted by the courts, differs from the meaning of broadcasting in German constitutional law (in contrast to the earlier assumption in this regard). The term when used in ordinary law describes as a broadcaster an entity that has the legally protected possibility of determining whether or not a programme is transmitted.[44] This determination under ordinary law of the right to broadcast must be distinguished from the – de facto and de jure – control over transmission under telecommunications law. This applies both under German law and, according to Recital 19, to the AVMSD.[45] However, if the German concept is taken to refer to the power to make the final decision on the programme as a whole, then there is no link to the organisation of the programme as the reference point of the control so that the legally protected possibility of taking the final decision on the programme should be understood as only a necessary but not as a sufficient condition.

41) The Ofcom Broadcasting Codes accordingly prohibit a television broadcaster from contractually relinquishing its influence in order to avoid power vacuums of this nature. See Jeremy Miles/Amanda Bannister, "Branded television content: some legal and commercial perspectives", *Entertainment Law Review* 2007, p. 227 (228).
42) See also Wolfgang Schulz, op. cit., p. 107 (109).
43) Remy Chavannes, in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer, op. cit., Article 1 of the AVMSD, marginal no. 68.
44) See Wolfgang Schulz, *Beck´scher Kommentar zum Rundfunkrecht*, on section 2) of the Interstate Broadcasting Agreement, marginal no. 44, with reference to the Rhineland-Palatinate Administrative Court of Appeal's decision of 6 November 2003 – Case 2 B 11372/03 OVG.
45) Remy Chavannes, in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer, op. cit., Article 1 of the AVMSD, marginal no. 68.

It is necessary at this point to return to the indications of the existence of exemptions from liability under the terms of Articles 12 *et seq*. of the ECD (see section 2.4 above). It is clear that the technical service providers referred to, which, according to Recital 42 of the ECD, should have neither knowledge of nor control over the information transmitted, cannot be assumed to have editorial responsibility. Hosting providers within the meaning of the ECD appear to be comparable to certain service providers, such as platform operators in the audiovisual sector. A glance at the provisions of Article 14 of the ECD can therefore help to identify the area to be excluded from the scope of the AVMSD. Article 14(1) of the ECD refers to a provider that stores information without having any specific knowledge of it (an activity described in Recital 42 as being "of a mere technical, automatic and passive nature"). Article 14(2) of the ECD, on the other hand, denies exemption from liability to those services where the information is not supplied by "unknown" third parties and a special relationship exists between the provider and the "user".[46] The presumption is expressed that it can no longer only be assumed in such cases that automatic storage with no connection to any other activity has taken place. This is in tune with the assumption that control over employees, for example, can also result in content being attributed to a provider. However, other contractual relationships that are aimed at control by the provider and through which the information creator loses its status as an uninvolved third party vis-à-vis the provider exclude exemption from liability and thus are no longer able to give any indications of exemption from editorial responsibility within the meaning of the AVMSD. As soon as clearer criteria emerge for the definition of the services described in Article 14 of the ECD, they could, according to what has just been described, also be employed for defining editorial responsibility.

Summing up our findings, it can be held that effective control enables the provider to shape the communicative characteristics of a service and Art. 1(c) of the AVMSD has to be interpreted accordingly.

3.3. Aspects of "Selection" and "Organisation"

Given the realisation that the establishment of a power of final decision can only be a first step towards attributing editorial responsibility, the actual subject of effective control – and, therefore, the possibilities that have to exist for that control to be exercised effectively – can only be determined by defining the terms "selection" and "organisation".

According to the definition, the provider of the media service is responsible for selection and organisation, and it is these activities that define it. Depending on the type of content, different players are causally involved from the creation of audiovisual content to its reception by the viewer. The only thing that is clear in this context is that as an action the mere "transmission" to the recipient is not enough. This emerges from Recital 19.[47]

Recital 19 contributes little to the interpretation because it once again refers to editorial responsibility, so this is a circular argument. Accordingly, it will only be possible to infer from this exception that simultaneous, complete and unchanged retransmission within the meaning of Article 2(b) of the European Convention on Transfrontier Television clearly implies no (new) editorial responsibility.[48] However, whenever a change is made to the audiovisual

46) See Jochen Marly, in: Eberhard Grabitz/Meinhard Hilf, *Das Recht der Europäischen Union*, Munich, Article 14 of the ECD, marginal nos. 17 f.

47) The exclusion is also a logical consequence of the concept of drawing a horizontal distinction in the case of regulation, namely between networks and the services distributed on them. The retransmission only relates to the telecommunications side of the networks.

48) On the difficulty in understanding the term "retransmission", see Tarlach McGonagle/Ad van Loon, op. cit., p. 15 f.

content the broadcast is no longer a retransmission. It will depend solely on the interpretation of this term whether the editorial responsibility then changes.

The fact that retransmission is exempted thus relates to only one particular example within the responsibility spectrum. In practice, it is certainly possible to find cases where companies that only use technical means to retransmit content have themselves reserved the right to have a say in such matters as changes to a programme schedule (see 4.2 below) but this is not expressly mentioned in the Directive.

On the other hand, the AVMSD does not refer directly to content production. The service for which the regulation is to be co-ordinated is the service linked to the publication of content. As in the TVWF Directive, we are dealing with the regulation of the entity that decides whether content is to be made public.[49]

However, the exclusion of these two aspects as relevant actions for the assumption of editorial responsibility only provides clarification for extreme cases. In order to provide further clarification, the two levels that are important for developing an understanding of the relevant terms will be discussed.

The Directive distinguishes between "selection" and "organisation". In its literal sense, the former refers to *whether* audiovisual content is included in the service, while the latter refers to *how* content is placed in the service. This is clear in the English version – unlike in the German text, which speaks of *Breitstellung* (literally "provision"). The Swedish version, which uses *ska struktureras* (literally "must be structured") is even more graphic.

Editorial responsibility could conceivably be exemplified by reference to the rules on which the decisions of the (potential) provider are based. The term *"editorial"* responsibility might suggest that, in order to speak of a media service provider, a set of professional journalistic-editorial rules in the occupational sociological sense should be the basis for the selection and organisation of the content. Journalism selects and structures content according to specific criteria of social relevance and is regarded in the field of communication science as the service side of a specialised social system.[50] Editorial responsibility is accordingly associated with professional ethics and so with the rules on which journalistic action is based.[51]

The view that, as in the case of journalistic services, a service must have a particular relevance with regard to shaping public opinion in order to fall within the scope of the Directive was discussed by the relevant focus group and subsequently rejected.[52] Moreover, professionalism as a criterion to which editorial responsibility is linked was incorporated into the Parliament's amendments but was not to be found in the common position of the Council

49) See Remy Chavannes, in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer, op. cit., Article 1 of the AVMSD, marginal no. 71, and Thomas Gibbons, "Jurisdiction over (Television) Broadcasters", in EMR (ed.), *Die Zukunft der Fernsehrichtlinie*, Baden-Baden 2004, p. 53 (58 f.). This view was also explicitly put forward in Amendment 79 of the Parliament.

50) See, for example, Siegfried Weischenberg, *Journalistik: Medienkommunikation: Theorie und Praxis*, *Vol*. 1: *Mediensysteme, Medienethik, Medieninstitutionen*, 3rd edition, Baden-Baden 2004, pp. 41 *et seq.*; Armin Scholl, "Journalismus als Gegenstand empirischer Forschung", *Publizistik* 1997, p. 468 (474).

51) See, for example, the BBC Editorial Guidelines available at: http://www.bbc.co.uk/guidelines/editorialguidelines/onguide/responsibility/

52) See the Focus Group 1 paper, available at: http://ec.europa.eu/avpolicy/docs/reg/modernisation/focus_groups/fg1_wp_en.pdf , p. 3, in comparison to the final issues paper, available at: http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/ispa_scope_en.pdf , in which the criterion is no longer mentioned.

and the Commission and is not supported by the wording of the definition in Article 1(c) of the AVMSD. As an (albeit weak) argument it might be pointed out that Article 9 of the Data Protection Directive[53] refers to "journalistic" and not "editorial" purposes, thus the difference is also made clear at the level of European law: the media privilege that it enshrines is much more about journalistic-editorial work in the narrower sense mentioned above. Ultimately, the fact that on-demand services, for which no traditional journalistic-editorial rules exist, can also be editorial speaks against such an interpretation. Accordingly, the "editorial" criterion does not have its own separate meaning referring to a specific mode of handling information. Rather, what the Directive means by "editorial" becomes clear from the "selection" and "organisation" criteria.

The approach of the Directive is consequently more basic than it would be if occupational sociological criteria had to be applied. The possibility of "selecting" and "organising" is (only) a precondition for journalistic-editorial selection in this sense. Other selection approaches are accordingly conceivable and are enough to assume the existence of a media service within the meaning of the AVMSD.

The following dimensions, on the other hand, appear relevant for the definition:

- The implementation level, to which the decision on the service refers. – In the case of linear services, therefore, this means the decision on such matters as the positioning of individual themes in the programme or on the actual programme itself, such as fundamental elements of the schedule, for example certain thematic categories. This differentiation also played a role in the old TVWF Directive, especially with regard to the question of which of these levels is important for determining which branch of a company with regional operations is relevant for determining the Member State with jurisdiction.[54]

Table 3: Possible levels with regard to the decision on the audiovisual content of a service

Linear	**Nonlinear**
Single contribution to a programme	Single contribution to a programme
Programme	Programme
Programme category	Category
Type/Genre	Type/Genre
Programme schedule	Catalogue categories
Programme structure	Catalogue structure

- The division into linear services, i.e. television programmes, and nonlinear services, i.e. on-demand services. Here, it should be pointed out that the type of decisions to be taken in the case of on-demand services is not the same as with traditional broadcasts. Moreover, in the case of on-demand there is a broad technical and organisational spectrum that ranges from a service defined by a single provider to an open user-generated content platform, which does not apply to the same extent to linear broadcasts.

The dimensions mentioned will now be considered in connection with interpreting the various terms.

53) Directive 95/46/EC of the European Parliament and of the Council of 24 October on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
54) See Tarlach McGonagle/Ad van Loon, op. cit., p. 12 f.

3.3.1. The Selection of Programmes Criterion

In the case of both linear and nonlinear services, it is necessary to ask whether in order to assume that a player has editorial responsibility it is enough for it not to take the *ex ante* decision to add the relevant content to its service but merely to have the possibility de jure and de facto of *ex post* excluding the content from the service.

At first glance, it might be thought that this distinction has no particular significance for linear services, i.e. traditional television, but the example of a "network broadcaster" shows that there may be situations in which this is not the case. A company can award programme slots that are filled with content by the editorial departments of different publishers.[55] The difference from on-demand services is merely that effective control can only be exercised here if an examination is undertaken before the programme is broadcast, while in the case of on-demand services the subsequent removal of content is possible.

However, the procedures in the case of television provide an indication as to what requirements the EU legislators specify for audiovisual media services as far as the selection criterion is concerned. Their declared aim was to include "television-like" media services.[56] A teleological examination results in the aspects of editorial responsibility being interpreted to mean that only those providers that shape the communicative characteristics of the relevant audiovisual service have that responsibility. Although the old TVWF Directive and the new Directive do not constitute genuine media regulation – the Community does not have the legislative competence for this[57] – they do co-ordinate the regulations that Member States have enacted with an eye on the communicative importance of electronic media. It is accordingly plausible – even when the scope is widened – to define the service provider as the entity that has this communicative importance.

Against this background, it can be assumed that merely possessing the technical and legal possibility of removing content is not enough to meet the "selection" criterion. This leads on to the question of what possibilities of positively influencing content selection are sufficient for this criterion to be regarded as having been met.

A low-level possibility of exerting this influence would consist in a company obtaining a right of consent from a third party when the broadcast schedule or catalogue is organised or changed, which is quite normal practice in the case of cable platform operators. In this case, it will be necessary to distinguish between the levels at which the possibility of exerting influence arises. The consent to or rejection of an overall programme schedule would thus be insufficient for it to be established that influence comparable to that of a traditional broadcaster is exerted. However, if influence is exerted at the lower levels and perhaps even goes so far as to relate to an individual programme, it might be possible to assume the entity is a co-provider (see 2.2.2.2 above). This conclusion can ultimately only be drawn on a

55) This is shown by the case of the German window broadcaster DCTP: doubt was cast on its eligibility to be granted a licence on the ground that it did not have sufficient control over the content since it awarded only certain programme slots, but the supervisory authorities and the courts considered it was enough for DCTP de jure and de facto to be able to determine whether a contribution was broadcast. This was assured by the provisions of the contract entered into. See Rhineland-Palatinate Administrative Court of Appeal, decision of 6 November 2003 – Case 2 B 11372/03 (see also Michel Knopp/Alexander Scheuer, "Discussion on Broadcasting Time for Independent Third Parties, Part 1", in: IRIS 2004-2:9/17 available at: http://merlin.obs.coe.int/iris/2004/2/article17.en.html).

56) See Recitals 16 and 17 and the remarks on the relevant discussion in Alexander Scheuer, "Traditional paradigms for new services?", *Communications & Strategies* 2006, p. 71 (87 f.).

57) See Karl-E. Hain, "Regulierung in den Zeiten der Konvergenz – Wirtschaftsrechtliche und/oder medienrechtliche Steuerung?", *Kommunikation & Recht* 2006, pp. 325 *et seq*.

case-by-case basis. Evidence will no doubt be provided by the ability to influence the choice of editorial staff, a choice that indirectly affects the direction in which the service itself is steered.

The decisive factor is that the provider is able to make a choice and actually uses this possibility in such a way that it makes the service distinguishable from other services of the same type. In the world of the classical media, it would be assumed that there must be influence that enables journalistic competition to exist among services available from different providers. This will normally happen through positive selection according to content criteria laid down by the provider, so that a user can expect certain types of programmes from a specific service offered. The fact that a service is distinguishable owing to comfortable navigation, functionality or "look and feel"[58] would not be enough.

However, it is also conceivable that the provider does not make a selection itself but gives incentives for third parties – such as the users – to fill the catalogue provided with certain types of content.[59] In this way, too, the service can be given the relevant characteristics. Despite the fact that according to Recital 16 user-generated content is not covered, the EU legislators presumably had their eyes on the open forms common today. It can neither be assumed from the wording nor from a teleological interpretation that less control within the meaning of Article 1(c) of the AVMSD is exercised as a result of guided self-selection than through an entity's own positive selection. This must apply all the more as the proposal to make "prior" control a feature of editorial responsibility was not adopted in the final version of the Directive. Even the systematic deletion of uploaded content according to specific content-based criteria, which leads to only certain audiovisual content being provided by third parties and the service thus taking on particular characteristics, could in some cases, if not always, be sufficient.

Placing the emphasis on the "communication characteristics" of a service in the context of editorial responsibility is also supported by Article 3a of the AVMSD, which states that Member States must ensure transparency with regard to the name, address, etc of a media service provider. According to Recital 43, the reason for this is to ensure that the recipient knows who bears the editorial responsibility for a particular media service.[60] This raises the issue, which is also stressed by Recital 43, of editorial responsibility as an important criterion for the formation of public opinion – but, other than in the case of the definition of the scope of application, not as a means of ensuring compliance with certain minimum standards, such as in the area of the protection of minors or commercial communication, but rather with regard to the opinion-forming function of the service. Despite the doubts that may be had concerning the Community's competence to regulate communication objectives of this nature,[61] it can be concluded from this that the notion of editorial responsibility was definitely also seen in the context of the provision of communication by the mass media. The predominating picture is thus not so much that of diversified "many-to-many" communication as the one of a classical (solely) responsible publisher.

58) This term is used in software design to refer to the (graphical) user interface but can be transferred to the design of a nonlinear service or an EPG, for example.

59) Hannes Rösler, however, is totally opposed to the inclusion of such forms. See "Die Umwandlung der Fernsehrichtlinie in eine Richtlinie über audiovisuelle Mediendienste", *Europäische Zeitschrift für Wirtschaftsrecht* 2007, p. 417.

60) See the Focus Group 1 paper (cf. footnote 53).

61) See Article 151(5) of the EC Treaty. On the lack of jurisdiction with respect to rules of European law that impact on the cultural side of audiovisual media, see Christine Heer-Reissmann/Dieter Dörr/Valérie Schüller-Keber, in: Dieter Dörr/Johannes Kreile/Mark Cole (eds.), *Handbuch Medienrecht*, Frankfurt am Main 2008, p. 45 f.

Accordingly, when this criterion is interpreted the result must be that it does neither apply to platforms that do not undertake a positive examination of audiovisual content nor to those that are actually able to do so, but their ability only refers in an abstract way to the service as a whole and thus does not provide sufficient grounds for assuming the possible exercise of media influence.

At any rate, the fact that the Directive refers to "editorial" responsibility does not mean in the context of the rules on content selection that they only concern those providers that adhere to professional journalistic and editorial standards. This has been shown above (see 3.3).

3.3.2. The Organisation of Programmes Criterion

The meaning of the second criterion in this group, that of "organisation", is clear in the English version of the Directive, and not immediately so in the German, which refers to "*Bereitstellung*" (see 3.1. above): it refers to the arrangement of the individual programmes selected to form a whole service.[62] This is immediately clear in the case of linear services as the characteristics of the programme as a whole can be concluded from the chronological order of the programme, which gives a media service its specific distinguishing features.

What is not so clear is what may be meant by "organisation" with regard to catalogues of on-demand programmes. The time element plays a less important role here, although it is also present when, for example, determining how long a programme will be kept available for retrieval. Moreover, the EU legislators evidently had in mind that the basis of the systematic classification by content in a *catalogue* of programmes is an "editorial" arrangement comparable to television. It must therefore be assumed that this criterion is met when a video-on-demand catalogue, for example, is arranged according to specific genres or other organisational features.

On the other hand, a video-on-demand database accessed solely with the aid of a search system, for example, lacks this feature. At first sight, this might seem inappropriate with regard to the purpose of the Directive since issues relating to the proper protection of minors or even to the rules of commercial communication that apply to all audiovisual media services do not extend to such large databases even though they pose the same risks to the legally protected assets concerned. Nonetheless, such an interpretation does appear appropriate as the Directive deals with co-ordinating Member States' rules on the mass media publication of audiovisual content. A comparable starting-point where the "editorial" processing of content plays a role for the recipient is the "(programme) presentation" criterion in for example German broadcasting law: for the area of application of the broadcasting regulations, the focus is, among other things, on whether it is possible to establish the existence of a particular power of suggestion.

62) The requirements of the Directive thus clearly go beyond those contained in the 10th amendment to the German Interstate Broadcasting Agreement (planned entry into force: 1 September 2008) with respect to the definition of a "platform provider", which merely presupposes the "combination" of content. Cf. the wording of the new version of section 2(2)(10):
[Within the meaning of this Interstate Agreement …]
… A platform provider is anyone who uses digital transmission capacities or digital datastreams to combine broadcasts and comparable telemedia (telemedia directed at the general public), including from third parties, with the aim of making these offerings accessible as a full service, or anyone who decides on the selection of the content to be combined.

No power of suggestion could exist in the case of a mere search facility that does not give the user any instructions on what to look for. The general exclusion of search engines – also perhaps stemming from other reasons – from the scope of the Directive (see Recital 18) bears out this view. Moreover, there is no evidence that the EU legislators intended to extend the scope to cover other intermediaries of public communication, such as search engines.

With this criterion too, it will – apart from these more obvious instances – only be possible to establish when a service involves the "organisation" of content by reference to specific indications in an individual case. These indications may include structuring on the basis of content criteria, such as genres, commenting on and assessing content, and editorial tips given by the provider.

4. Reference Cases for (the Lack of) Editorial Responsibility

In the following, audiovisual content reference services will be examined to see if they can be subsumed under the aforementioned defining criteria and the results of the examination are set out in a table.

Table 4: Reference cases

Linear Services		
	Selection	Organisation
1. (Technical) Retransmission	X/0	0
2. (Technical) Retransmission with consent requirement	X/0	0
3. Packaging	X	0
4. EPG	X	0
5. Interactive television	X/0	X/0
Nonlinear Services		
	Selection	Organisation
6. Technical platform	0	0
7. Video database	X	0
8. Video platform (e.g., YouTube)	0	X
9. Packaging	X	0
10. Operator-generated online computer games	X	0
11. User-generated online computer games	0	0

Legend: X = available; 0 = not available; X/0 = both possible, depending on constellation

4.1. The (Technical) Retransmission of Linear Media Services

The technical transmission of linear programmes is not itself an audiovisual media service, so the clarification in Recital 19 is hardly necessary. Although it is conceivable that selection in the sense defined above comes about when the technical platform operator, such as a cable retransmitter, chooses the programmes it distributes, the organisation of programmes according to a time schedule, which is necessary for a service to be linear in nature and over which the technical platform operator has no control, is no doubt lacking.

However, even if the platform operator selects the programmes, it does not make a nonlinear service available since it does not enable programmes to be watched at any time. The service consequently does not constitute an audiovisual media service within the meaning of the AVMSD.

On the other hand, Article 2a(1) of the AVMSD protects audiovisual media service providers from the prevention or obstruction of retransmissions by Member States, but where other services, such as packaging for marketing purposes, are concerned, only the general limits imposed by the free movement of services enshrined in Article 49 of the EC Treaty apply. Anything else only applies if the operator's additional services themselves constitute a media service and thus fall within the area co-ordinated by the AVMSD.[63]

4.2. (Technical) Retransmission with a Requirement to Give Approval

One practice that can be observed is for the technical retransmitters of linear programmes to reserve the right to make any changes to a programme schedule subject to their approval, and failing that they can terminate the retransmission contract. The reason for this is that they want to select the programmes according to their attractiveness and offer a programme mix that corresponds to their own ideas.

In this way, they obtain indirect influence on the selection of content for programmes available from the services they retransmit. This influence is structurally similar to that of providers for their services. However, this control is not sufficient for there to be editorial responsibility within the meaning of Article 1(c) of the AVMSD. The control must refer to the level of the selection of content for the individual programmes, and it is not enough for there to be influence on the programme schedule.[64] Retransmitters that exert such influence accordingly do not become (co)providers of the services they distribute.

4.3. Packaging

A combination of everything that has been said above applies to the service providers that package and market linear programmes (the terminology is not consistent, others refer to this level as "aggregation"). Their platform itself constitutes neither a linear nor a nonlinear

63) According to Article 1(a), second indent, of the AVMSD, this is the case when audiovisual commercial communication is added. This applies, for example, to the platform Zattoo, which shows advertising when viewers switch between various channels.

64) Here, the same criterion applies as in the case of the TVWF Directive with respect to deciding which unit of a company is to be determined as being the place of establishment (see 2.2.1 above).

service, so the question of whether they are also subject to media regulation owing to their quasi-editorial function (they are sometimes correctly referred to as meta-providers or meta-broadcasters) does not arise under the Directive[65]. Whether they are to be considered as (co)providers regarding the programmes they package depends on whether they actually influence the selection and organisation in the way described above. In practice this is rarely likely to be the case as the organisation element will in most cases be missing[66]. At any rate, the obligation to approve changes to the programme schedule is insufficient.

4.4. EPGs

Providers of electronic programme guides (EPGs) must be assessed in a similar way to service providers that put together and market linear programmes. At any rate, the sufficient level of influence on the organisation of the service will be lacking. Although Recital 22 mentions EPGs as possibly falling within the scope of the Directive, this only applies if they "accompany" programmes (as in the case of the subtitles mentioned in this context). It accordingly gives no indication as to the different classification of EPGs offered separately.

4.5. Interactive Television

This example is more a working hypothesis since research into the use of television reception shows that television reception is not geared towards interactivity.[67] Nonetheless, it is conceivable for the user to be able to decide how a programme will end, for example, or to a large extent determine the run of events by means of selection. If everything runs in a linear fashion, this involves switching between various linear programmes the timing of which is determined by the provider. There is no change to the editorial responsibility, even if viewers are able to change the narrative structure of the audiovisual content by selecting items. In the case of nonlinear services, this phenomenon comes close to that of a computer game (see 4.9 below).

4.6. Technical Platforms as Nonlinear Services

A basic prerequisite for editorial responsibility is the technical and legal possibility of exercising control (see 3.3.1 above). If this does not exist, then a service is not a media service within the meaning of the Directive. Moreover, examination has shown that it is necessary for there to be actual influence to such an extent that the "provider" concerned shapes the service in communication terms. This is not the case with host providers, for example, even if they systematically examine the audiovisual content available for retrieval and, if necessary, remove items on the grounds of the protection of minors or copyright, as this does not as such provide sufficient influence on the character of the service.

65) See for example,Christoph Wagner, *Rechtsfragen digitalen Kabelfernsehens*, Berlin 1996.

66) This also applies to platform operators under section 2(2)(10) of the Interstate Broadcasting Agreement in the version of the tenth amendment. See footnote 62 above.

67) On this phenomenon, see Bernd Beckert, *Interaktives Fernsehen in Deutschland*, Baden-Baden 2004; on the mode of reception, see Uwe Hasebrink, "Konvergenz aus Nutzerperspektive: Das Konzept der Kommunikationsmodi", in Uwe Hasebrink/Lothar Mikos/Elizabeth Prommer (eds.), *Mediennutzung in konvergierenden Medienumgebungen*, Munich 2004, pp. 67 *et seq.*

4.7. Video Databases

A database that makes selected programmes available on demand is an example of a service that meets the "selection" criterion but not the "organisation" criterion in the above sense, so that the database provider has no editorial responsibility. The arrangement of the content in a catalogue, which would give the service communicative characteristics, is lacking. A search engine to locate the content without any details being provided by the operator does not constitute a catalogue in this meaning of the word.

4.8. Video Platforms (YouTube)

User-generated content platforms along the lines of YouTube have developed into an important reference case (but only in the last few years).[68] Whether they have editorial responsibility may be a decisive factor for the business model, even if, as shown above, this must be determined independently of the question of liability under the ECD – or national regulations outside the area co-ordinated by European law. As far as the selection is concerned, although no systematic prior or even subsequent check on the audiovisual content that users upload onto the platform takes place, it may, according to what has been said above, be sufficient for incentives to be given that result in the users making a selection themselves and that in particular result in communicative characteristics shaped by the provider. However, this is not the case when content is merely deleted *ex post*, for example on the grounds of rules for protection of minors or copyright. Ultimately, therefore, for cases like YouTube in their present form it does not matter whether the arrangement of the content is to be regarded as "organisation" since the element of selection by the provider is missing.

However, it has to be said that the fact that users themselves provide the content and that there is no prior check by a "provider" does not in principle exclude the latter's editorial responsibility. However, the provider must influence the communication character of its service and that influence must be equivalent to that of a provider that makes a positive selection. For example, the provision of categories within which contributions can be published, perhaps in conjunction with tagging systems, can lead in this direction. At this point, the Directive must remain open to a certain amount of future interpretation, which would not be possible by merely focusing on "traditional" structuring mechanisms.

4.9. Online Computer Games

Another field that is hotly debated with regard to whether it is covered by the Directive is that of online computer games and virtual worlds. In the following analysis, these are understood to be, on the one hand, mainly virtual worlds with user-generated content modelled on Second Life and, on the other hand, online role-playing games for large groups of participants known as "massively multiplayer online role-playing games" (MMORPGs), the operation of which is only guaranteed by a games provider.[69] Apart from peripheral phenomena,

68) See Monica Ariño, op. cit., p. 115 (118). She points out that YouTube had only just officially been launched at the time of the first draft of the Directive. It is only in the last two years that video platforms like this have developed into a mass phenomenon that can be assumed to be "television-like".

69) For more precise details, see Jan Schmidt/Stephan Dreyer/Claudia Lampert, *Spielen im Netz*, 2008.

such as in-game broadcasting, the main question that arises in addition to the actual classification of commercial communication in online games is whether as such the games offered constitute audiovisual media services within the meaning of Article 1(a) of the AVMSD. Despite the sweeping exemption in Recital 18, it is sometimes believed that this may in principle be the case.[70]

With regard to the editorial responsibility aspect with which we are dealing here, it is argued that the constantly updated provision of game worlds by the operators of MMORPGs is even equivalent to the drawing up of a broadcasting schedule, while in the case of a virtual world based on user-generated content the operator cannot be assumed to have any central editorial responsibility in any case.[71] This latter aspect of the creative freedom of the players as users of a game was stressed in a statement by the Interactive Software Federation of Europe (ISFE), which considers it virtually impossible to ascribe editorial responsibility to a single central person in the context of a game in view of the constant reorganisation and movement of the players within the game.[72] This would indeed appear to be an important point with regard to editorial responsibility. Although the audiovisual content is pre-structured by the game designer's code, it only takes on its concrete form through the user's interaction. What actually happens on the screen can be very much individually influenced, even if all the figures, textures, etc., originate from the designer's creative work. The operator thus loses all control over the portrayal of the audiovisual content seen by the user.

It must therefore be assumed that – from the point of view of editorial responsibility if nothing else – online computer games at least in the sense defined here do not fall within the scope of the Directive.

5. Consequences for Member States' Legislation

The extension of the scope of the Directive in the context of the simultaneous differentiation of the supply structure and the increasingly diverse group of entities involved in audiovisual communication distribution pose significant challenges for Member States with regard to the implementation of the AVMSD.

The term editorial responsibility in Article 1(c) of the AVMSD is a key to understanding the Directive with respect to the issues mentioned. Irrespective of the circular references, differences in the language versions and terms that have not necessarily been rendered more precise by the long legislative process, the definition contains an intelligent link between the service and the way it is produced (that is, with editorial responsibility), which can be helpful in the case of nonlinear services in particular, where the actual nature of the service may not be clear.

70) Paul Göttlich, "Online Games from the Standpoint of Media and Copyright Law", IRIS *plus* 10-2007, pp. 5 *et seq.*, available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus10_2007.pdf ;
Thomas Steiner, „Advertising in Online Games and EC Audiovisual Media Regulation", available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101363

71) Paul Göttlich, op. cit., p. 7.

72) ISFE, "Online Games do not belong in the Audiovisual Media Services ('AMS') Directive", June 2006. Available at: http://www.culture.gov.uk/NR/rdonlyres/F414028A-3D5A-4D5C-9811-77F02C48ED25/0/ELSPApart2.doc

The analysis has revealed the following findings for the implementation of the Directive:

- When assessing whether an audiovisual media service in the sense of Article 1(a), first indent, of the AVMSD is involved, the criterion of a provider's editorial responsibility does not have any importance that extends beyond criteria that define the provider itself.

- When determining the editorial decisions on which, according to Article 2(3)(a), the place of establishment depends, the same criteria are applicable that have to be applied when determining editorial responsibility in accordance with Article 1(c) of the AVMSD. The notion of the media service provider must be understood in such a way that a service is normally subject to the jurisdiction of just one Member State.

- When implementing the Directive, Member States must ensure with reference to their own legal rules that with regard to its area of application only *one* player, namely the media service provider defined in Article 1(d) of the AVMSD, complies with those provisions of the Directive which explicitly refer to that player.

- This does not rule out the possibility of Member States subjecting companies other than the media service provider to regulations under their domestic law, and to ensure compliance with them, in order to achieve the aims of the Directive. The implementation of the Directive may even oblige them to do so.

- The rules on liability contained in the ECD and editorial responsibility within the meaning of the AVMSD must always be determined independently of one another. De facto, however, there is some overlap and, in individual cases, there are indications of the existence of possible situations that will have to be excluded from the notion of editorial responsibility since the exemptions from liability in Articles 12 *et seq*. of the ECD are based on similar considerations as the exclusion relating to the transmission of programmes in Recital 19 of the AVMSD.

- The effective control criterion in Article 1(c) of the AVMSD is predetermined by Community law.

- The effective control criterion in Article 1(c) of the AVMSD must not be understood to mean that service providers that do not actually exercise control that is possible both de facto and de jure do not fulfil this criterion. Such control enables the provider to shape the communicative characteristics of a service.

- The effective control criterion in Article 1(c) of the AVMSD must not be understood to mean that it is only met by those providers that exercise their control according to professional journalistic and editorial rules.

- The selection criterion in Article 1(c) of the AVMSD must be understood to mean that it is met by providers that give the service its communication character by controlling its content. The overall picture is shaped by the limitation to "television-like" services intentionally chosen by the Directive.

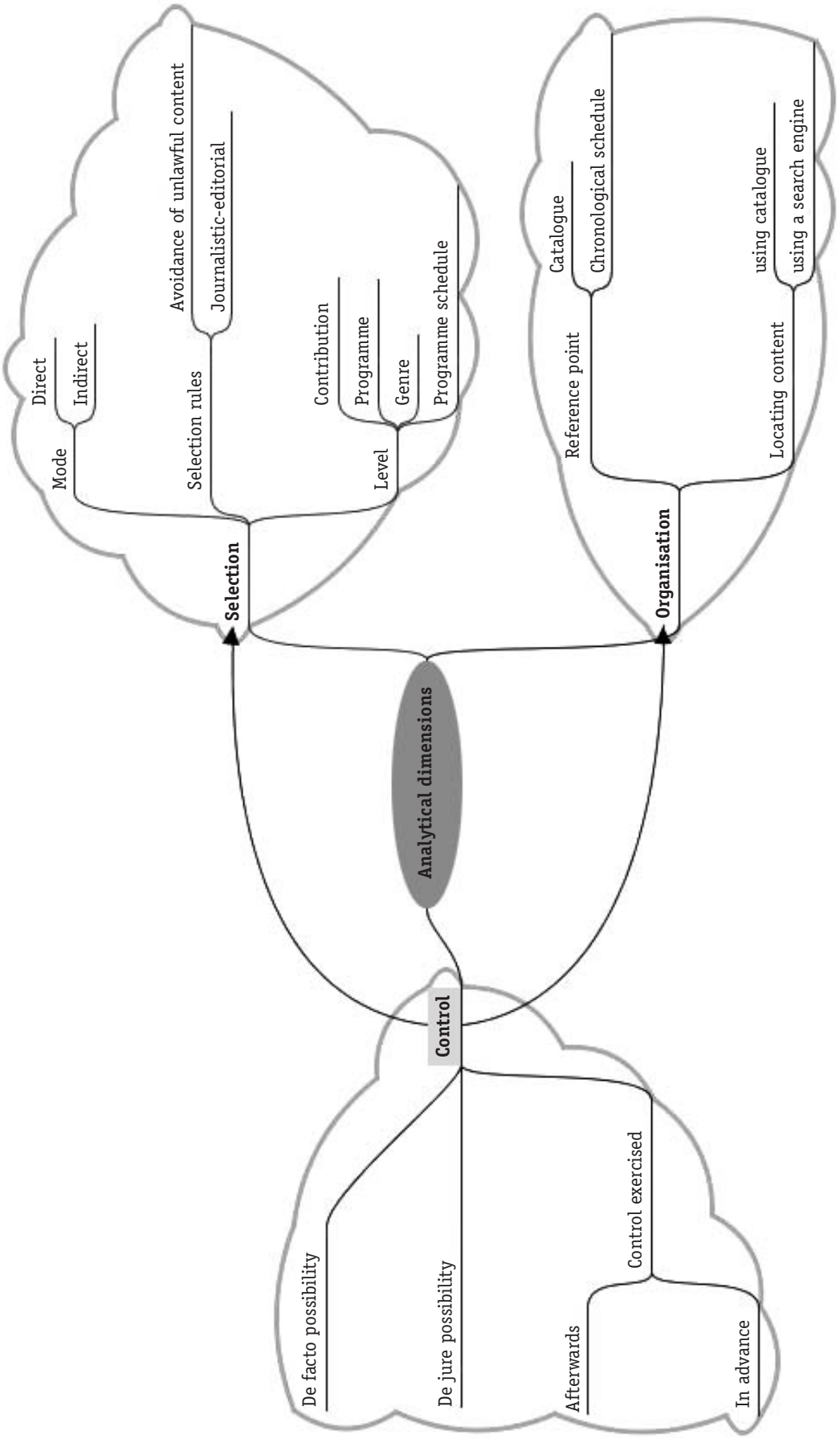
- The selection criterion in Article 1(c) of the AVMSD must be understood to mean that in the case of on-demand services it is met by only those providers that do more than merely search for material and sort it according to content-based criteria.

The term audiovisual media service has accordingly remained within narrow limits with regard to its meaning and is also limited in scope.[73] This in turn means that in the field of computer games, platforms with user-generated content and the creation of channel packages, for example, Member States are beyond the area co-ordinated by European law and retain their media-political leeway. For the providers concerned, this means that there are no minimum standards, but there is also no security against double controls if other provisions, such as the ECD or the direct application of Article 49 of the EC Treaty, do not prevent them from being carried out.

73) Rightly critical with regard to the often overestimated importance of the Directive are Peggy Valcke/David Stevens, "Graduated regulation of 'regulatable' content and the European Audiovisual Media Services Directive: One small step for the industry and one giant leap for the legislator?", *Telematics and Informatics* 2007, pp. 285 *et seq*.

Appendix I: Analytical Dimensions of the Players' Roles with regard to Audiovisual Content

Different criteria were examined when analysing the question of when editorial responsibility within the meaning of the AVMSD must be assumed to exist. Apart from the criteria identified in the above text as relevant for the implementation of the directive by the member states, when taken together they may also be important for the classification levels mentioned in section 2 with respect to services or service providers. They are therefore set out here once again in the form of a mind map, which could be further differentiated if necessary.



Appendix II: Wording of the Most Important Provisions of EU Law Cited Here

Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (text with EEA relevance)

OJ. L 332 of 18 December 2007, pp. 27–45

[…]

(16) For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.

(18) For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude 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. Examples include 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. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts

devoted to gambling or games of chance, should also be excluded from the scope of this Directive.

(19) For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.

(20) Television broadcasting currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example, is an on-demand audiovisual media service. In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.

(23) The notion of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the notion of 'effective control', when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

(28) In order to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the European Union, only one Member State should have jurisdiction over an audiovisual media service provider and pluralism of information should be a fundamental principle of the European Union.

(43) Because of the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions, it is essential for users to know exactly who is responsible for the content of these services. It is therefore important for Member States to ensure that users have easy and direct access at any time to information about the media service provider. It is for each Member State to decide the practical details as to how this objective can be achieved without prejudice to any other relevant provisions of Community law.

[…]

Article 1

For the purpose of this Directive:

a) "audiovisual media service" means:

– a service as defined by Articles 49 and 50 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 Article or an on-demand audiovisual media service as defined in point (g) of this Article; and/or

– audiovisual commercial communication;

[…]

c) "editorial responsibility" means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

d) "media service provider" means 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 2

(1) Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.

(2) For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are those:

a) established in that Member State in accordance with paragraph 3; or

b) to whom paragraph 4 applies.

(3) For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:

a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;

[…]

Article 3

[…]

(6) Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers under their jurisdiction effectively comply with the provisions of this Directive.

[…]

(8) Directive 2000/31/EC shall apply unless otherwise provided for in this Directive. In the event of a conflict between a provision of Directive 2000/31/EC and a provision of this Directive, the provisions of this Directive shall prevail, unless otherwise provided for in this Directive."

Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

OJ L 202 of 30 July 1997 pp. 60 – 70

[…]

Article 1

Directive 89/552/EEC is hereby amended as follows:

1. in Article 1:
a) the following new point (b) shall be inserted:
b) "broadcaster" means the natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of (a) and who transmits them or has them transmitted by third parties.

[…]

2. Article 2 shall be replaced by the following:

"**Article 2**

[…]

(3) For the purposes of this Directive, a broadcaster shall be deemed to be established in a Member State in the following cases:

a) the broadcaster has its head office in that Member State and the editorial decisions about programme schedules are taken in that Member State;"

[…]

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce")

OJ. L 178 of 17 July 2000 pp. 1 – 16

[…]

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

[…]

Article 12

Mere conduit

(1) Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider

a) does not initiate the transmission,

b) does not select the receiver of the transmission; and

c) does not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

(3) This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14

Hosting

(1) Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the

service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

(2) Paragraph 1 shall not apply when the recipient of the service is acting under the

(3) This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

European Convention on Transfrontier Television, Strasbourg, 5 May 1989
Text amended according to the provisions of the Protocol (ETS No. 171) which entered into force, on 1 March 2002.

Article 2 – Terms employed

For the purposes of this Convention:

[…]

"Retransmission" signifies the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public;

[…]

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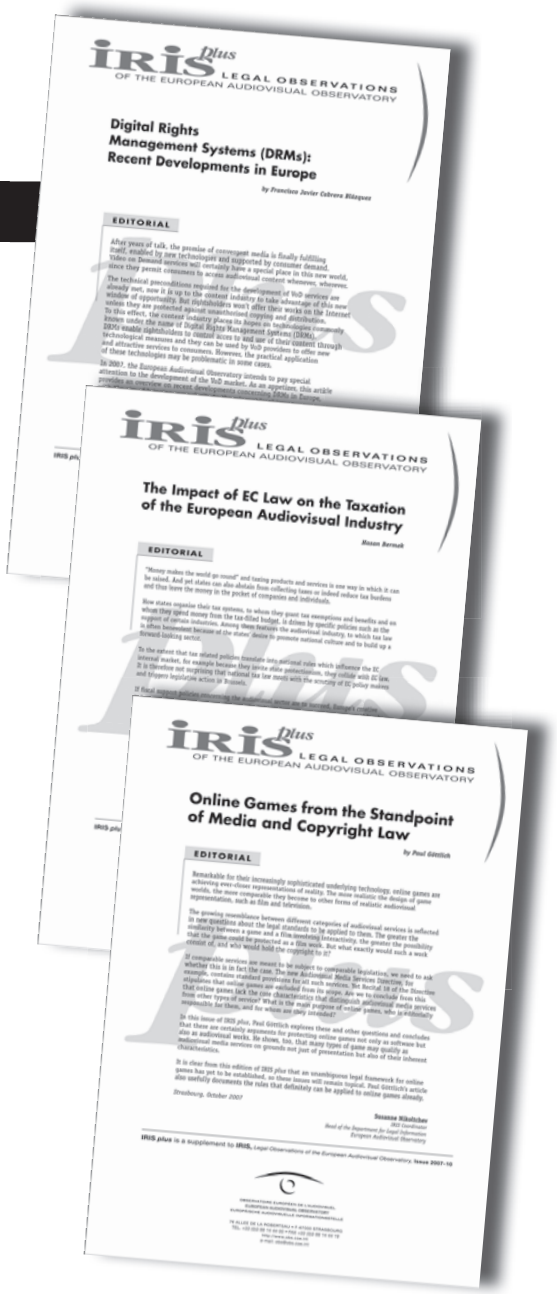

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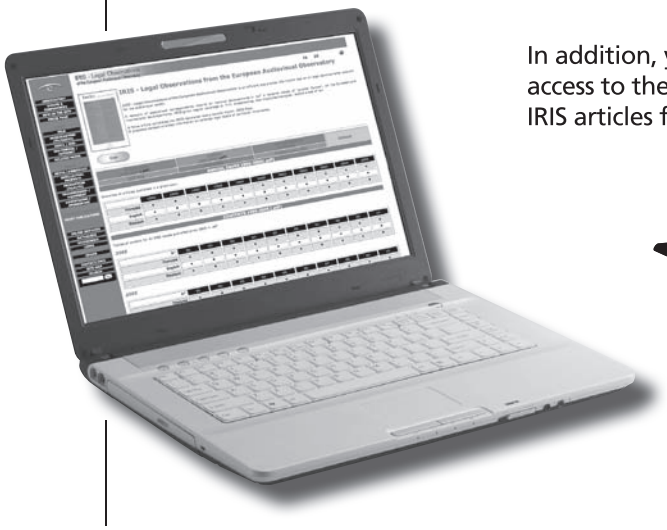

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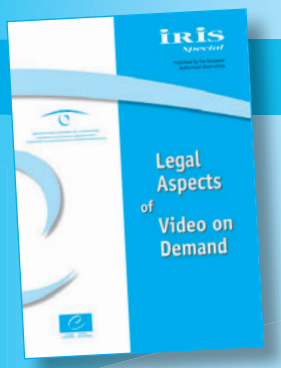

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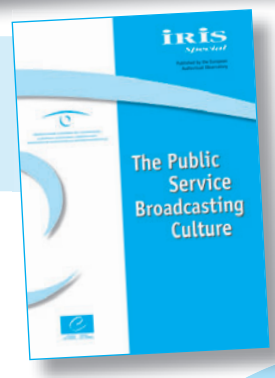

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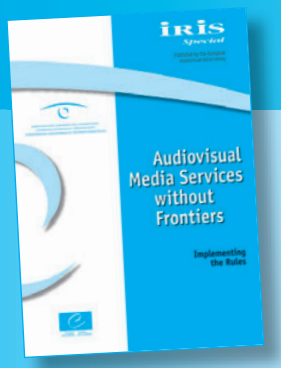

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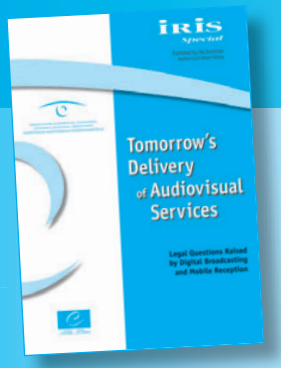

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