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Ready, Set... Go?

The Audiovisual Media Services Directive

IRIS Special

IRIS *Special:*
Ready, Set… Go?
The Audiovisual Media Services Directive

European Audiovisual Observatory, Strasbourg 2009
ISBN: 978-92-871-6665-4
Price: EUR 89

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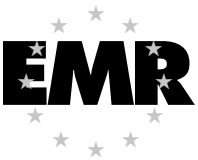

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Typesetting:
Pointillés, Hoenheim (France)

Print:
Council of Europe, Strasbourg (France)

Publisher:
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Please quote this publication as:
Susanne Nikoltchev, Ed., IRIS *Special:* Ready, Set… Go? – The Audiovisual Media Services Directive (Strasbourg, European Audiovisual Observatory, 2009)

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Published by the European Audiovisual Observatory

If the transposition of the EC Directive were to be compared to a competition, it would be between the national legislatures to see which has produced the best domestic law. Many different yardsticks could be used to measure which law is the "best", such as the interests of the legislature or of those to whom the provisions are directed, the rights to be protected, the interests of society or – perhaps in first place in the EC context – its benefit for the EC's internal market. However, the different interests involved are just one aspect of this publication, which also deals with the means of transposing the Directive, that is to say the choice and characteristics of the models selected and the actual steps taken to implement the provisions and subsequently monitor the results. These aspects are also important when it comes to assessing the quality of the domestic law in each case.

A better understanding of the Directive: interests to be protected

The recitals of the Audiovisual Media Services Directive mention a number of interests that the Directive wishes to serve with the Community-law framework that it lays down. In the very first recital, the Directive mentions ensuring optimal conditions of competitiveness and legal certainty for European companies and services in the context of the information technologies and the media and points out the (public) interest in cultural and linguistic diversity. Other recitals refer to the situation of small and medium sized companies or emphasise the public interest in having a right to information, the public interest in media pluralism, in the protection of minors, in consumer protection, and in enhancing public awareness and in fostering media literacy. These interests are seen in the context of the general digitisation of society, which has led both to the emergence of new services and to the need to revise existing regulations.

This IRIS Special contains a large amount of information on how national solutions take into account the various interests, especially with regard to regulating non-linear services and in areas for which national rules can be relaxed in the future. The publication answers such questions as:

- What approaches are available for promoting cultural diversity?
- What protection can be provided against hate speech and other unacceptable content? In particular what protection can be given for underage users of audiovisual media services?
- What limits will be imposed on advertising in the future?
- What decisions will the member states take in the case of product placement?
- What will happen to the right to short reporting?

Models and organisation of the Directive's transposition

The second yardstick for the quality of national law consists of an assessment of the intelligibility, acceptance, manageability and efficiency of the solutions chosen for implementation. Their manageability and efficiency partly depend on how flexibly a solution can react and how it fits into the existing national legal framework. In contrast to the rules of the Directive, national law must relate to and be applied to

actual situations. EC directives set legislative objectives for 27 different countries, so directives mainly reflect compromises and necessarily work with general notions, broad definitions and generally worded objectives. The choice of the means for implementing these objectives is not only the prerogative of the member states but also imposes high standards on their implementation. The transposition of the general objectives into national law thus becomes both an interesting task and a difficult one to carry out.

- How do the member states handle this yardstick?
- How successful are they in transposing notions of EC law, such as linear and non- linear services, and incorporating them into existing media law?
- How do they define editorial responsibility?
- What criteria determine whether a product has been given too much prominence in a programme?

As far as the choice of regulatory approach is concerned, the Directive expressly encourages the use of co-regulation.

- For what areas is there actually a future for this form of regulation in the member states?
- How is it organised?
- When and why would a law passed by parliament perhaps be the better option?
- How detailed should legal provisions be?
- For what cases and to what extent should the regulation of specific issues or an entire set of issues be delegated to (independent) regulatory authorities?
- What rights should the citizens have to be heard with regard to the various regulatory approaches and what rights should the industry stakeholders have?

Finally, in order to transpose the Directive a number of organisational questions also have to be resolved. For example, it is necessary to lay down the rules and mechanisms that will enable co-operation between various decision-makers to take place and compliance with the law to be monitored.

- Does co-operation take place?
- Who co-operates with whom?
- Who monitors the implementation of and compliance with the rules in an individual case?

The solutions found also play an important role with regard to the quality of the Directive's transposition.

Latest information on the state of play

This IRIS Special contains initial answers to the various questions that arise both with regard to the transposition of the Directive and, later, the implementation of the solutions. On the basis of this information, the reader can, firstly, track the transposition of the Directive, which must be completed by 19 December 2009. Secondly, they will be able to see where some matters will still presumably need to be clarified and, therefore, action taken after this deadline has expired. Thirdly, their attention is drawn to the question of what interests might clash with one another in actual cases. This IRIS Special provides facts and guidance on all these questions while at the same time leaving it up to the reader – that is to say, you personally – to judge the winner of the "competition" for the best transposition of the Directive.

It was a particular challenge for this IRIS Special that the transposition period had not yet expired by the time we went to press, although a number of states had already adapted their legislation. If the speed of transposition were taken as the benchmark, the race photo would show Romania as the clear winner. However, it remains to be seen whether Romania's decision to adopt more or less the same wording as the Directive has satisfactorily solved the task set. In the meantime, other states have partly or fully completed the transposition. For example, Belgium's Flemish Community passed the *Decreet betreffende radio-omroep en televisie* (Broadcasting Decree) on 27 March 2009, thus following the example of the country's French-speaking Community, which had already completed the transposition in February. In June 2009, Luxembourg transposed into national law the rules concerning advertising, sponsorship teleshopping and self-promotion. More countries will be added to the list tomorrow – it should be pointed out that most of the contributions to this IRIS Special were completed *at the end of February 2009*.

A number of events that might become relevant for the issues discussed here have since taken place in countries that have not yet completed the transposition process. For example, the new Irish Broadcasting Bill was passed by the *Dáil Éireann* (the House of Representatives) on 18 June 2009 and is now in front of the Senate. A draft law has now been put before the Dutch parliament, and the government

intends to complete the transposition of the Directive by 19 December 2009. In Germany, the draft of the 13th Interstate Treaty amending interstate broadcasting treaties (*Rundfunkänderungsstaatsvertrag*) was discussed on 4 June by the Conference of *Land* Prime Ministers and was largely approved. There is still no consensus on whether public service broadcasters should continue to be allowed to carry product placements free of charge, so a final decision on the treaty is not expected before October at the earliest. The Italian parliament is discussing a draft law (*legge comunitaria*) that would empower the government to issue a decree on the transposition of the Directive within twelve months. As reported in this IRIS Special, France is one step ahead of Italy with its Law of 5 March 2009, which lays down the basic principles of the transposition and leaves the enactment of detailed provisions to future legal instruments. However, there is so far neither a concrete timetable nor has a draft of such a legal instrument been published. In the United Kingdom, the finishing touches are being made to the AVMS Directive (Implementation) Regulations, which will ultimately instruct the national regulatory authority Ofcom to oversee the implementation. In Denmark, a hearing is due to take place at the end of the summer, after which a draft law could be placed before parliament in early October. No legislative activities of any consequence can be reported as far as a number of countries are concerned, including Spain. Fundamental debates are still taking place in Hungary. Although a draft bill was presented to parliament in early June, it is highly unlikely to obtain the necessary support of two-thirds of MPs, so that the transposition is still very much in its early stages in that country.

None of the latest developments have any impact in terms of content on the information and analyses contained in this publication. These announcements thus confirm that this IRIS Special is about fundamental issues that will occupy minds in the audiovisual sector for a long time to come.

Structure and genesis of this publication

This IRIS Special deals with 14 themes in 14 separate chapters, each of which contributes to a better understanding of the Directive and the demands it makes with regard to its transposition into national law. The chapters contain many facts, examples and analyses, and the information provided will remain of considerable relevance beyond the actual transposition date. Twelve of the contributions were presented and discussed at a workshop, and this exchange of views and information has been summarised in a report that precedes the individual contributions as an additional chapter. Two contributions were written after the workshop to complement this IRIS Special since their importance became clear during the discussions.

In this IRIS Special, insights gained at a workshop are presented for the ninth time in the form of a stimulating and highly up-to-date publication. The Observatory and its partner organisation the Institute for European Media Law (EMR) invited a small group of selected experts to the workshop on which this publication is based. We therefore particularly wish to thank the EMR, which spent many hours on the joint planning and organisation of the workshop and was its outstanding host. Our EMR colleagues are also responsible for the workshop report and have assisted the Observatory with the editorial work. Equally indispensable was the support provided by all the workshop participants and, of course, above all the authors of the contributions, who did not shy away from the months of editing and translation. We trust you will benefit from the knowledge and the exchange of ideas of everyone who has contributed to this IRIS Special.

Strasbourg, 22 June 2009

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CONTENTS

Accompanying the transposition of the Audiovisual Media Services Directive

Report on the joint EAO/EMR workshop held on 30 and 31 January 2009 in Saarbrücken

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I. Introduction

On 30 and 31 January 2009, the Institute for European Media Law (EMR) and the European Audiovisual Observatory (EAO) held a joint workshop on "Accompanying the transposition of the Audiovisual Media Services Directive". It was organised to discuss the activities of the European Union member states concerning the transposition of Directive 2007/65/EC on audiovisual media services[1] (AVMSD) into national law. The aim was, first of all, to exchange information on the state of progress with the transposition in the member states and, secondly, to discuss existing difficulties in transposing the AVMSD and ways of resolving them. Three key topics were covered by contributions from 12 speakers and then discussed.[2]

In the first part of the workshop, the speakers endeavoured to convey a basic understanding of the Directive, describing important concepts contained in it and discussing their significance for the work involved in transposing it into national law. In the second part, the contributions dealt with practical issues and possible solutions. The speakers began by referring to the various possible forms of regulation and analysed them with reference to examples of areas covered by the Directive (product placement, short reporting and the promotion of European works, as well as self- and co-regulation). The contributions in the third part of the workshop mainly dealt with issues relating to secondary legislation and monitoring, which follows on from the primary transposition into national law. This report summarises the main statements made in the contributions and also provides an overview of additional information and arguments that were exchanged in the discussions on the individual topics.

The contributions and discussions made a number of matters clear: the transposition of the AVMSD by the member states is at various stages and is affected by the many different legal traditions of the individual member states, but the, in some cases, broadly defined terms and targets in the Directive provide sufficient scope for continuing these traditions. However, some provisions in the AVMSD require changes in the member states' current "television regulation culture". In particular, the new rules on video on demand (VOD) and other on-demand services will lead to the adaptation and harmonisation of the law in the various member states.

1) Directive 2007/65/EC 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, of 11 December 2007, OJ L 332 of 18 December 2007, pp. 27 ff.
2) The event was opened by Wolfgang Closs, Executive Director of the EAO, and Bernd Radeck, legal adviser to the Saarland Broadcasting Corporation (Saarländischer Rundfunk), and moderated by Susanne Nikoltchev, Head of the EAO's Department for Legal Information, and Alexander Scheuer, Director of the EMR.

II. Definitions and other key concepts: impact on the transposition in the national legal

1. The influence of concepts of Community law on national law, especially with regard to the transposition of the AVMSD

In the first presentation, Emmanuel Joly[3] immediately asked the two key questions in connection with the terms and concepts employed in the AVMSD: are the member states bound by the AVMSD terminology and do they have realistic alternatives to employing it?

In the first part of his contribution, Mr Joly elucidated the basic concepts used and, in some cases, legally defined, in the AVMSD, especially Arts. 1, 2 and 3. The second part was devoted to answering the questions asked at the beginning. He did not think the member states were directly bound by the Directive's terminology, since Art. 249 para. 3 EC left them to choose the form and methods for implementation. Only the aim to be achieved had to meet the sense of the purpose of the AVMSD. The question of whether the member states had realistic alternatives that would enable them to deviate from the terms and concepts employed in the AVMSD was considered from various points of view. A number of key concepts were analysed and explained to illustrate the problems involved in deviating from the provisions of the AVMSD. It was pointed out that the concept of an "audiovisual media service" gave the member states little room for manoeuvre. It was only possible to give it a more extensive definition in national law, which might then be examined by the Court of Justice of the European Communities (ECJ). Nor was it really conceivable for there to be any fundamental alternatives to the definition of linear/non-linear services. Here, too, only more extensive definitions than those in the Directive were feasible. With regard to the provisions on jurisdiction and the relevant (but not defined) terms in Arts. 2 and 3 AVMSD, Mr Joly pointed out that the notions concerned should be defined in the member states' national legislative procedures.

Finally, the speaker noted that the member states would be on the safe side if they adopted the same terminology employed in the Directive although they had no legal obligation to do so. *De facto*, however, it was particularly important for them to accept the terms used.

In the ensuing discussion, a participant first of all pointed out that in Belgium the power to pass legislation in the broadcasting sector was split up among the three communities (Flemish, French and German) and that they were each transposing the Directive independently. According to the Belgian constitution, the term "broadcasting" comprised both linear and non-linear distribution. However, despite the use of different terminology, the AVMSD was being properly transposed, and that should be taken into account by the European Commission when it considered the matter.

It was then pointed out that the term "European works" as used by the Directive also covered works originating from the Holy See or states such as Belarus, so that the Directive had an impact beyond the group of EU member states.

The next important point for discussion was the term "non-linear media services". The participants considered what requirements the AVMSD laid down in this connection and asked whether the member states could introduce stricter rules. They agreed that, in view of Mr Joly's observations, this was possible in principle as long as the minimum requirements laid down in the Directive were met. However, if the member states intended to introduce stricter rules than the AVMSD then the obligation to notify the Commission imposed by Directive 98/34/EC applied.[4] Some took a critical view of the introduction of a large number of stricter rules as that could lead to the complete rejection of the "graduated regulation" intended by the Directive and run counter to its objectives. It was accordingly necessary to observe the principle of proportionality. If in doubt, member states could discuss their understanding of "non-linear" media services with the Commission.

3) See Emmanuel Joly's article in this publication.
4) Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204 of 21 July 1998, p. 37–48, amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 217 of 5 August 1998, pp. 18 ff.; cf. also Recital 13 of the AVMSD.

It was pointed out that there seemed to be a trend in several member states (for example, France) towards extending the existing detailed rules on linear services to non-linear services by employing general provisions, but it was questionable whether it was sensible in practice to establish the same requirements for both types of service. For example, it was impossible in the case of non-linear services to wait until late in the evening to distribute content unsuitable for children. One participant took issue with this, saying that precisely this had been done in Germany in the case of a music video of the band *Die Ärzte*. At its website, two different versions of the clips were available, depending on the time of day.

2. Distinction between linear and non-linear services

The next speaker, Nico van Eijk,[5] first of all compared in his contribution the original "Television without Frontiers" Directive[6] (TWFD) with the AVMSD. While on-demand services were not covered by the TWFD, the AVMSD now covered and distinguished between linear and non-linear media services (i.e., in particular on-demand services).

In the ECJ's *Mediakabel* decision,[7] which involved the court's interpretation of the TWFD, the key criterion with regard to the classification of a service as linear or non-linear was the standpoint of the service provider. The AVMSD imposed technically more neutral criteria. In the case of linear audiovisual media services, the key aspect was that the programming schedule was laid down in advance, while the decisive factor in the case of non-linear audiovisual media services was that users could choose their programme individually from the provider's catalogue. Here, Mr van Eijk mentioned in contrast to clearly classifiable examples (cf. Commission Memo/06/208[8]) YouTube as a service that could not be precisely assigned to a particular category. That was because the video portal primarily offered user-generated content.

With regard to the transposition by the member states, Mr van Eijk first asked whether it was right for the AVMSD to be transposed word for word, as had happened in Romania, for example. He then said the Netherlands (like Sweden) would adopt the definitions in the Directive but also intended to introduce more far-reaching provisions. There were currently a number of constitutional difficulties in the Netherlands with respect to rules for VOD services: the state could enact rules concerning radio and television, such as on the establishment of programme categories in order to ensure the protection of minors,[9] but according to Art. 7 para. 3, first sentence, of the Dutch Constitution no prior approval was required when an opinion was expressed in other forums or places (for example, theatre performances).[10] Some argued that VOD services fell within the scope of Art. 7 para. 3 of the Dutch Constitution and could accordingly not be the subject of specific *ex ante* legislation. However, that problem could probably be solved by considering VOD services to be covered by the term "television" contained in the Constitution. Mr van Eijk pointed out that this as yet unsolved problem in the Netherlands could also lead to difficulties in the transfrontier exchange of such services.

The ensuing discussion first centred on whether the Netherlands explicitly intends to enact legal provisions for services comparable to YouTube. It was not possible for a clear answer to be given to this question but the matter of platforms providing wholly or partially user-generated content or comparable services would be debated in the Netherlands and regulations would be enacted. The existing structure in the regulatory authorities would be retained – i.e., no new department would be created to deal with issues relating to YouTube. The precise operating structure would be established in the discussions on transposing the AVMSD. The general consensus was that especially those services that still mainly offer user-generated content are an extremely contentious issue.

5) See Nico van Eijk's article in this publication.
6) Council Directive 89/552/EEC of 3 October 1989 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 298 of 17 October 1989, pp. 23 ff., as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, OJ L 202 of 30 July 1997, pp. 60 ff.
7) ECJ judgment of 2 June 2005, Case C-89/04, Mediakabel BV v. Commissariaat voor de Media, European Court reports 2005, page I-04891.
8) The Commission's memo of 18 May 2006 is available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/208&format=HTML&aged=0&language=EN&guiLanguage=en
9) Cf. Art. 7 para. 2, first sentence, of the Dutch Constitution: "Rules concerning radio and television shall be laid down by Act of Parliament".
10) Cf. Art. 7 para. 3, first sentence, of the Dutch Constitution: "No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law".

Attention then turned to the aforementioned problem of VOD services that arises under the Dutch Constitution, especially Art. 7 para. 3. It was pointed out that expressions of opinion that fell within the scope of that provision could not be made subject to *ex ante* regulations. There were, of course, general laws that could be applicable (the criminal law, the Protection of Minors Act, etc.), but their regulatory mechanisms only took effect *ex post*. However, Art. 7 para. 3 of the Constitution prohibited the prior censorship of content.[11] Accordingly, if it were to be held that VOD fell within the scope of Art. 7 para. 3, there would be no possibility of adopting regulations in advance in order to influence the content. Only when, for example, a VOD offering included pornographic content could that be subsequently established by a court and be both assessed under the civil law and prosecuted under the criminal law. The situation would be different if those VOD offerings were considered to fall within the definition of television as it was traditionally understood, in which case it would, for example, be possible to impose quotas ("positive content regulation") or adopt youth protection regulations ("negative content regulation"). It was thus necessary to take a decision in the Netherlands on the fundamental question of which paragraph of Art. 7 of the Constitution had to be applied to VOD.

In response to Mr van Eijk's remark that it was prohibited in the Netherlands to regulate the content of media services in advance, one participant asked if it was not possible, for example, to enshrine the criminal law prohibition of child pornography in the Dutch media laws in advance and thus provide *ex ante* for negative obligations regarding the content of services offered. There was also uncertainty as to whether that ban in the Netherlands only concerned the content aspect and did not also apply to the commercial side (commercial communication) – not least against the background of Art. 10 of the European Convention on Human Rights (ECHR). Mr van Eijk replied that, according to Art. 7 para 4 of the Dutch Constitution, the provisions of Art. 7 did not apply to commercial advertising. Although Art. 7 was not applicable to commercial advertising, the protection under Art. 10 ECHR naturally continued to be provided. A participant asked whether, against the background of Art. 10 ECHR, the "quota regime" requirements of Arts. 4 and 5 TWFD/AVMSD should be understood as relating to content or to commercial/industrial activities. Mr van Eijk replied that those rules were to be understood to apply to programme content.

Finally, it was pointed out that a different system applied to the classification of cinema films, where minors were protected by a private system of voluntary self-regulation.

3. Establishment of editorial responsibility

In his paper, Jean-François Furnémont[12] first of all considered the need to balance the implementation of the common market against the maintenance of a national media landscape characterised by specific cultural features. Both the TWFD and the AVMSD adopted the same approach. The "cornerstone" of the Directives was the free movement of services, but that had to be in reasonable proportion to the specific culturally conditioned objectives of individual member states. Mr Furnémont asked whether the provisions of the AVMSD had made it possible, or at least might make it possible, to resolve the conflicts that had arisen in the context of trying to strike the aforementioned balance in the years following the enactment of the TWFD. As Art. 2 para. 1 AVMSD[13] retained the country of origin principle,[14] albeit in modified form, there was once again potential for conflict. With reference to Recital 12 of the TWFD[15] and the existing criticism by some member states,[16] Mr Furnémont took issue with the current version of Art. 2 para. 1 AVMSD, his main complaint being that the country of origin principle should not have absolute validity. Moreover, it should have been emphasised that the AVMSD was based on the principle of promoting "cultural diversity" and not on economic considerations.

11) Mr van Eijk explained the historical background to this rule and to the way it is understood. Its purpose is to provide an, in principle, unlimited guarantee of freedom to demonstrate. Cf. Nico van Eijk, *Artikel 7 Grondwet en de richtlijn Audiovisuele mediadiensten*, Mediaforum 2009-3, p. 77, available at: http://www.ivir.nl/publicaties/vaneijk/Mf_2009_3.pdf

12) See Jean-François Furnémont's article in this publication.

13) Art. 2 para. 1 AVMSD states: "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".

14) Inter alia, Recital 27 of the AVMSD confirms the country of origin principle.

15) Recital 12 of the TWFD states: "it is consequently necessary and sufficient that all broadcasts comply with the law of the Member State from which they emanate".

16) Mr Furnémont referred to an amendment dated 13 May 2005 proposed in the Council by Austria, Belgium, the Czech Republic, Estonia, Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovenia and Sweden (described in the discussion as the "position of the 13"). The member states' statement is available at: http://register.consilium.europa.eu/pdf/en/05/st08/st08806.en05.pdf

Mr Furnémont also discussed the reference to "editorial responsibility" in Art. 1(c) AVMSD, with the help of which the member state responsible for a media service provider was to be determined. The concept was not new[17] but was now being defined in more detail for the first time, and member states had a certain amount of scope in this regard when adopting measures to implement the Directive. However, they were also obliged to subject the editorial responsibility of media service providers to "effective control".

Finally, Mr Furnémont presented a number of proposals with regard to how the member states could implement the provision on editorial responsibility in accordance with the AVMSD without losing the ability to protect their specific cultural characteristics.

In the ensuing discussion, a participant was of the opinion that Mr Furnémont's criticism that the Commission had not taken sufficient account of the objection raised in the "position of the 13"[18] was wide of the mark. The AVMSD was based on the country of origin principle and the free movement of services and was not an instrument for emphasising the cultural diversity in member states. The TWFD had also been based on that understanding. The AVMSD could not take account of all economic and cultural aspects. It was not the task of a directive to regulate every single detail, which was the responsibility of the member states and, as the case might be, their regulatory authorities. Experience showed that member states tend to transpose the Drective literally in order to "be on the safe side". Problems would thus not become apparent until after its transposition.

This was countered by the view that, despite the fact that the country of origin principle was recognised as fundamental, it was incomprehensible that the initiative of the thirteen member states had not been taken into account when drawing up the AVMSD. With this position paper, the member states had pointed out that the country of origin principle meant they could not regulate television programmes with content primarily directed at their own country if the providers of the programmes concerned were established in another member state. To cover cases like that, they had called for the Commission to make proposals that would enable the receiving state to enact regulatory measures to reconcile its media policy interests with the country of origin principle. Moreover, that principle also led to problems in other areas of regulation. The audiovisual sector in particular involved both economic and cultural aspects. If the AVMSD was transposed without any qualifications, national cultural aspects would be ignored, which would mean a failure to comply with the subsidiarity principle.[19]

One participant was of the opinion that Arts. 2 and 3 of the AVMSD did not contain any innovations; only the definition of editorial responsibility in Art. 1 was new. The meaning of "effective control" could only be established by interpreting the aim of the Directive. On the basis of the actual wording, it could not be determined at what intervals the media service providers had to exercise the control in order to act "effectively" within the meaning of Art. 1(c) AVMSD. In order to achieve the required effectiveness, it might no longer be enough to take strategic decisions in advance on the composition of media services for a period of two years. Rather, if "effective control" were to be guaranteed and, therefore, editorial responsibility assumed, it would be necessary to take decisions on programmes almost on a daily basis. A participant then pointed out that at RTL in Luxemburg editorial activities were checked once a month to meet the editorial responsibility requirements. That practice could be taken as an example for determining the intervals to be observed to exercise "effective control" within the meaning of Art. 1(c) AVMSD.

The criteria proposed by Mr Furnémont reminded some participants of the arguments of the Dutch Government and the Belgian licensing authority *Conseil Supérieur de l'Audiovisuel* (CSA) in the "RTL cases".[20] The question of how to determine who was responsible for the "editorial work" and how the term "establishment" was to be defined had been hotly debated for many years, and only the ECJ could provide an answer. That was also the opinion of the majority of the discussion participants.

17) Cf. Art. 1 b) TWFD.
18) See fn. 16.
19) In the sense in which it is used in Art. 5 para. 2 EC.
20) See the Conseil d'Etat decision of 25 November 1998, 172407, IRIS 1999-1: 5, available at: http://merlin.obs.coe.int/iris/1999/1/article6.en.html; decision of the CSA of Belgium's French-speaking Community of 29 November 2006, IRIS 2007-1: 4, available at: http://merlin.obs.coe.int/iris/2007/1/article5.en.html. A good overview is provided by Dommering E., *Commentary to Article 2 TWFD*, in: Castendyk/Dommering/Scheuer, European Media Law, marginal refs. 52-62.

With regard to the speaker's proposals concerning the implementation of the AVMSD as regards non-linear services, it was pointed out that it was even harder to find criteria for on-demand services than was already the case in the television sector.

A participant pointed out that the AVMSD was based on a proposal by the Commission but had been ultimately adopted by both the Parliament and the Council, so it corresponded to the will of the majority of member states. The Commission could therefore not be used as a scapegoat if it established, in accordance with the tasks assigned to it, that the Directive was not being properly implemented or not implemented at all and reprimanded the member states for that.

The next item discussed was the importance of so-called "light touch transposition", by which is meant transposing the Directive by adopting its wording. The "Romanian approach" [21] is one example of this and was criticised by a number of participants, who asked what then remained of a national media policy and the subsidiarity principle.

The opinion was expressed that it was not right if the regulatory authorities had to solve the problems that arose in practice but could not conduct an exchange of views with the Commission. In particular, the contact committee (cf. Art. 23a AVMSD) was, on the basis of experience gained, not suitable for carrying out the relevant discussions. Especially when it came to interpreting the concept of "editorial responsibility", however, the Commission should support the national regulatory authorities by laying down more manageable criteria.[22]

Overall, the participants seemed to agree that the differences in the way the member states interpret the definitions of the terms used in the AVMSD should not be too great. However, since it is in the end impossible to give a precise answer to the question of what "editorial responsibility" actually comprises, the participants concluded that this was ultimately the task of the ECJ.

III. Individual areas covered by the AVMSD

1. Product placement: stricter rules – opt-in or opt-out?

In the papers that dealt with various regulatory options with regard to transposing the Directive, the first point discussed was product placement. Oliver Castendyk[23] opened his presentation with extracts from the film "I Robot" in order to demonstrate the relevant practice in American film productions.[24] In his introduction, he compared the provisions governing advertising and product placement in the AVMSD and the TWFD and pointed to the difficulties in establishing the borderline between product placement on the one hand and (prohibited) surreptitious advertising on the other.

Mr Castendyk then explained the structure of Art. 3g AVMSD, according to paragraph 1 of which product placement was in principle prohibited, although the first indent of paragraph 2 mentioned exceptions to that rule that applied if a member state did not decide otherwise. For example, failing any provisions to the contrary, the AVMSD permitted product placements in cinema films and series as well as in cases that involved the provision of goods and services free of charge, provided that the requirements set out in para. 2 (a) to (d) were also met. That meant in particular that product placement should not influence editorial decisions and should not contain any direct invitation to make a purchase. In legal terms, that could be described as a so-called opt-out structure. Finally, Art. 3g para. 3 AVMSD contained an absolute ban on product placement in the cases listed (cigarettes, tobacco products, etc.).

Mr Castendyk particularly emphasised the question of when it might be possible to speak of the provision of goods and services "free of charge" within the meaning of Art. 3g para. 2, first indent. With reference to Recital 61 of the AVMSD, product placement was only involved in the case of products "of significant value". However, it was not clear whether an absolute limit should be laid down for establishing that value or whether a relative value should be the determining factor. Mr Castendyk was in favour of the latter approach.

21) See in this connection the above summary of the paper by Nico Van Eijk (II. 2.).
22) See on the definition of the term "editorial responsibility" Wolfgang Schulz and Stefan Heilmann, *Editorial Responsibility*, IRIS *Special*, European Audiovisual Observatory, 2008, pp. 11 ff.
23) See Oliver Castendyk's article in this publication.
24) According to the speaker, approx. 10% of film industry revenues derive from product placements.

Finally, the contribution dealt with the issue of the "undue prominence" of a product (as apposed to the meaning of the term in the case of surreptitious advertising), with the obligation to clearly identify programmes containing product placements and with the "prohibited influence" on editorial responsibility and the independence of the media service provider, within the meaning of Art. 3g para. 2 (a), (c) and (d) AVMSD.

In the ensuing discussion, a participant made it clear that a member state did not have to "opt-in" for sponsorship to be permissible. Product placement was legally regulated for the first time throughout the EU, which was another reason why it was important to clearly establish the difference between those two forms of audiovisual commercial communication.

A number of participants then compared the existing rules on product placements in their own member states: in Denmark, for example, it was banned, and the ban would probably be maintained in the future despite the less stringent provisions of the AVMSD. It was feared that the strict ban might lead to the complete withdrawal of the advertising industry from the Danish market. Moreover, sponsorship was controlled more strictly in Denmark than provided for by the AVMSD. In Germany, on the other hand, there were as yet few proposals on dealing with the broad scope for the transposition of the AVMSD in the case of product placements. The political discussion on the subject had only just begun and no concrete proposals were to be expected before the middle of 2009. The question remained as to what action to take in that area in view of the provisions of the AVMSD. Product placements had so far been allowed without any restrictions, and provisions on them had to be drawn up in the light of the fact that, according to the AVMSD, the determining element was that products should be "of significant value".[25] In France and Belgium, where the debate on transposing the AVMSD had only just begun, it was the regulatory authorities that intervened in cases of prohibited product placement. In Ireland, too, there was a general ban on product placements and it would probably be retained.

The discussion then turned to the background to, and the application and interpretation of, the term "significant value" as used in the AVMSD, and it was pointed out that examples illustrating its possible interpretation were to be found in the relevant literature.[26] The background to the introduction of the term had been the concern that product placement might breach the rules on editorial responsibility and decisions, and the intention had been to limit the problem involved. It was not clear from what point it might be possible to speak of illegitimate influence on "editorial responsibility". One participant thought it was not necessary to provide any proof of actual influence. Every case of product placement involved influencing "editorial decisions", and only when a product did not appear in the finished production would it be possible to assume a complete lack of influence. The crucial question was therefore whether illegitimate influence was achieved by a product placement in an individual case. The establishment of an upper limit to the value was also open to debate. It was possible to consider introducing either an absolute upper limit, such as in the case of Austria (EUR 1,000) or a relative limit (such as 1% of the total costs of a production). Many participants thought a relative limit was more suitable for establishing illegitimate influence.

There was also a question as to how a warning drawing attention to a product placement should be worded. It was pointed out that the AVMSD did not prohibit any reference being made to the company for which a product placement was being undertaken. For example, the relevant brands could be mentioned in a warning to viewers, which might be very interesting for the industry concerned.

Another subject of discussion was the more general question of whether the national legislature actually had to turn its attention to the issue of product placement. Did the rules on product placement also have to be transposed into national law? What would happen if the legislature did not make any reference to it at all in the transposition? According to Art. 3g para. 2 AVMSD, the member states could enact rules relating to (and limiting) product placement. If they decided not to enact their own rules, product placements would in principle be permissible in the cases mentioned in the Directive. That followed from the principle of the direct vertical effect of directives enshrined in Community law, which meant that, after the expiry of the transposition period, EU citizens could refer to sufficiently determinable and precisely worded rights granted by the Directive vis-à-vis their own member state. However, transposition without provisions on product placement would be incomplete, for the member states were obliged to enact rules by 19 December 2009 concerning the conditions to be observed (e.g.,

25) See the above summary of Oliver Castendyk's paper (III. 1.).
26) Cf. Castendyk, O., *Commentary to Article 3g AVMSD*, in: Castendyk/Dommering/Scheuer, European Media Law, marginal ref. 18.

no "undue prominence") and, in particular, to implement the requirements regarding the obligation to draw the viewers' attention to product placements. If member states chose not to enact their own provisions, they would not be making full use of the scope available to them. Furthermore, there would be instances of legal uncertainty if the current national provisions, which prohibited product placements (and surreptitious advertising) in most member states, were retained. In such a case it would not be clear from the national legislation transposing the Directive whether the national ban continued to apply to the programme categories for which product placements were permissible under the Directive.

Finally, it was pointed out that the rules on product placements in the AVMSD applied to all programmes of media service providers, so that the state from which programmes originated was in principle immaterial (which meant that, in contrast to the provisions of the TWFD, the AVMSD also covered American films unless a member state made use of the possibility of not providing a warning in the case of programmes from non-EU members). It was necessary to take into account that the ban on "undue prominence" applied under the AVMSD, which would lead to product placements in such films as "I Robot" no longer being permissible in the EU. The extent to which firms in the United States would really allow themselves to be influenced by that provision remained an open question.

2. The right to short reporting

Robert Rittler's paper on the right to short reporting also discussed issues relating to various transposition options.[27] First of all, the relevant rules in the AVMSD were compared with the corresponding provisions in the European Convention on Transfrontier Television.[28] Reference was also made to the provisions on (the exercise of) exclusive rights to broadcast events of major importance to society contained in that convention and introduced into the TWFD in 1997.[29] Both the substance of the rules concerned and the persons subjected to the regulation were analysed.

Mr Rittler then drew attention to an interesting case concerning short reporting rights in Austria.[30] The matter at issue was whether the Austrian Broadcasting Corporation (Österreichischer Rundfunk – ORF) should be given the right to produce short reports on Austrian Bundesliga football matches.[31] He outlined the decision of the Austrian Administrative Court and referred to the parties' legal opinions. The key significance of the decision had been that the court had interpreted the terms "event" and "event of general public interest". He also commented on the question of compensation for Premiere Austria, the holder of the rights concerned, pointing to the conspicuous difference between the price paid by Premiere Austria for the exclusive rights (EUR 14 million per season) and the amount paid by ORF for the short reporting rights (EUR 108,000). Finally, he established that Art. 3k para. 6 AVMSD left it up to the member states whether or not to provide for the reimbursement of costs. If they did so, the reimbursement should not exceed the additional costs incurred in granting the access. Such a restriction provided for by Art. 3k para. 6 AVMSD was neither compatible with Austrian nor with German constitutional law since it meant unjustified interference with the freedom to carry on a profession and with basic property rights.

With regard to the present situation concerning the transposition of the Directive in Austria, Mr Rittler noted that the provisions enacted to date were limited to advertising and teleshopping, for which the more liberal requirements of the AVMSD had been transposed into national law.

The discussion initially picked up on the speaker's doubts concerning the compatibility of Art. 3k para. 6 AVMSD with national constitutional law.

27) See Robert Rittler's article in this publication.
28) The European Convention on Transfrontier Television of 5 May 1989, as amended by the Council of Europe Protocol of 9 September 1998, which entered into force on 1 March 2002, is available at: http://conventions.coe.int/Treaty/EN/Treaties/Html/132.htm
29) Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 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 ff., introduced the provision of Art. 3a on exclusive rights into the TWFD.
30) Cf. Administrative Court judgment of 20 December 2005, Case 2005/04/0126; Administrative Court judgment of 27 January 2006, Case 2004/04/0234.
31) It was claimed that the right to short reporting should also cover the following football events: the Red Zac First League, the Stiegl Cup, the Hallen Cup, the Super Cup and the Intertoto Cup.

A participant asked what was to be done when the holder of rights to a sports event contractually prohibited a licensee from assigning short reporting rights. Was that contractually imposed ban directed at the licensee at variance with the AVMSD or were rights holders allowed to make such arrangements? The answer was that there was initially nothing to preclude them being made, but the member states could enact legislation declaring such a ban unlawful. The resulting interference with freedom of contract and, perhaps, the situation of holders of copyrights or related rights protected by the law of property had to be tolerated.

The next question was whether in addition to the transmission costs involved the production costs might be taken into account when calculating the payment owed for the acquisition of the short reporting right. In the opinion of some of the participants, the production costs could not be taken into account as the AVMSD only referred to costs "directly incurred in providing access". Several participants were critical of this. Some held that Art. 3k para. 6 did not prohibit the production costs from also being charged. Moreover, such an arrangement was compatible with German constitutional law. The Federal Constitutional Court[32] had stated that compensation had to be paid for the right to short reporting. The AVMSD itself also provided in principle for that possibility and in fact only limited its extent. At any rate, the AVMSD provided sufficient scope for an interpretation in conformity with the (German) constitution. The aim of the provision in Art. 3k para. 6 AVMSD was only to prevent prohibitively high costs from being claimed or to avoid the compensation resulting in the enrichment of those subject to the obligation.

The vast majority of the participants were of the opinion that, for reasons connected with the need to protect legitimate expectations and safeguard existing legal positions, the provisions of Art. 3k AVMSD could only be applied to future contracts.[33] Future contracting parties would thus be aware of the restrictions to which their legal position might be subjected. A number of participants concluded from this that existing agreements remained unaffected by the provisions of the Directive. They regretted that Art. 3k AVMSD, unlike Art. 3a TWFD, did not contain any rules concerning its application *ratione temporis*.

The discussion then turned to the connection between the term "public interest" in Art. 3k AVMSD and the freedom of access to information enshrined in Art. 10 ECHR. It was pointed out that the right of access to information could, as an absolute right, in principle be weighed against the exclusive right of the originator of a work to its protection. A participant drew a parallel to the right of football stadium owners to only allow a limited number of journalists access to their stadiums (in accordance with their right to choose who to allow on their property). He also compared the situation to a ban on reporting on disturbances and violence at football matches contractually negotiated between their organisers and journalists. Some participants contributed to the discussion at that point with a number of remarks on the exploitation of sports events in other member states. Although those events did not enjoy any copyright protection in France, a right akin to copyright existed and could be enforced.[34] In the United Kingdom, too, the right to exploit sports events fell within the scope of the provisions of copyright law (the Copyright, Design and Patents Act).

A participant asked who determined what was an "event of general public interest" in the individual member states. In the United Kingdom, the Department for Culture, Media and Sport (DCMS) determined the events that were considered important. The comparable decision in Belgium's Flemish Community was taken by its government. In the French-speaking Community, the government first of all reached an agreement with the CSA on drawing up a list of events.[35]

Finally, the participants provided a short overview of the right to short reporting in various member states. In Denmark, that right was sold by contract. Those sales constituted a very important and lucrative market in that country and it might collapse as a result of the AVMSD. Nor was it clear

32) Cf. Federal Constitutional Court judgment of 17 February 1998, Case 1 BvF 1/91 (Official Collection of Federal Constitutional Court decisions [BVerfGE] 97, 228).
33) It remained unclear whether that meant the expiry of the period for transposing the Directive on 19 December 2009 or the date of the entry into force of the AVMSD (19 December 2007).
34) See the detailed observations by Pascal Kamina, *Country Report France*, in: Blackshaw/Cornelius/Siekmann (eds.), *TV Rights and Sport: Legal Aspects*, Den Haag 2009, pp. 336 ff.
35) See the detailed report by Valcke P., *Country Report Belgium*, in: Blackshaw/Cornelius/Siekmann (eds.), op. cit., pp. 263 ff. An overview of the existing provisions on major events at the level of the member states is provided by the essay *Major Events and Reporting Rights* by Max Schoenthal, IRIS *plus*, April 2006, pp. 5 ff., available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus4_2006.pdf.en

whether the provision in the AVMSD conflicted with Directive 2001/29/EC[36] (Copyright Directive) and the "three-step test" enshrined in it.[37]

The Copyright Directive was about the legal protection of copyright and related rights, especially with regard to the information society. Subject to the conditions specified, holders of copyrights and related rights were protected in connection with, among other things, reproducing works and communicating them and making other subject-matter available to the public (Arts. 2 and 3 Copyright Directive). According to Art. 5, the member states were entitled to provide for exceptions and limitations to those rules. However, it was necessary to take note of Art. 5 para. 5, according to which such measures were only permissible in certain special cases (1st step) in which the normal exploitation of the work or other protected subject-matter was not adversely affected (2nd step) and the rights holder's legitimate interests were not unreasonably prejudiced (3rd step). Recital 35 of the Copyright Directive stated that rights holders should "receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter" if such exceptions or limitations were provided for in domestic law (cf. Art. 5 para. 2 (a), (b) and (e) in the case of reproduction rights). Recital 40 of the AVMSD made it clear that the provisions of the Directive on the right to short reporting did not affect the Copyright Directive.[38]

A participant pointed out that a major discussion was about to take place on the subject in Denmark. In Germany, the right to short reporting existed under existing legal provisions[39] but was nonetheless often explicitly mentioned in contracts concerning sports transmission rights. That also applied to Italy.

3. The promotion of the production of European works in the case of on-demand services

Pascal Kamina[40] initially discussed in his contribution the provisions concerning the promotion of the "production of European works" in Arts. 4[41] and 5[42] TWFD. He pointed out that the member states had not only transposed its provisions correctly at that time but often introduced stricter rules to promote European works, which was possible under Art. 3 para. 1 TWFD.

Although reference was made in many AVMSD recitals to the promotion of "cultural diversity",[43] Mr Kamina said there were no comparable references in Art. 3i AVMSD, which dealt with the promotion of European works in the case of non-linear media services. He stressed that on-demand audiovisual media services could potentially replace television programmes in some cases, so that the aim of Art. 3i AVMSD should probably be considered to be more of an economic nature (i.e. the protection of the European film industry). The promotion of "European works" in the case of non-linear services was important not least because they were currently not subject to any quota arrangements, and items offered by the existing on-demand services were often mainly of American origin.[44]

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36) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167 of 22 June 2001, pp. 10 ff.

37) The reference is to Art. 5 para. 5 Copyright Directive.

38) In the literature on this subject, the question is therefore first asked as to what protection the relevant provisions of copyright law grant for the actual pre-transmission signal, which is not necessarily produced by a broadcaster. Secondly, it is pointed out that the majority of cases involve events that do not enjoy any copyright protection. Thirdly, attention is drawn to the fact that copyright law already provides for exceptions in favour of short extracts on current events, for example Art. 5(3) Copyright Directive. Cf. Scheuer A. / Schoenthal M., *Commentary to Article 3k AVMSD*, in: Castendyk/Dommering/Scheuer, European Media Law, marginal ref. 5.

39) Cf. section 5 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement – RStV).

40) See Pascal Kamina's article in this publication.

41) Art. 4 para. 1 TWFD states: "Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria."

42) Art. 5 TWFD states: "Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, or alternatively, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to broadcasters' informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria; it must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five years of their production."

43) Cf. Recitals 1, 4, 5, 8 and 48 AVMSD. The speaker went in particular into Recital 48 of the AVMSD.

44) Mr Kamina referred to a study by the companies Attentional, Rambøll Management, Oliver & Ohlbaum Associates and Headway International of 15 October 2008 on behalf of the European Commission: *Study on the application of measures concerning the promotion of distribution and production of European works in audiovisual media services, including television programmes and non-linear services*, available at: http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm

Mr Kamina then described the individual requirements of Art. 3i AVMSD. The "media service providers" mentioned in Art. 3i para. 1 could only be those that also bore "editorial responsibility" within the meaning of Art. 1(c) AVMSD. It was up to the member states to define the term in more detail. He also discussed the phrase "where practicable and by appropriate means" in Art. 3i para. 1 AVMSD, which had been adopted from Arts. 4 and 5 TWFD, and examined the "promotion" requirement, pointing out that the promotion of European works could also refer to financial contribution models other than those mentioned in Art. 3i para. 1 AVMSD.

Finally, Mr Kamina described the situation in France and the progress made there on transposing the Directive. The existing "video tax" was being extended to cover VOD services.[45] In order to promote French works, producers and distributors of on-demand offerings had also entered into self-binding agreements relating, inter alia, to streaming and downloading.[46] Furthermore, on 5 March 2009 France had enacted a law that created a basis for the adoption of provisions to transpose the AVMSD.[47]

Amedeo Arena added a number of comments on the compatibility of Art. 3i AVMSD with WTO rules, especially the GATT 1947/1994.[48] Various conflict scenarios were conceivable. For example, the introduction of quotas for non-linear services might breach the provisions of the GATT 1947/1994. The exception provided for by Art. IV(a) GATT 1947/1994 would probably not provide any assistance as it referred to release windows in the case of cinema films.

He then discussed the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 18 March 2007.[49] Inter alia, it provided in its Art. 7 that the parties could take measures for the promotion of cultural expressions. According to Art. 20 para. 1 (b), when interpreting and applying the other treaties to which they were parties, the parties were required to take into account the relevant provisions of the Convention. The GATT agreements might therefore be interpreted according to the UNESCO Convention. In practice, that would mean that the member states could refer to that Convention when implementing measures for the "promotion of European works" within the meaning of Art. 3i AVMSD and that there would be no breach of the GATT 1947/1994 rules. Mr Arena also reminded the participants of the UTECA case and the reference made in it to the UNESCO Convention.[50] A participant pointed out that American lawyers attached little if any importance to the declarations in that Convention concerning intentions and objectives.

The ensuing discussion concerned the provision relating to the "promotion" of European works in Art. 3i AVMSD. The majority of participants appeared to be certain that Art. 3i AVMSD gives the member states considerable room for manoeuvre when transposing its provisions. It was pointed out that the rule could even justify the member states taking no action at all. Art. 3i AVMSD only stated that the member states should ensure the promotion "where practicable and by appropriate means". One participant was of the opinion that that provision was tantamount to an opt-out.

The discussion then turned to the progress made by member states in transposing Art. 3i AVMSD: For example, the (as yet unpublished) draft law in the Netherlands neither provided for any rules concerning VOD nor contained any explicit reference to the "promotion of European works". That contrasted with France, where, as already stated, rules on promoting national works were to be introduced. In the French-speaking part of Belgium, too, that rule had been hotly debated. The current draft law[51] essentially adopted the wording of Recital 48 of the AVMSD. In addition, providers of non-linear media services in Belgium's French-speaking Community had to ensure that particular emphasis was placed on the European works contained in their catalogue by giving prominence to the

45) Copyright holders accordingly receive payment for the VOD exploitation of their works. Cf. *Current issues under French law* in "Legal Aspects of Video on Demand", IRIS Special, European Audiovisual Observatory 2007, p. 96.
46) Cf. The Inter-professional memorandum of understanding on cinema on demand *(Protocole d'accord interprofessionnel sur le cinéma à la demande)* of 20 December 2005 (see also IRIS 2006-3: 14, available at: http://merlin.obs.coe.int/iris/2006/3/article24.en.html).
47) Law No. 2009-258 of 5 March 2009 on audiovisual communication and the new public television services is available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020352071&categorieLien=id
48) See Amedeo Arena's article in this publication.
49) The convention is available at: http://unesdoc.unesco.org/images/0014/001429/142919e.pdf
50) ECJ judgment of 5 March 2009, Case C-222/07, UTECA v. Administración General del Estado. The judgment is available at: http://curia.europa.eu/
51) This is available at: http://staatsbladclip.zita.be/moniteur/lois/2009/03/18/loi-2009029140.html

list of European works available, through an attractive presentation of such works.[52] It could therefore be expected that the regulatory authority would in future be asked, for example by a media service provider's lawyer, what constituted an "attractive presentation".

Finally, the participants discussed the question of what form the "support" for European works should take. As the third sentence of Recital 48 of the AVMSD only mentioned the "financial contribution" as one example of support, the vast majority of participants in the discussion were of the opinion that any support measure could be chosen. When transposing the Directive, the member states were thus free to choose any means they wished.

The participants also agreed that the actual difficulty in transposing these provisions lay in the wording of the AVMSD, because it would be hard for member states to put the word "promote" in Art. 3i AVMSD into a concrete legal form. For that reason, it was not possible to provide a final assessment of the state of progress regarding the transposition in the member states.

4. The protection of minors in the United Kingdom and the AVMSD: a choice between traditional regulation, co-regulation and self-regulation

In the final contribution on the various regulatory options available when transposing the Directive, Lorna Woods[53] described the protection of young people against harmful media content in the United Kingdom and discussed the various players responsible.[54] She then examined the different approaches to ensure that protection, beginning with the system of self-regulation and leading on to co-regulation and the system of traditional comprehensive regulation.

She mentioned the advertising of junk food (products high in fat, salt or sugar – so-called HFSS products), because minors were a prime marketing target for the food industry. She described ways of getting to grips with this problem and also provided information on possible solutions in connection with the advertising of alcohol, which, she pointed out, also played a big role in the UK.

Ms Woods then presented the initial results of the public consultation[55] on the implementation of the AVMSD in the UK.[56] Discussions were taking place on the introduction of a single regulatory model and the rules on advertising laid down by the AVMSD (with the possible exception of product placement). However, the focus had not really been placed on the protection of minors, which was a big problem as there was a lack of certainty with regard to dealing with that subject when transposing the provisions of the AVMSD. It was crucial to find a proper regulatory system to ensure the protection of young people in the UK against harmful media content.

In the ensuing discussion, a participant first of all asked about the status quo regarding measures to ensure "media literacy" in the member states. In this connection, it was pointed out that, although the AVMSD referred to media literacy,[57] it had deliberately not been made a subject for discussion by the workshop.

The participants then turned to the question of how providers of on-demand services should draw attention to content that might have an undesirable influence on young people, in order to meet the requirements of the AVMSD. Was it sufficient to state before such content was accessed that it was only available to adults or did the provider have to check whether the person concerned was 18 years of age or more? In a number of member states, the law already required such proof of age and that had resulted in chat-room services being closed down. In France, the CSA had laid down the requirement for providers to designate any content liable to have an undesirable influence on young people. In this

52) Art. 47 bis: *"La RTBF et les éditeurs de services doivent dans leurs services télévisuels non linéaires assurer une mise en valeur particulière des œuvres européennes comprises dans leur catalogue, en ce compris des œuvres originales d'auteurs relevant de la Communauté française, en mettant en évidence, par une présentation attrayante, la liste des œuvres européennes disponibles."*

53) See Lorna Woods' article in this publication.

54) British Broadcasting Corporation (BBC), Office of Communications (Ofcom), Advertising Standards Authority (ASA), British Board of Film Classification (BBFC), etc.

55) See also DCMS, *Consultation on Proposals for the Implementation of the EU Audiovisual Media Services Directive in the United Kingdom: Summary of Responses*, March 2009, available at: http://www.dcms.gov.uk/images/publications/summary_report.pdf

56) See the statement by Andy Burnham, Secretary of State, available at: http://www.culture.gov.uk/reference_library/minister_speeches/5932.aspx

57) See Art. 26 AVMSD.

connection, a number of questions about data protection were asked. Owing to the requirement to provide proof of age, some companies had consulted users' driving licence or social security files to establish their age, which was naturally not the "right way to go about things".

A participant then provided the example of so-called "text message bombs", which had turned out to be a double-edged sword: after a murder in the Netherlands, the police had sent a text message to all the mobile telephones in the immediate vicinity of the crime asking whether anyone had "witnessed the murder". Minors had also received those messages and had understandably been shocked. All the participants in the discussion therefore agreed that text messages like that could have an adverse effect on the development of young people and that, in order to avoid that happening, technical means should be employed before sending the text message to establish whether the number of the mobile telephone belonged to a minor.

In Italy, according to information provided by one of the participants, there had been two initiatives in connection with the protection of minors but they had not been particularly effective. First of all, there had been the self-regulatory measure "Minors and Mobiles", which had involved the Italian mobile telephone providers satisfying themselves that their customers were not underage by consulting the billing data. However, very few providers had adopted the system, with the result that the initiative had been a failure. The second initiative had been entitled "Internet and Minors" and had involved providers having to label their offerings according to their content. That system had not been effective because it had only concerned national Internet providers, whereas foreign websites had not contained the relevant information on the nature of the content.[58]

Finally, the participants discussed existing regulatory models. Their attention was initially directed to Art. 3e para. 2 AVMSD and its genesis. It had originally been intended to make the rule more binding by using the word "ensure", but that had been toned down in the deliberations on the AVMSD, and the present version merely stated that the member states and the Commission should "encourage the media service providers ...". One participant thought that possible self-regulation models were not particularly effective in the case of countries like Bulgaria, for instance, because, in contrast to other member states, such as the United Kingdom, those countries lacked the relevant self-regulation experience. The participants agreed that it was hard in some cases to draw a distinction between co- and self-regulation,[59] and that remained the case despite the study conducted in the UK[60] containing criteria for separating the two models. It was also clear that, although self-regulation was in principle a good model, total self-regulation was not advisable in the context of protecting young people against harmful media content. According to the wording of the Directive, as well as in the opinion of the Commission, the *sole* use of self-regulatory models did not meet the requirements of the AVMSD. Rather, the co-regulation system was a more suitable method for the member states to implement the requirements of the AVMSD in the appropriate way (unless they resorted to self-regulation to complement traditional state regulation).

IV. The transposition of the AVMSD from the point of view of the legislator and the regulatory authorities

1. Application: jurisdiction and co-operation

Tom Krieps[61] discussed how the Luxembourg regulatory authority *Conseil National des Programmes* (CNP) viewed Art. 2 AVMSD. At the beginning of his contribution, he established that the *Al Manar* case[62] had initiated a paradigm change in the case of programmes originating from third states. Firstly, the change in the jurisdiction criteria laid down in Art. 2 TWFD would lead to an easing of the burden on countries in which satellite operators were established (France, Luxemburg). Secondly, the member

58) Cf. the HBI/EMR study, Annex 5: *Reports on possible co-operative regulatory systems, Study on Co-Regulation Measures in the Media Sector,* Study for the European Commission, Directorate Information Society and Media, Unit A1 Audiovisual and Media Policies, June 2006, Country Report Italy, pp. 398 ff., available at: http://ec.europa.eu/avpolicy/docs/library/studies/coregul/annex5.pdf

59) One participant pointed out that even bodies in the UK were unable to clearly determine whether they were a self- or co-regulatory authority.

60) See fn. 55.

61) See Tom Krieps' article in this publication.

62) Judgment of the French *Conseil d'Etat* of 13 December 2004, Case no. 274757; see IRIS 2005-2: 12, available at: http://merlin.obs.coe.int/iris/2005/2/article21.en.html

states' regulatory bodies had decided to work together more closely on issues of regulation, a development which he emphasised as being of particular importance.

Before discussing the question of determining Luxembourg's jurisdiction for cross-border audiovisual media services, Mr Krieps mentioned the results of the latest case involving RTL.[63] It was only not a problem to establish a member state's jurisdiction over a media service provider when the matter was clear-cut.[64] He then discussed the Luxembourg based satellite operator SES Astra, which registered all channels originating from third states and informed the Luxembourg broadcasting regulatory authority[65] of the total number. The service providers using its satellites had to inform SES Astra from which member state(s) they operated.

Mr Krieps then addressed two problems that arose in the case of transmissions via SES Astra: when capacities were sold on, the satellite operator sometimes did not know the identity of the actual user as no direct contract was concluded with the latter. Consequently, the "actual" legal entity responsible for a given channel could not always be established beyond any doubt. Furthermore, following the introduction of multiplex technology it was now possible to transmit a number of channels on the same frequency. If SES Astra were to switch off complete transponders on which prohibited content was distributed, that would also affect the other providers using the same frequency, which could lead to considerable legal problems.

Mr Krieps finally discussed the provision in Art. 2 para. 4 AVMSD. The question of which member state had jurisdiction over a media service provider depended on the location of the registered office of the satellite ground station from which the uplink signal[66] was transmitted. The use of a specific frequency by the television broadcaster was no longer the decisive factor.[67] Despite that change, there might, in his opinion, still be a number of problems. Although it was forbidden for SES Astra to transmit programmes with an uplink from a third state, they would be transmitted via SES Astra frequencies when the media service providers had received a licence from another member state in Europe.[68] Moreover, there might be a "cat-and-mouse game" if an uplink were closed down due to the distribution of prohibited content but the provider simply changed member state in order to use another uplink at a new location. A number of media service providers could thus select the most favourable place for them, so there needed to be more intensive contacts between the member states with regard to the existing uplink facilities so as to be able to implement the requirements of the AVMSD effectively.

In the ensuing discussion, the majority of participants stressed how important it was for the location of the uplink to be monitored by the authorities responsible. The monitoring exercise should be optimised through closer co-operation between the member states. However, attention was also drawn to the difficulties faced by authorities in identifying "black sheep" that simply switched states after their uplink facility had been closed down. In order to solve that problem, the satellite operators could make the necessary information available to the regulatory authorities about the uplink companies using their capacities and the media services distributed via them. Firstly, the satellite operators were aware from their technical installations of where the uplink was located, and secondly that knowledge emerged from the terms and conditions of the contract. However, it was questionable whether the satellite operators would be prepared to allow that information to be consulted.

A number of participants then discussed the problem of also identifying individual channels when multiplexing was used. One participant suggested that the regulatory authorities should be given access to the satellite operators' databases containing details of frequency assignment. It had become

63) Judgment of the Belgian *Conseil d'État* of 15 January 2009, Case no. 189.503; IRIS 2009-4: 5, available at: http://merlin.obs.coe.int/iris/2009/4/article5.en.html
64) See the establishment criteria in Art. 2 para. 3 (a) and (b) AVMSD: Where is the head office? Where are the editorial decisions taken? Where is a "significant part of the workforce" located?
65) *Service des Médias et des Communications* (SMC).
66) This means the transmission of the signals from the ground station to the satellite.
67) Art. 2 para. 4 TWFD states: "Broadcasters to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:
(a) they use a frequency granted by that Member State;
(b) although they do not use a frequency granted by a Member State they do use a satellite capacity appertaining to that Member State;
(c) although they use neither a frequency granted by a Member State nor a satellite capacity appertaining to a Member State they do use a satellite up-link situated in that Member State."
68) That was, for example, the case with programmes of the station Al Jazeera.

more difficult for regulatory authorities to keep databases up to date. For example, in the case of SES Astra there was a list dating from 2007 but it was hard to obtain current data owing to the speed of developments and to the satellite operators' less than co-operative attitude.

A participant in the discussion stressed that there was already good co-operation between the member states' regulatory authorities, for example between the French CSA and its counterpart in Belgium's French-speaking Community. On the other hand, co-operation with the Luxembourgish regulatory authority, the *Conseil National des Programmes* (CNP) was more difficult.

Another important aspect pointed out by the participants was the fact that VOD providers from third states might not be covered by Art. 2 AVMSD, so that jurisdiction for those on-demand services could not be established with complete certainty. However, that had to be accepted, as did the danger of media service providers leaving Europe because they did not agree with the provisions of Art. 2 AVMSD. Nonetheless, there was an incentive for providers from third states to transfer their registered office to Europe and thus submit to the jurisdiction of a member state, because they would otherwise potentially subject themselves to 27 different legal systems. The country of origin principle would either not be applicable at all or at any rate not to the extent provided for by the AVMSD.

A participant spoke about the experience of co-operation in the Baltic states.[69] Twice a year, representatives of the Estonian, Latvian and Lithuanian regulatory authorities met for an exchange of information.

The problems involved in determining a media service provider's place of establishment were discussed with reference to the example of the First Baltic Channel (Pirmais Baltijas Kanāls), 95% of the main programmes of which, it was pointed out, consist of Russian state television. The station used Riga as the location of its uplink but it was also registered in London, where it had received a licence from Ofcom in 2006. However, the majority of its staff were located in Riga. Advertising programmes, on the other hand, were produced in the individual Baltic states and inserted from there into the uplink signal. Given those facts, it was very hard to determine where the "editorial decisions" were taken and which state had jurisdiction.

2. Restriction on the free movement of services in the case of hate speech, violations of human dignity and harmful content

Martine Coquet[70] first of all provided in her presentation an overview of the provisions of the AVMSD that prohibit hate speech and content detrimental to the development of minors.[71] Those provisions, she said, meant at the same time a restriction on the free movement of audiovisual media services. She discussed the TWFD and compared its provisions to those of the AVMSD. It was important to note that interference with the free movement of television programmes was subject to different conditions from those applicable to on-demand services (cf. Art. 2a para. 2 and 4 AVMSD). In the case of the former, the member states could only "provisionally" enact their own provisions in order to deviate from the basically unrestricted guarantee of the free reception of audiovisual media services, whereas in the case of the latter they were permitted to deviate permanently from the obligation to provide that guarantee.

Ms Coquet then discussed the situation in France, describing the existing legal framework (especially sections 1, 3 and 15 of the Law of 30 September 1986 on freedom of communication, governing the protection of human dignity, the ban on hate speech and the protection of minors)[72] and the amendments made necessary by the AVMSD.

She referred to the approach currently employed by the CSA in dealing with prohibited programme content[73] and mentioned several examples of measures taken by the CSA in the past few years.[74] Most cases involved Arab stations that, in the CSA's opinion, were guilty of incitement to hatred.

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69) For a detailed account of the situation in the Baltic states, see Andris Mellakauls' article in this publication.
70) See Martine Coquet's article in this publication.
71) Cf. Arts. 3b and 22 AVMSD.
72) Law no. 86-1067 of 30 September 1986 on freedom of communication (*Loi Léotard*). The text is available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930&dateTexte=20090423
73) It first issues a warning, then a caution, followed by a ban. Finally, the matter is brought before the Conseil d´État.
74) She mentioned for example the *Al Manar* case in which the Conseil d´État was asked for a ruling (cf. fn. 62). By contrast, in the *Al Aqsa TV* case, only a warning was issued to Eutelsat not to transmit the programme any longer, and the satellite operator complied.

Mention was made of the ban applying in France on producing television programmes for children under three. However, the ban did not take effect if media service providers acquired licences from other member states, and she mentioned Ofcom as one of the most relevant licensing authorities in this connection.

Problems in establishing jurisdiction had arisen in France too. For example the channel X Stream had distributed its programmes via Eutelsat but the station's head office had been located in Panama.

Finally, Ms Coquet pointed out that the AVMSD did not provide an answer to the question of what regulatory authority was responsible for considering programmes distributed by broadcasters via satellite operators outside Europe. It was also often difficult to determine the precise addresses of broadcasters, especially so-called pirate stations. It would probably be necessary to find solutions at the national level in those cases.

In the ensuing discussion, a participant found it incomprehensible that there was an absolute ban in France on television programmes for children under three. He pointed out that Germany had the children's channel "Kinderkanal", the state funding of which had been approved by the Commission in 1999[75] and which possessed a certain quality level. Logically, France would also have to impose the ban on Internet providers since children's programmes were now available online. The answer to the question was that after consulting with psychologists the CSA had reached the conclusion that television was inappropriate for children under three. In its views, children should experience the world around them without television, so the ban was maintained. Furthermore, it was necessary for regulations to be adopted with regard to online services too. It was probably not possible to prevent programmes from being transmitted from other member states but in those cases the CSA formally enquired whether the providers could at least transmit the programmes with a warning logo.

Another subject for discussion consisted of the numerous complaints addressed to the Commission concerning the pornographic content of programmes. The participants agreed that the Commission could not be the first body asked to deal with such complaints. A participant pointed out that member states' citizens should be told to contact their national regulatory authorities in the first instance. The Commission could perhaps set up a virtual complaints website (as a one stop shop) for EU citizens. The majority of the participants saw a need for greater co-operation between the member states' regulatory authorities.

Another subject of discussion was the difficulty in establishing a programme provider's registered office or address, which raised the question of the practical implementation of the obligations arising under Art. 3a AVMSD with regard to identifying the provider. The participants mentioned various possible solutions: firstly, the provider's exact address could normally be found quite simply by using a search engine such as Google or via an online community like Facebook;[76] secondly, the satellite operators SES Astra and Eutelsat could be compelled to keep a register. As already touched upon in the previous discussion, the operators should make a constantly updated list of programmes and their providers available to the regulatory authorities. An important argument here was that this obligation to keep a register had already borne fruit in the case of telecommunications companies.[77] One participant, however, was critical of this proposal. In his opinion, after receiving a caution, the programme providers could simply change their name or the location of the uplink. Despite the frequency change, it was still clear from the nature of the television programmes that they were from the same provider. The proposal was also made to introduce an obligation for providers to register with the regulatory authorities, who could then take action in the case of dubious content.

Finally, the general opinion was that transparency was particularly important in the audiovisual sector but that it could currently not be fully achieved, so there was still a need for further discussion on how to ensure sufficient transparency.

75) The relevant press release of the Commission of 24 February 1999 is available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/99/132&format=HTML&aged=0&language=DE&guiLanguage=en

76) A participant pointed out in this connection that American tax authorities had already been successful using this method.

77) The participant referred here to the transparency requirement in Art. 21 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Services Directive), OJ. L 108 of 24 April 2002, p. 51, the implementation of which requirement had to be assured by the regulatory authorities. For example, pursuant to section 66h para. 2 of the German Telecommunications Act (*Telekommunikationsgesetz*) the Federal Network Agency (*Bundesnetzagentur*) collected all 0900 premium rate numbers in a database and published them on the Internet.

3. Regulation by national regulatory authorities: the example of commercial communication

Margaret Tumelty[78] described the Irish approach to the transposition of the rules of the AVMSD on commercial communication.[79] She said it was planned to have a bill ready by the end of February 2009 and then discussed the individual arrangements in Ireland (*inter alia*, with regard to the protection of minors in the case of advertising and to access to on-demand audiovisual media services). The starting-point was the Broadcasting Act 2001[80] and the two main sets of rules on advertising based on it, namely the Children's Advertising Code 2005[81] and the BCI General Advertising Code 2007.[82] Ms Tumelty described the objectives and specific features of each of these two sources of law. In particular, food advertising was subject to strict controls (additives such as sugar, etc. had to be specifically mentioned).

She then described the process that had led to the two sets of rules being drawn up. It had consisted of a number of stages. In the first stage, a draft had been produced with definitions and general structures. In the second stage, the draft had been presented to the public and various interest groups had been able to make suggestions and voice objections. The draft had then been completed in the third phase on the basis of the results obtained. The advantage of that approach was that the representatives of the various positions had "calmed down" in the course of the procedure, the discussions had become much more dispassionate and most misunderstandings had been eliminated in advance. Overall, the approach had made it possible to bring about a stronger feeling of commitment to the provisions ultimately enacted.

Ms Tumelty then discussed the individual provisions of the AVMSD. She pointed out which ones still had to be transposed in Ireland, which were already covered by the existing rules and which still had to be specified. For example, the Irish bill contained provisions intended to transpose Arts. 3e, 3g and 3h AVMSD as well as Art. 10 AVMSD into national law. With regard to on-demand audiovisual services, there had so far only been a number of discussions, and developments on the subject were eagerly awaited. Nor had any steps yet been taken in Ireland with regard to product placement.

Finally, Ms Tumelty made the critical remark that it was *de facto* not always possible to determine who was in charge of policy-making – the legislature or, rather, the regulatory authorities.

The ensuing discussion was initially dominated by the question of whether it was a good thing that the regulatory authorities might play a key role in the area of media policy, because it was considered problematic if the legislature left them to take decisions that it could take itself by enacting legal provisions. For example, a participant asked why advertising harmful to minors was not simply prohibited by law in Ireland or, indeed, in other states. At any rate, a critical view should be taken of an approach that gave the regulatory authorities the power to decide what content was harmful. In response, it was pointed out that a legal ban would only make the product seem "important". Secondary regulation was therefore better. Another solution was provided by contractual commitments or self-regulatory agreements entered into by the industry, an approach that was also to be preferred over a legal ban. The participants then discussed the situation in individual member states. For example, the United Kingdom had a "traffic light labelling" system, which involved the food industry using traffic light colours for its products in commercials.[83]

In France, it was generally traditional for the legislature not to specify every detail in matters to do with the regulation of broadcasting since that provided more flexibility for precise requirements to be determined by the CSA. The same applied to Germany. By contrast, the Hungarian regulatory authority had no power to issue rules on implementation. In Belgium, it was also the case that the regulatory authority had no legislative powers under Belgian constitutional law and was thus unable to adopt any regulatory measures either. The legislative and regulatory powers were vested in the parliament. For example, the parliament had passed a Code of Conduct.[84] Nor was it right to allow

78) See Margaret Tumelty's article in this publication.
79) See Art. 3e para. 1, Arts. 3g, 3h, 10 and 15 AVMSD.
80) Available at: http://www.irishstatutebook.ie/2001/en/act/pub/0004/index.html
81) Available at: http://www.bci.ie/documents/childrens_code_oct_04.pdf
82) Available at: http://www.bci.ie/documents/BCI_gen_ad_code_mar_07.pdf
83) See http://www.eatwell.gov.uk/foodlabels/trafficlights/
84) An overview of the various regulations in Belgium concerning advertising for children is available at: http://www.obs.coe.int/online_publication/reports/advertising_children_europe_be.pdf

regulatory authorities too much leeway for making decisions since that would mainly have the drawback that the parliament would not carry out the statutory task for which it was paid. If decisions were delegated to regulatory authorities, which needed financial and human resources for the purpose, then it was impossible to understand why additional funds were allocated to the legislature. Another view was that various models existed owing to the cultural differences in the member states. Nor was it necessarily a drawback if the parliament took a back seat and left it to the regulatory authorities to flesh out general provisions. It would not involve wasting taxpayers' money either, for the legislature made its own contribution by specifying and enacting the substance of the rules by which the regulatory authorities were assigned their tasks.

A discussion then developed on the additional advantages that making use of regulatory authorities in the media field was presumed to have. A participant pointed out the fact that it was not clear why the aims of a free system of communication were better served by establishing such authorities than by entrusting the relevant tasks to the usual executive bodies. It was said in reply that the purpose of the dispersal of effort based on the use of regulatory authorities was to protect freedom of expression and freedom of the media, especially against state influence on the communication process. In order also to protect the independence of the audiovisual media, it was preferable to employ models that ensured that the state remained aloof as far as possible. Setting up independent regulatory authorities provided a safeguard against the danger of direct influence being exercised on the content of communication media since state power in the form of the parliament and government was restricted. The legislature could not only lay down requirements concerning transparency and the authorities' sphere of responsibility but also the basic procedures and criteria according to which those authorities had to work. The legality of their actions was normally examined by the courts, and was therefore subject to public scrutiny.

A number of participants emphasised that the AVMSD, in contrast to other directives, provided considerable scope for its transposition, especially with regard to who should be given responsibility for regulatory matters after the initial transposition . It was first necessary to develop a feeling for the areas for which regulatory authorities were needed in order to carry out monitoring and oversight. A balance therefore had to be struck between the aims to be achieved by the national regulatory authorities and the system desired for Europe as a whole. A solution might lie in involving the national regulatory authorities more in the European decision-making process. It would also be possible to establish a system that made the players responsible for European legislation aware of the specific features (based on cultural diversity) of the audiovisual media in the member states. A possible platform for that was the contact committee.

Finally, the participants discussed whether the member states should provide the regulatory authorities with more financial and human resources and whether that was likely to happen. Denmark had adopted a wait-and-see policy as it was first necessary to gather information, but more money was unlikely to be forthcoming. In France, the CSA had asked for more staff. In the Netherlands, there would be no rise in the budget for the media regulator. In the Baltic states, too, there would be no increase as funds were tied to the income of the television broadcasters. In Germany, a structural reform of media regulation was planned and should be completed by the end of 2013, so time would tell whether more staff were needed. The British regulatory authority Ofcom, which was also responsible for regulating the telecommunications sector, had approx. 1,800 staff and there would probably be no increase in personnel or in the budget. In Belgium, too, there would be no change in the budget, but that could be due to the fact that there had been a 16% increase in the budget in the last few years.

4. Monitoring of member states' compliance with the AVMSD: national regulatory and co-regulatory authorities

Roberto Mastroianni[85] first of all discussed in his contribution the correct approach to transposing the Directive according to the rules of Art. 10 para. 1 EC in conjunction with Art. 249 para. 3 EC. Art. 10 para. 1 EC established the principle of "effective co-operation" among the member states and between the member states and the Commission. He also explained the principles of "effective co-operation" pursuant to Art. 23b AVMSD and "mutual recognition" in accordance with Arts. 2, 2a and

85) See Roberto Mastroianni's article in this publication.

3 AVMSD. He pointed out that there were no provisions on sanctions in the event of a lack of co-operation by the regulatory authorities. In particular, proceedings concerning a breach of the treaty pursuant to Art. 226 EC could not constitute a means of enforcement. Despite the lack of possible sanctions, an attempt should, however, be made to observe the principle of mutual assistance in order to prevent potential conflicts between the member states in the case of matters of a transfrontier nature.

Mr Mastroianni then considered the European Convention on Transfrontier Television (ECTT).[86] He examined Art. 19 ECTT in detail and the principle of "mutual assistance" enshrined in it. He also discussed the principle of "close co-operation" laid down in Art. 23b AVMSD, pointing out that that article was a typical compromise provision that would have no far-reaching legal impact. He considered the *Al Manar* case[87] and said it was important to set up a database for the dissemination of information.

He posed the question of whether there should be a new European authority whose task would be to monitor co-operation between the member states' regulatory authorities. However, that proposal had failed to gain acceptance in the negotiations because the majority of member states had been against it. More emphasis should be placed on increased co-operation between the member states.

Finally, Mr Mastroianni discussed the "independent regulatory bodies" referred to in Art. 23b AVMSD. What did "independent" mean? It could be taken to signify both "independent of state influence" and "independent of commercial influence" or even independent in terms of structure, staff or financial resources. Those questions would have to be decided by the ECJ. He referred to a case pending with the ECJ (Case C-518/07) on the question of the independence of a national supervisory authority.[88]

At the beginning of the discussion a participant emphasised that the terms "independence", "monitoring" and "observance" stressed by Mr Mastroianni were important concepts in the AVMSD. He hoped that Art. 23b AVMSD would not suffer the same fate as Art. 3 para. 3 TWFD.[89] It was, however, difficult to decide what the "independence" of the regulatory bodies meant. Reference was once again made to the aforementioned case pending before the ECJ.

Another participant discussed the need to give the term "independent regulatory bodies" an autonomous meaning, because despite the proposal to delete the term[90] it was still used by the AVMSD (for example, in Recitals 65 and 66 and Art. 23b).

The participants had different interpretations of the term "independent" but they agreed that it should be taken to refer to economic independence, structural independence, independence in terms of staff and, especially, independence from the state. They then took a vote on what member states in their opinion had "independent" regulatory authorities. The result showed that the regulatory bodies in Belgium, Denmark, Estonia, Germany, Greece, Hungary, Ireland, Lithuania, and the United Kingdom were considered to be independent, whereas those in Luxembourg, Italy and Spain, on account of being state-run, could not be regarded as independent. It was particularly interesting in this connection that participants from one and the same member state did not have the same opinion about the independence of the regulatory authority.

Some participants held the view that the national regulatory authorities could not be clearly assigned to a category in the system of the separation of powers, that is to say they could neither be classified as part of the judicial branch nor the executive or legislative branch. In addition, there were also substantial differences in the powers of the national authorities, which naturally led to many

86) See fn. 28.
87) See fn. 62.
88) ECJ decision of 14 October 2008 in Case C-518/07, Commission v. Germany, available at: http://curia.europa.eu/
89) Cf. Mastroianni, R., *Rechtsschutzmöglichkeiten des Verbrauchers*, *EMR Schriftenreihe*, Band 22, p. 53; Scheuer, A., *Commentary to Article 3 TWFD*, in: Castendyk/Dommering/Scheuer, European Media Law, marginal refs. 63 ff. and *Commentary to Article* 3 AVMSD, op. cit., marginal ref. 6.
90) A good overview of the "lengthy" decision-making process is provided by Scheuer A./Palzer C., *Commentary to Article 23b AVMSD*, in: Castendyk/Dommering/Scheuer, European Media Law, marginal refs. 2 ff. Cf. also Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and Committee of the Regions of 14 December 1999, Principles and guidelines for the Community's audiovisual policy in the digital age, COM(1999) 657 final, p. 13, available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0657:FIN:EN:PDF

different problems.

One opinion held by participants was that it was not necessary for there to be "independence" to achieve the aim of co-operation between the member states. For example, Germany had voted against the inclusion of the word "independent" in Art. 23b AVMSD. It had not done that because it rejected the reference to "independent regulatory bodies" but, rather, with the intention of ensuring respect for the principle of subsidiarity.[91]

At any rate, most participants seemed convinced that Art. 23b AVMSD could be interpreted in various ways as the wording of the rule did not provide a precise definition. As a minimum requirement, the "functional" independence of the regulatory authorities was presumably sufficient to ensure the proper transposition of the Directive.

V. Conclusion

The workshop examined different areas of the AVMSD. The participants first discussed a general basic understanding of the Directive before exchanging views on specifically regulated matters such as product placement or short reporting rights, as well as the tasks of the national regulatory authorities. The participants reported on the first results of the transposition process in the member states and drew attention to various problem areas that have emerged during this process. It is likely that VOD, product placement and the protection of minors – all areas affected by the Directive – will become particularly important for the transposition and result in new national provisions governing them. There will also be increased co-operation between the regulatory authorities, which could be given extended powers in the member states in the course of the transposition.

91) See Art. 5 para. 2 EC.

The general impact of key notions of the AVMS Directive and their definitions on the national framework

(Arts. 1, 2 and 3 of the Directive)

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Directive 2007/65/EC,[2] adopted by the Council and the Parliament on 11 December 2007, updated the "Television Without Frontiers" Directive which, at the same time, became the "Audiovisual Media Services Directive".[3] Required to transpose it into their national law by 19 December 2009, the member states have good reason to assess carefully how much room for manoeuvre they have as they do so: do they have to implement the provisions of the directive literally, particularly the concepts on which it is based, or do they enjoy a large degree of freedom in terms of the wording of their national rules and the selection of the key notions that they contain? These questions, especially the question of the impact of the key notions of the AVMS Directive on national transposition measures, are addressed by the current article (III). First, however, it is necessary to explain the general framework for the transposition of the AVMS Directive (I) and to identify the different notions contained in the Directive that may be considered key concepts (II).

I. Legal framework for the transposition of the AVMS Directive

Art. 249 of the Treaty establishing the European Community stipulates that directives "shall be binding, as to the result to be achieved, upon each Member State to which [they are] addressed, but shall leave to the national authorities the choice of form and methods". This provision reflects the institutional and procedural autonomy granted to the member states in the context of their transposition measures. In principle, the member states enjoy a certain degree of autonomy in the way they ensure that a directive is fully implemented (1.). However, this autonomy is restricted (1.).

1. Autonomy of member states

All directives give the member states a certain amount of discretion. Unlike regulations, which are general acts that are binding in their entirety, a directive is an individual act that binds the member states in terms of the result to be achieved, but allows them to choose what form and methods to use.[4] Although the member states are all under the same obligations set out in a directive, the transposition measures they adopt can therefore vary quite considerably. In particular, they can choose whether to transpose the provisions word for word or to adapt them to their national legal system. According to

1) Head of Sector for Implementation of Regulatory Framework, Audiovisual and Media Policy Unit, Directorate General for Information Society and Media. The opinions expressed in this article are those of its author; they do not represent the views of the Commission and do not bind the Commission in any way.
2) OJ L 332, 18 December 2007, pp. 27–45.
3) Unofficial consolidated version of the Directive available at: http://ec.europa.eu/avpolicy/reg/avms/index_en.htm
4) Denys Simon, *Le système juridique communautaire*, Presses Universitaires de France, 2nd edition, 1998, pp. 214-230.

a general report published at the end of a colloquium organised by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, different countries have different attitudes in this regard: some member states, such as Italy, tend to opt for literal transposition, while others, such as Germany, prefer to adapt the provisions so that they fit in better with their national legal system.[5] The report explains, however, that in spite of these tendencies that can be observed, member states' choice of transposition methods depends on a number of factors, particularly the "area at issue".[6] Transposition measures may emanate from the federal state or a federate entity and may be adopted by the government or parliament. It is up to the member state to fulfil its responsibilities in this respect, provided that the decision-making process is in conformity with the constitutional rules in force.[7]

Furthermore, the Court of Justice of the European Communities (ECJ) explained that, in some circumstances, specific transposition measures are unnecessary: "according to the case-law of the Court [...], the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may [...] be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner". In accordance with their duty of loyalty under Art. 10 of the Treaty, member states which assert the existence of a legal context sufficient to meet the objectives of the directive must show that all the provisions of the directive have already been implemented, that the measures taken in this regard are sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts.[8]

2. Limits on the autonomy of member states

The freedom enjoyed by the member states is limited both by general EC law and by the way in which the various directives describe the obligations on the member states.

Under general EC law, national transposition measures adopted by the member states must be binding and sufficiently stable "to ensure that the directive is fully effective, in accordance with the objective which it pursues".[9] They must make the legal situation precise and clear, make individuals fully aware of their rights and enable them to rely on them, where appropriate, before the national courts. These national measures therefore require a certain level of publicity and stability.[10] Mere circulars or administrative practices do not meet these criteria, since they are too unstable.[11] Furthermore, under the principle of equipollence, transposition measures should have the same legal force as the type of provisions that normally govern the area concerned.[12] National transposition measures are therefore significantly limited by the Treaty and by ECJ case-law. As mentioned above, it is possible for a member state, faced with a new directive, to try to prove that national measures already in force are fully adequate and to refrain from adopting specific transposition measures. However, bearing in mind all the conditions laid down by the ECJ and the fact that the burden of proof falls on the member state, this is a very tricky task. The ECJ often rules, in such circumstances, that the existing national measures referred to by a member state are unsatisfactory, either because they do not cover all the objectives of the directive and are therefore incomplete, or because they are based on an administrative practice that is considered unstable.[13]

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05) See general report, *The quality of European legislation and its implementation and application in the national legal order,* 19th colloquium, The Hague, 14 and 15 June 2004, see in particular pp. 31-52; available at: http://www.juradmin.eu/colloquia/2004/gen_report_en.pdf
06) Idem, p. 32.
07) In this connection, see the report of the 15th colloquium of the Councils of State and Supreme Administrative Jurisdictions of the European Union of April 1996 on "the transposition of directives of the European Union into national legislation", pp. 13-18, available at: http://www.juradmin.eu/colloquia/1996/gen_report.pdf
08) Judgment of 30 May 1991, Commission v. Germany, C-361/88, ECR I-2567, para. 15.
09) ECJ, 10 April 1984, Von Colson and Kamann (case 14/83), ECR 1891, para. 15.
10) Regarding the need for publicity, see Simon, D., *Le système juridique communautaire*, *op.cit.*, p. 226.
11) ECJ, case 145/82, 15 March 1983, Commission v. Italy, para. 10; ECJ, 15 October 1986, Commission v. Italy (case 168/85), para. 13, ECR 2945 "mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty".
12) ECJ, 6 May 1981, Commission v. Belgium, case 102/79, para. 10. See also declaration no. 19 appended to the Maastricht Treaty on the implementation of EC law.
13) See the report of the 15th colloquium of the Councils of State and Supreme Administrative Jurisdictions of the European Union of April 1996 on "the transposition of directives of the European Union into national legislation", p. 13.

Furthermore, the autonomy of the member states depends on the normative force of directives, which can be extremely variable. For example, the ECJ noted "great differences in the types of obligations which directives impose on the Member States and therefore in the results which must be achieved".

> "Some directives require legislative measures to be adopted at national level and compliance with those measures to be the subject of judicial or administrative review (see, for example, Article 4, in conjunction with Article 8, of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17); see, in this regard, Case C-360/88 *Commission* v. *Belgium* [1989] ECR 3803 and Case C-329/88 *Commission* v. *Greece* [1989] ECR 4159).
>
> Other directives lay down that the Member States are to take the necessary measures to ensure that certain objectives formulated in general and unquantifiable terms are attained, whilst leaving them some discretion as to the nature of the measures to be taken (see, for example, Article 4 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32); see, in this regard, Case C-365/97 *Commission* v. *Italy* (the '*San Rocco*' case) [1999] ECR I-7773, paragraphs 67 and 68).
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> Yet other directives require the Member States to obtain very precise and specific results after a certain period (see, for example, Article 4(1) of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p. 1); see, in this regard, Case C-56/90 *Commission* v. *United Kingdom* [1993] ECR I-4109, paragraphs 42, 43 and 44, Case C-198/97 *Commission* v. *Germany* [1999] ECR I-3257, paragraph 35, Case C-307/98 *Commission* v. *Belgium* [2000] ECR I-3933, paragraph 51, and Case C-268/00 *Commission* v. *Netherlands* [2002] ECR I-0000, paragraphs 12, 13 and 14)."[14]

The question of whether a member state has failed to meet its obligation to transpose a directive must therefore be assessed according to each individual directive and the wording of the obligations on the member states. In some situations, particularly when the subject matter is highly technical and the rules very detailed, literal transposition appears the most appropriate option.[15] Although the ECJ is careful not to go so far as to deem it legally indispensable, it has sometimes ruled that "a faithful transposition" can, in some circumstances, become "particularly important".[16]

The question is whether the AVMS Directive requires such precise transposition and incorporation of the key notions that it contains, or whether the member states have a degree of flexibility. If the latter is the case, the boundaries of their freedom need to be defined.

II. The various key notions of the AVMS Directive

In order to evaluate their impact, it is necessary to identify the different key notions on which the Directive's provisions are based, and to assess their function, whether they are precisely defined (2) or not (1).

1. Undefined notions

1.1. Notions that are essential to the overall functioning of the Directive: jurisdiction criteria, notion of circumvention

Aimed at facilitating the application of the principle of the freedom to provide services in the audiovisual media services sector, the AVMS Directive makes provision for a minimum level of harmonisation of national rules that are designed to safeguard certain public interests, including the

14) ECJ, 18 June 2002, Commission v. French Republic, case C-60/01.
15) This is particularly true with regard to patent rights, VAT and environment law.
16) Such was the case with Directive 79/409 on the conservation of wild birds, under which the management of a common heritage is entrusted to the member states in their respective territories. In this connection, see the ECJ's judgment of 27 April 1988 - Commission of the European Communities v. French Republic – Failure to comply with a directive - Conservation of wild birds, case 252/85.

protection of European works, the right to information, the protection of minors and consumer protection. Based on such harmonisation, the directive lays down the country of origin principle, which is the cornerstone of the Directive, while allowing the member states, if they wish, to adopt more detailed or stricter provisions concerning service providers under their jurisdiction. The effective application of the country of origin principle depends on precise jurisdiction criteria that are used to determine the member state in which media service providers operating in the European Union are established and therefore the law that applies to them. These criteria are: the "head office", the place where "editorial decisions" are taken and the place where "a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates". In cases where these criteria do not result in a service provider being deemed established in a European Union member state, the directive requires the application of technical criteria: the use of a "satellite up-link", followed by the use of "satellite capacity". Only as a last resort, if these technical criteria are also inconclusive, the Directive refers to the notion of establishment as defined in Arts. 43 to 48 of the Treaty in order to determine which member state has jurisdiction over the audiovisual media service concerned. These jurisdiction criteria also appeared in the "Television Without Frontiers" Directive. The only notable difference is the reversal of the criteria relating to satellite up-link and satellite capacity. Finally, it should be noted that the concept of "circumvention" is also essential, since it provides for an exception to the principle of the freedom to provide services and its corollary, the application of the country of origin principle.

1.2. Notions on which audiovisual content rules are based

Apart from Arts. 1, 2 and 3, on which this report is particularly based, a number of notions and expressions are referred to in the rules on audiovisual content in general, such as "incitement to hatred on grounds of race, sex, religion or nationality" or "content that might seriously impair the physical, mental or moral development of minors". Other notions play an important role in the rules on audiovisual commercial communication, such as "human dignity", "discrimination based on sex, racial origin, etc." or, especially in relation to product placement, "undue prominence" and "significant value". Furthermore, the level of regulation depends on the actual need for protection, which varies between different types of programme. The way in which these programmes are categorised in the directive, particularly using the terms "news programmes", "films", "series", "sports programmes" and "children's programmes", can therefore be crucial.

2. Defined notions

The Directive and the rules it contains are founded on a number of essential, precisely defined notions. One particularly important example is the notion of audiovisual media service which, in itself, determines the scope of the Directive. Art. 1 of the Directive defines it precisely, particularly using criteria that are themselves subsequently defined:

- "a service as defined by the Treaty", in other words a service normally provided in return for remuneration;[17] in this regard, recital 16 of Directive 2007/65 confirms that all forms of economic activity, including those of public service enterprises, constitute services as defined by the Treaty, whereas the same does not apply to 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;
- under the "editorial responsibility"[18] of a "media service provider", where "editorial responsibility" is defined as the exercise of effective control both over the selection of the programmes and over their organisation (chronological for linear services; in a catalogue for on-demand services);
- the principal purpose of which is the provision of "programmes", where the term "programme" is defined as a set of moving images constituting an individual item within a schedule or a catalogue

17) This notion is not defined by the directive but there is ECJ case-law on the subject. Consequently, education that is funded by the state through taxes does not constitute a service provided in return for remuneration, whereas broadcasting services are included, even if they are provided by a public broadcaster and the recipient does not pay the provider in return. In the same way, hospital services are services as defined by the Treaty, even if they are paid for directly by the social security system. See Demaret, P., *L'accès au marché des services réglementés : la libéralisation du commerce des services dans le cadre du Traité CE*, available at: http://www.cairn.info/revue-internationale-de-droit-economique-2002-2-page-259.htm

18) Art. 1(c).

and whose form and content are comparable to those of television broadcasting[19] (examples: feature-length films, sports events, documentaries, etc.), and where the expression "principal purpose" excludes services in which audiovisual content is of secondary importance and does not constitute their principal purpose (websites in which audiovisual elements, such as short advertising spots, are incidental, as well as games of chance, including lotteries, betting and other forms of gambling[20]);
- in order to inform, entertain or educate the general public (a function inherent in mass media[21]);
- by electronic communications networks.

The Directive specifies that the notion of audiovisual media service also covers audiovisual commercial communications, which are defined as images (not necessarily animated) which are designed in particular to promote goods or services accompanying or included in a programme. On-demand services that consist exclusively of commercial communications or the direct offer for sale of products or services that do not accompany audiovisual media services do not therefore constitute audiovisual commercial communications. However, the provisions of the Directive apply *mutatis mutandis* to channels exclusively devoted to teleshopping, advertising or self-promotion, even if they do not represent audiovisual media services *stricto sensu*.

The notion of "television broadcasting", synonymous with a linear audiovisual media service, is characterised by "simultaneous viewing of programmes on the basis of a programme schedule", as opposed to "on-demand audiovisual media services" (or non-linear services) that are provided for "the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider". This distinction is vitally important because the Directive contains different rules for linear and non-linear services.

Now that we have identified and, where possible, placed the different notions in distinct categories, we shall consider their actual significance and their potential impact on national transposition measures.

III. The impact of key notions of the AVMS Directive on national transposition measures

First of all, we should define this question clearly and explain that it is not a case of discussing whether the member states should use the precise words and terms contained in the Directive. As long as it has the same definition, the choice of an alternative term that appears more appropriate, particularly for linguistic or historical reasons, is equivalent to the incorporation, pure and simple, of the relevant notion of the Directive. For example, some member states in which the concept of broadcasting is understood more broadly may prefer this term to the concept of audiovisual media service as governed by the Directive. There is nothing in principle that makes it absolutely compulsory to incorporate the precise terms contained in the Directive, as long as the words or expressions chosen by the member states have the same definition. It is therefore necessary to ensure, in the example given, that the notion of broadcasting in question covers both linear and non-linear services and is genuinely equivalent to the notion of audiovisual media service as it appears in the Directive. For the sake of clarity, this broader national interpretation of the concept of broadcasting will need to be clearly distinguished from the narrower notion of broadcasting referred to in the Directive or as it is understood elsewhere in EC law.[22] Finally, in accordance with the principle of consistent interpretation, it is important that the member states ensure that these terms and expressions continue to be interpreted in the same way as their equivalents in the Directive, taking ECJ case-law into account.

19) Art. 1(b).
20) See rec. 18.
21) See rec. 18.
22) The concept of broadcasting referred to in the Amsterdam Protocol or the 2001 Communication on state aid for public service broadcasting corresponds with that of the directive.

With this in mind, it appears at first glance that the member states are free to choose whether to adapt their national law or literally transcribe the provisions of the AVMS Directive. Literal transposition, of course, implies the incorporation of the key notions of the Directive, whereas adaptation would enable the member state to use other notions, which may be more suited to its national legal system. Beyond Art. 249, para. 3 of the Treaty, which leaves to the member states the choice of form and methods, the AVMS Directive itself provides for a degree of flexibility in the transposition process by explicitly authorising the member states to adopt stricter or more detailed provisions covering service providers under their jurisdiction.[23] However, the analysis and response to the question of the impact of the key notions of the AVMS Directive on national measures should be qualified even further since, in reality, the level of autonomy of the member states varies according to the notions concerned, whether they are defined (2.) or not (1.).

1. Undefined notions

The member states do not appear to have any flexibility in terms of the territorial jurisdiction criteria, which particularly include the «head office», the place where «editorial decisions» are taken, the place where «a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates» and subsidiary technical criteria. As we have seen, these criteria play a decisive role, since they guarantee the effectiveness of the freedom to provide services and the application of the country of origin principle, on which the Directive is based. The overall functioning of the Directive and the freedom to provide services which it enshrines largely depend on the effective, clear application of these jurisdiction criteria, particularly in order that services do not find themselves subject to the authority of two member states at the same time or, conversely, do not fall under the jurisdiction of any member state. To this end, it is important that each member state should take the criteria set out in the Directive word for word and interpret them in total conformity with ECJ case-law.

The member states probably have more discretion in relation to rules on audiovisual content. Authorised to adopt stricter or more detailed provisions, they clearly have a certain amount of leeway in terms of the notions used in the Directive. For example, concerning the protection of minors, the member states may adopt a fairly diverse range of rules and methods of protection, as long as they are sufficient to meet the minimum standards laid down in the Directive. Similarly, certain provisions governing television advertising may not need to be transposed into national law if domestic legislation already contains stricter, less qualified rules or simply prohibits the practice governed by the Directive. For example, the notions that form the basis of the rules on alcohol advertising in the Directive will probably be superfluous in a member state in which television advertising for alcoholic beverages is banned.[24] In the same way, the notions of children's programmes, films, series or films made for television, used by the Directive in its provisions on advertising, need not be included in the national rules of a state which prohibits advertising breaks during programmes or which, at the very least, makes all programmes subject to the same minimum restrictions described in the Directive.[25] On the other hand, if a member state wishes to bring its national legislation into line with the minimum rules contained in EC law, it appears preferable to use the relevant concepts of the Directive in order to ensure that national courts interpret them in the same way as the ECJ. This is demonstrated by the ECJ's case-law on the notions of films made for television and series.[26]

23) It could even be added that the idea of co-ordination suggests a level of harmonisation lower than that of a harmonisation directive, although in reality the terminology is neither precise nor rigorous and it appears that there is no real distinction between harmonisation and co-ordination, notions that are both different to the more intense concept of standardisation. See: Poillot Peruzzetto, S., *La diversification des méthodes de coordination des normes nationales*, available at: http://www.peruzzetto.eu/art/internormativite-methode-laurence.pdf and Eugene Stuart, *Principles of law harmonisation and approximation,* available at: http://cstp.undp.ba/download.aspx?id=736

24) The ECJ considered such a ban to be in conformity with EC law. ECJ, 13 July 2004, Commission v. France, case C-262/02.

25) For example, if a member state deems it appropriate to apply to all television programmes the advertising rules set out in the directive for children's programmes, its national law does not need to use the notion of children's programmes at all.

26) ECJ, 23 October 2003, RTL Television GmbH, case C-245/01.

However, content-related provisions and the notions on which they are based can sometimes be the result of a delicate compromise between conflicting fundamental rights. Examples include the notions of human dignity and non-discrimination which, where audiovisual commercial communication is concerned, can quite legitimately limit freedom of expression. The directive reflects the value given to respect for human dignity and non-discrimination, the latter being an expression of the equality principle. Since these notions are enshrined in the European Convention on Human Rights and the Charter of Fundamental Rights, it is hard to see how a member state can prescind from them in its own transposition measures.

2. Defined notions

2.1. Notion of audiovisual media service

Even though it is defined in the Directive, it appears that the member states enjoy some freedom in terms of the notion of audiovisual media service in accordance with recital 23 of the Directive, which states that "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". Such additions at national level may certainly influence the scope of national measures taken to transpose the Directive, depending on whether the notion of effective control is interpreted broadly or more narrowly. This ability of the member states is nevertheless limited in view of the fact that the Directive always requires effective control over both the organisation and the selection of programmes. Of course, a member state could, if necessary, impose certain obligations concerning audiovisual content on operators that lack such control over programme selection and organisation. However, such measures would be outside the realms of the AVMS Directive and their conformity would need to be examined under other provisions of the Treaty, or indeed of the E-Commerce Directive. To this end, the member state would need to clarify which of the measures it adopted were actually aimed at transposing the AVMS Directive, in order to distinguish them from measures that fell outside the scope of the Directive. The notion of audiovisual media service, which determines the Directive's scope, appears to provide the necessary boundary.

Moreover, regardless of the question of editorial responsibility, some member states may wish to apply similar content rules to services other than audiovisual media services, such as radio services or online services devoted exclusively to commercial communication. A member state may also want to make the provision of audiovisual services subject to regulations similar to those contained in the Directive, including when such activity plays an accessory role in the context of another principal activity, such as publishing, for example. In all such cases, the member state would have to go beyond the rules of the Directive in order to achieve its aims and this should be clearly indicated in its transposition measures or, at the very least, in the communication of the measures to the Commission, in order to aid the Commission's analysis of them. Here also, a distinction should be made between national transposition measures covered by the AVMS Directive and domestic rules that extend beyond the Directive and which the Commission will need to examine in the light of other EC law provisions. In other words, the member state should be able to identify the national measures that concern audiovisual media services on the one hand, and those that concern other services on the other. In conclusion, even if its transposition measures have a broader scope, it seems difficult for a member state to disregard the notion of audiovisual media service.

2.2. Distinction between linear and non-linear

As we have seen, the distinction between linear and non-linear is essential insofar as it determines the type of applicable regulation: linear services are subject to stricter rules[27] or, to be more precise, adapted rules that take into account their impact on public opinion.[28] There are several possible scenarios for the transposition of the Directive into domestic law:

27) See, for example, the quantitative rules on advertising and the rules governing the promotion of European or independent works.

28) See, for example, the rules on the lists of events of high interest to the public or those on short extracts of events, which cannot really be described as stricter.

- Rejecting the need for different regulations. This approach would simply lead to the omission of any distinction between linear and non-linear services in domestic law and to the application of all rules that apply to broadcasting to on-demand services. It would certainly seem feasible, for example, to impose the application of the rules on advertising breaks to audiovisual works accessible via video-on-demand or to apply the rules on short extracts to on-demand services. Nevertheless, it will be up to the member state concerned to ensure that these measures comply with EC law and, in particular, that they are proportionate to the general interest objective pursued. It will also be necessary to assess the adaptability of all these rules to non-linear services. For example, in relation to the provisions requiring linear services to broadcast mostly European works, how can users of video-on-demand services be obliged in the same way to watch mostly European works? In order to achieve such a goal, it would be virtually necessary to ban all non-European works from the catalogues, which might seem rather extreme. This example shows that it is difficult to reject totally the need for different regulations, based in the Directive on the distinction between linear and non-linear services. Any member state that decides to completely rule out the idea of different regulations therefore seems destined for failure.

- Substituting the distinction between linear and non-linear services with a different distinction. Without ignoring the pertinence of adopting different regulations, some member states could be tempted to replace the distinction between linear and non-linear services with a different distinction, based on other criteria such as impact on public opinion, which might, for example, be linked to the audience or market share of the service. However, such a clear-cut solution does not seem conceivable, particularly since the linear audiovisual media services covered by the Directive cannot be subject to a level of national legislation that is lower than that stipulated in the Directive. According to the Directive, the very nature of a linear service means that it has a greater impact on society, justifying stricter rules than those that apply to on-demand services.[29] If a linear service did not reach a particular audience threshold laid down in national law, a member state would not therefore be allowed to exempt the service concerned from the specific rules laid down in the Directive. It therefore seems impossible for a member state to disregard the distinction between linear and non-linear services set out in the Directive.

- Respecting the distinction between linear and non-linear services, with the addition of subcategories. Finally, while recognising the distinction described in the directive between linear and non-linear services, a member state could add other subcategories depending, for example, on the degree of influence exerted by the services in question on public opinion. Since they respect the categories of linear and non-linear services set out in the directive and incorporate them in the member state's legislation, there is no obvious reason why such more detailed regulations should not be adopted. Nevertheless, it will be necessary to ensure that these more detailed rules conform to EC law.

In conclusion, the member states actually have relatively little room for manœuvre in terms of their transposition measures, even though the AVMS Directive permits them to adopt stricter or more detailed provisions. Apart from this opportunity granted to the member states, there seems to be little room for regulations based on different concepts. It should also not be forgotten that the AVMS Directive is the result of the amendment of the "Television Without Frontiers" Directive, which has already been transposed in the member states. Reflecting the changes made at EC level following the entry into force of Directive 2007/65/EC, national transposition measures could simply be amended rather than totally revamped. In this context, the scenario whereby the member states incorporate the new notion of audiovisual media services and the distinction between linear and non-linear services, while preserving the other notions that remain valid, has the advantage of simplicity. For many reasons and particularly if they wish to align their national legislation with the AVMS Directive, it may therefore be appropriate for the member states to use the key notions contained in the Directive.

29) See recital 42: «On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society [...]. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive.»

Linear and non-linear audiovisual media services

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The Audiovisual Media Services Directive[1] (AVMSD) introduces a new, more technology-neutral approach by regulating linear and non-linear audiovisual media services. Linear/non-linear services now cover a broader range of services than the old definition of "television services". This contribution will first of all look into this new distinction and then discuss the implementation of the new distinction into national regulation.

I. From television broadcasts

The AVMSD has a long history. In fact, it is nothing more than a further revision of the original Television without Frontiers Directive (TWFD) that was first adopted in 1989.[2] The TWFD had a limited scope and only addressed television broadcasting, this being defined as "the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public". This definition can be considered to be relatively technology-dependent, as it explicitly mentions specific distribution technologies (i.e. wire/over the air/satellite). Art. 1 TWFD also mentioned several services that fell outside the scope of this definition. These consisted of communications services providing items of information or other messages on individual demand, such as telecopying (or faxing as we call it today), electronic databanks and other similar services.

The exclusion of on-demand services was an important one. Over the years, the on-demand delivery of audiovisual services had started to develop and had created new business opportunities. Instead of service providers simply supplying a broadcasting service, the demand side could start to play a direct role as far as the selection of content was concerned. But the exemption for on-demand services released them from the restrictions and obligations of the TWFD, forming an important incentive for some service providers to have their services labelled as on-demand activities. In the *Mediakabel* case, the Court of Justice of the European Communities (ECJ) had to look into the question of when a service would fall under the definition of a television broadcast or would be considered an on-demand service.[3]

Mediakabel was a Dutch company providing a subscription service called "Mr Zap", which allowed the reception of television broadcasts using a decoder and a smart card. The offering included a pay-per-view

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 (OJ L 332/27 of 18 December 2007).
2) Council Directive 89/552/EEC of 3 October 1989 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 298/23-30 of 17 October 1989); the Directive was amended in 1997 (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 202/60-71 of 30 July 1997)).
3) ECJ, Case C-89/04, [2005] ECR, p. I-4891.

service, in addition to the regular programmes, under the name "Filmtime". Films from the Filmtime catalogue could be ordered either by using the remote control or by telephone and, after the user had been identified and the payment received, he/she would be provided with an individual key which allowed him/her to view one or more of the films on offer each month, at the times determined by Mediakabel. Mediakabel claimed that Filmtime was an interactive service supplied at individual request thus falling outside the scope of the TWFD. The Court, after first confirming that the classic form of distribution (random/multipoint distribution) was used, subsequently judged that, within the context of the TWFD, it is the perspective of the provider that determines whether a television broadcast that is subject to the Directive is involved: "[a] service such as Filmtime, which consists of broadcasting television programmes intended for reception by the public and which is not provided at the individual request of a recipient of services, is a television broadcasting service." The determining criterion for this concept is the broadcast of television programmes "intended for reception by the public". Priority should therefore be given to the standpoint of the service provider in the analysis of this concept. One could criticise this approach and argue that the position of the user might be just as important. However, the text of the Directive does not allow for such an interpretation, as the Court rightly points out.

II. To linear/non-linear audiovisual media services

The *Mediakabel* decision has clearly inspired the definition framework of the AVMSD. The scope of the revised Directive has been extended and now includes on-demand services. Audiovisual media services include both linear (the traditional television broadcasts) and non-linear (that is to say on-demand) services. Television broadcasts/linear services are audiovisual media services provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule.[4] In the case of on-demand services, the services are provided for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider.[5] Here we clearly see that the definition follows the decision of the ECJ.

The second important element in the new definitions is the abolishment of the technology-dependent aspects. Linear and non-linear audiovisual media services are defined in a technology-neutral way. The distribution mechanism as such has become irrelevant: airwaves, satellite, cable, telecommunications networks, the Internet are all included. Nor do distinctions like analogue/digital or the use of certain protocols (such as the IP-protocol) make a difference. It should however be noted that technology still has relevance, as certain technologies have intrinsic limitations, including capacity restrictions or the lack of two-way communications.[6]

Thirdly, it is worth noting that services that are considered as substitutes by the end-user may fall under different regimes: a user may not experience any difference between watching a particular movie as part of a traditional television broadcast or as part of an on-demand service. Nevertheless, the regulatory context is different.[7]

III. Transposition

It is still difficult to make an assessment of the transposition and implementation of the revised Directive. Member States have until 19 December 2009 to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive.[8] In December 2008, the European Commission published an overview of the level of transposition among the Member States.[9] According to this overview, at the time of its publication only Romania had fully transposed the Directive by amending its national Audiovisual Law. At present, all other Member States are either still in the consultation process or have presented some kind of draft. In a few cases, more specific proposals have been sent to the national Parliament.

4) Art. 1 (e).
5) Art. 1 (g).
6) Furthermore, the rules on jurisdiction (Art. 2, para. 4) still attach particular importance to the phenomenon of satellite distribution.
7) This is also recognized in the preamble (see Recital 17), but has had no further consequences for the definitions and regulations of the Directive.
8) Art. 3 of the Directive.
9) IP/08/2032, d.d. 18 December 2008 ("Commission calls on Member States to rule with a light hand while updating TV rules in 2009").

IV. Transposition models

Nevertheless, the scarce information available does provide a first impression on the various approaches taken to transposition. We can distinguish two main methods of including the Directive into national regulatory frameworks.

The first category consists of countries which have chosen to primarily "translate" the provisions of the Directive. They incorporate the articles as directly as possible by copy-pasting the precise wording of the Directive. The Romanian implementation can be used as an illustration of this approach. In the amended Audiovisual Law, Art. 1 para. 3 of the first chapter reads as follows: "audiovisual media service on-demand means a non-linear audiovisual media service, where programmes are viewed upon individual request of the end-user and at a specific time chosen by the latter. The service is provided by a media services provider on the basis of a programme catalogue offered by the media service provider. The competent regulatory authority will be the National Audiovisual Council in this case".[10] This text does not differ on any essential point from Art. 1 (g) AVMSD.

The second category of Member States has opted to introduce changes, make choices (to the extent permitted by the Directive) or give the transposition some kind of local "flavour". An interesting example is the proposed transposition of the Directive into the French Audiovisual Law.[11] The following definition of on-demand services is introduced:

> "An on-demand audiovisual media service is defined as any electronic public communication service that enables the user to watch programmes at a time chosen by him and at his individual request on the basis of a catalogue of programmes selected and organised by the service provider. This does not include services that are non-economic in the sense of Article 256 A of the General Tax Code, those where the audiovisual content is secondary, those that involve the provision or transmission of audiovisual content generated by private users for the purpose of sharing and exchange within communities of interest, those that merely comprise the storage, for the purposes of making them available to the public via online public communication services, of audiovisual signals provided by recipients of such services and those where the audiovisual content is selected and organised by a third party. A service that comprises on-demand audiovisual media services as well as other, non-audiovisual communication services, is only subject to the present law in respect of the on-demand audiovisual media services."[12]

This provision includes the definition of on-demand services as provided by the Directive. However, the French text adds to this several sentences that further detail the scope of the definition. Most of the additions are taken from the preamble of the Directive. For example, a large part of consideration 16 has been included: "... but should not cover activities which are primarily non-economic..." and "...generated by private users for the purpose of sharing and exchange within communities of interest..." Consideration 18 of the Directive is also present: "...where any audiovisual content is merely incidental to the service and not its principle purpose...".

Placing parts of the preamble into the main text of the law is not just a technicality. It has substantial relevance from a legal perspective. Text in preambles is normally used to interpret the provisions of a law or a directive, which means that it has a lower status than the said law/directive provisions. By being integrated into the main text of the law, the preamble text is "upgraded" and

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10) Citation from a translation provided by the Romanian National Broadcasting Council.

11) *Projet de loi relatif à la communication audiovisuelle et au nouveau service public de la télévision* (*texte définitif*) (Proposal for a law on audiovisual communication and the new public service television (final text)), as adopted by the French Sénat on 4 February 2009, available at: http://ameli.senat.fr/publication_pl/2008-2009/189.html. For a complete overview of the legislative process see:
http://www.assemblee-nationale.fr/13/dossiers/nomination_audiovisuel_public.asp#nouveau_service_television

12) The original French text reads: *"Est considéré comme service de médias audiovisuels à la demande tout service de communication au public par voie électronique permettant le visionnage de programmes au moment choisi par l'utilisateur et sur sa demande, à partir d'un catalogue de programmes dont la sélection et l'organisation sont contrôlées par l'éditeur de ce service. Sont exclus les services qui ne relèvent pas d'une activité économique au sens de l'article 256 A du Code général des impôts, ceux dont le contenu audiovisuel est secondaire, ceux consistant à fournir ou à diffuser du contenu audiovisuel créé par des utilisateurs privés à des fins de partage et d'échanges au sein de communautés d'intérêt, ceux consistant à assurer, pour mise à disposition du public par des services de communication au public en ligne, le seul stockage de signaux audiovisuels fournis par des destinataires de ces services et ceux dont le contenu audiovisuel est sélectionné et organisé sous le contrôle d'un tiers. Une offre composée de services de médias audiovisuels à la demande et d'autres services ne relevant pas de la communication audiovisuelle ne se trouve soumise à la présente loi qu'au titre de cette première partie de l'offre."*

receives, in principle, the same legal level as the transposed articles of the Directive. In practice, such an approach limits the possibilities for regulators, but also for judges, to opt for a more open interpretation. On the other hand, of course, one could also argue that, in this manner, more guidance is provided by the legislator.

Another way of giving the transposition a local stamp of individuality is by not copying the precise language of the articles of the Directive. In the transposition proposal by the government of the French speaking Community, the definition of broadcasting/linear services and non-linear services is slightly modified:[13]

Linear Service	
Art. 1 (e) AVMSD[14]	"television broadcasting" or "television broadcast" (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;
Transposition Proposal[15]	Linear service: an audiovisual media service in which the programmes are meant to be received simultaneously by all or some users at a moment determined by the audiovisual media service provider on the basis of a programme schedule prepared by the service provider;

Notice the small differences. For example, the transposition proposal adds *"elaboré par lui"* ("made by him") to the definition of broadcasting/linear services. The Directive only requires that a media service provider provide a television broadcast on the basis of a programme schedule, but does not explicitly say that the schedule must be made by him. It seems a rather harmless and obvious addition, clearly in line with the meaning of the Directive, but nevertheless it could lead to questions, if not properly explained.

V. Constitutional issues

In some countries, the transposition of the Directive touches upon both old and new issues of a constitutional nature. Not every constitution is as modern as the Directive. The introduction of the linear/non-linear distinction to audiovisual media services may not match what is written in the constitution on the regulatory boundaries on State intervention. Most European constitutions protect the written press against government interference, by forbidding every form of *ex ante* involvement, more particularly censorship by the State. The same constitutions often regulate traditional radio and television broadcasting and allow for a rather high level of intervention in these media (specific content obligations, advertising regulations, etc.). However, partly due to the fact that many constitutions were put together decades ago and are often very difficult to change, the existence of non-linear audiovisual media services has neither been taken into account nor explicitly excluded from the definition of radio and television. In several jurisdictions, these kinds of services were primarily regulated under the regime for telecommunications services. This complexity can be illustrated by the Dutch situation. In the Netherlands, the first three paragraphs of Art. 7 of the Constitution, which deal with freedom of expression, read as follows:[16]

> "1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.
> 2. Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.

13) The text of the Walloon Media Regulator is available at: http://www.csa.be/breves/show/304
14) In the French version it reads: *"'radiodiffusion télévisuelle' ou 'émission télévisée' (c'est-à-dire un service de médias audiovisuels linéaire): un service de médias audiovisuels fourni par un fournisseur de services de médias pour le visionnage simultané de programmes sur la base d'une grille de programmes"*.
15) Original French text: *"Service linéaire: un service de médias audiovisuels dont les programmes sont destinés à être reçus simultanément par l'ensemble du public ou une partie de celui-ci au moment décidé par l'éditeur de services de médias audiovisuels sur la base d'une grille de programmes élaborée par lui".*
16) The translation by the Ministry of Foreign Affairs is available at: http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf

> 3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. (…)."

The first paragraph envisages the regulation of the press, the second of traditional radio and television and the third of all other forms of expression. From parliamentary history we know that the second paragraph includes subscription television and teletext.[17] But it is also clear that on-demand services are protected by the third paragraph.[18] This has interesting consequences because the third paragraph forbids regulation based on content ("No one shall be required to submit thoughts or opinions for prior approval …"). Narrowly interpreted, this implies that it would be against the Dutch Constitution to regulate the content aspects of on-demand services on an *ex ante* basis (existing penal and civil code provisions, which have an *ex post* nature, are still applicable). It is still unclear how the Government will deal with this issue, as the transposition proposal was not yet public when the present contribution was written. Probably, the Government will try to include on-demand services within the definition of broadcasting/linear services to the fullest extent possible, by following the widest possible interpretation. As a consequence, only a limited group of on-demand/non-linear services should then be covered by the third paragraph. It is however questionable whether such an approach would be in line with the intentions of the present Constitution, which might increase the pressure to revise/modernize its Art. 7.[19] Therefore, the possibility exists that Parliament will oppose – partly or entirely – proposals to regulate the content of on-demand services on an *ex ante* basis. Ultimately, this might imply that the Netherlands will not be able to exercise full jurisdiction over services that, based on the criteria of the Directive, should be its responsibility. An alternative might be to focus on *ex post* regulation, but then the question remains as to whether full compliance with the Directive would exist. Ultimately, the Government and Parliament could ignore a conflict between the Constitution and the Directive because Art. 120 of the Constitution prohibits courts from reviewing the constitutionality of laws and international treaties.

Another possible constitutional issue could involve questions of correct allocation to the jurisdiction of either national or regional authorities. Countries like Belgium and Germany have granted exclusive powers to regional authorities with regard to broadcasting/media. The above-mentioned constitutional issue (*ex ante* content control) might also be involved. However, we will not deal with (national) jurisdictional questions in this contribution.[20]

VI. Conclusion

It is still difficult to assess the implementation of the AVMSD as far as the transposition of the definition of broadcasting/linear and on-demand/non-linear audiovisual media services is concerned. The easiest way is, of course, copying the definitions of the Directive *verbatim*. It seems likely that several countries will choose this solution in order to avoid further complications with the interpretation of both notions. But existing implementation experience shows that other options are often chosen, through either expanding the original definition or through inserting small deviations from the original text. Such an approach is not unknown and is a logical consequence of the freedom that Member States have when implementing directives. Nevertheless, there is a line that cannot be crossed: national adaptations may not reduce the scope and relevance of the definitions as formulated in the Directive. Another dilemma described in this contribution concerns possible new constitutional complications. Not every Constitution seems to be fit to deal with the technology-neutral approach of the Directive. Such a problem may take more time to resolve than the time foreseen by the Directive: changing constitutions is not an easy process.

17) Although the inclusion of teletext was highly debated.

18) De Meij, J.M. (and others), *Uitingsvrijheid, de vrije informatiestroom in grondwettelijk perspectief*, 2000, p. 216-219 and 223-224.

19) It should be noted that earlier attempts to update the Constitution failed. A draft proposal made in 2001 to change the Constitution ("Constitutional Rights in the Digital Era") did not make it to Parliament and the announcements in 2004 and 2007 of a new proposal have still to materialise.

20) Nor will we discuss the question whether or not *ex ante* regulation that might be required by the Directive complies with Art. 10 of the European Convention on Human Rights.

Establishment

Editorial responsibility and effective control

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I. Foreword

It is not easy for someone whose main experience in the audiovisual sector has been gained by considering it from the regulatory point of view to contribute to a publication devoted to legislation. Regulation is too often confused with legislation, so an attempt will be made in this article to avoid this pitfall as far as possible.

It is even less easy for a Belgian to discuss jurisdictional issues. This question has always been very important for the audiovisual sector in French-speaking Belgium, a sector with at least four distinctive features:

- a historically very open market in which television viewers – thanks to a cable network that covers virtually 100% of the territory and has almost as many subscriber households – have been used for several decades to receiving a service comprising thirty to forty channels from French-speaking Belgium, Dutch-speaking Belgium, France, Germany, the Netherlands, the United Kingdom and many other countries;
- a very limited degree of control over access to the market which is also due to the cable penetration rate and therefore to the absence of the use of rare resources;
- a small French-speaking market adjacent to a large, linguistically comparable market (France);
- considerable sensitivity towards matters of cultural diversity.

Much of the case law of the European Court of Justice dealing with matters of jurisdiction concerns Belgian cases, and more recently the case of the Belgian channels of the RTL Group has attracted the attention of many European observers. However, an attempt will be made here, too, to adopt an approach that is the most "European" and the least "national" as possible on this subject.

Accordingly, this contribution will set out to be as least theoretical and least legal as possible. This is, first of all, in order to avoid overlap – many leading lawyers will be providing elsewhere in this publication the essential legal insights on the questions discussed here – and, secondly, because of a personal conviction, shared with the European media law specialist Emmanuel Derieux, that "in order to be better accepted and respected, European and international media law, which is destined to play an increasingly important role in the future, first of all needs to be better known, analysed, interpreted, explained and, perhaps, even criticised if not challenged".[1]

1) Emmanuel Derieux, *Droit international et européen des médias*, Paris, LGDJ (Librairie générale de droit et de jurisprudence), 2003, p. 16.

II. Jurisdiction

The political context in which the Audiovisual Media Services Directive (AVMSD) was drawn up and then negotiated between 2003 and 2007 provides an excellent starting-point for the analysis. If European audiovisual regulations have one specific feature in the vast European policy landscape, it is that particularly fragile balance between culture and commerce, a balance that, incidentally, was the symbolic and meaningful theme of the Liverpool conference,[2] which was crucially important for the drawing up of the AVMSD and where the tension between these two objectives pervaded all the working groups.

This tension – or this balance, depending on the point of view – is expressed in the opening recitals of the consolidated version of the Television without Frontiers Directive (TWFD). The second recital refers to the commercial aspect: "Whereas the Treaty provides for the establishment of a common market, including the abolition, as between Member States, of obstacles to freedom of movement for services and the institution of a system ensuring that competition in the common market is not distorted". The third refers to commerce too but also to culture: "Whereas measures should be adopted to permit and ensure the transition from national markets to a common programme production and distribution market and to establish conditions of fair competition without prejudice to the public interest role to be discharged by the television broadcasting services".

This balance – or this tension, depending on the point of view – is also often mentioned in connection with a specific aspect of European audiovisual policy, namely jurisdiction. It is considered from the point of view of the balance between the desire of the European Union – especially the European Commission – to work towards the elimination of all obstacles to the establishment of an internal market and the desire of the member states – or at least a large number of them – to organise or, less ambitiously, preserve a national audiovisual landscape with its own cultural characteristics, with some states focusing on matters relating to the protection of minors or consumers and others on quotas for the broadcasting of national works or on matters relating to financing the independent audiovisual production sector.

There is nothing surprising about this balance. It is partly a legacy of the European Convention on Human Rights, Art. 10 of which both guarantees freedom of expression and specifies the conditions under which it may be restricted. It also testifies to the specific features of European societies, which are committed to ensuring that official policies take account of both economic and social and cultural objectives. This commitment is mainly shown by the European Union's refusal in the context of UNESCO and the WTO to regard audiovisual services as services "like all others". It was taken into account by the TWFD and is still enshrined in the AVMSD, the cornerstone of which is the free movement of audiovisual services but which, on the one hand, compensates for this privilege by imposing cultural obligations and, on the other, lays down certain limits to freedom of establishment.

Against this background, the question to which this contribution should attempt to provide an answer might be worded as follows: Is the balance that was ultimately found by the European legislators after the text had passed through the Commission, the Council and the Parliament several times and after all the redrafting, negotiations and concessions made by one or other party,[3] satisfactory? Will it make it possible to respond to the problems that have arisen in the last ten years with regard to the application of the TWFD and to meet the challenges that the new regulatory framework will pose? And, if some replies are in the negative, can the transposition process provide the national legislators with an opportunity to redress the situation in accordance with their specific national requirements?

As regards the subject of this contribution, namely the links between jurisdiction, editorial responsibility and the new concept of effective control, the main issue in the revision process was to see what responses could be developed to the factual and legal situations that it had not been possible to resolve for ten or twenty years. No satisfactory response was obtained, as we will see in more detail below. However, we should not be surprised at this, given the history of European audiovisual policy, the foundations on which it is based and the objectives consistently pursued by the European Commission in its successive compositions.

2) Documents and reports available at: http://ec.europa.eu/avpolicy/reg/history/consult/liverpool_2005/index_en.htm
3) History of the review process available at: http://ec.europa.eu/avpolicy/reg/history/consult/index_en.htm

The response is given by Recital 12 of the TWFD, which states: "it is consequently necessary and sufficient that all broadcasts comply with the law of the Member State from which they emanate". This recital clarifies the situation by stating that the country of origin principle can at any rate be applied, if not unconditionally, by giving it precedence over other objectives set out in other recitals but fairly quickly passed over in the directive itself, such as fair competition or cultural diversity. It also shows why in the five years of the process of revising the TWFD it was never possible for the parties that wished to do so to discuss any substantive changes to be made to Art. 2. This is indicated in particular by:

- the absence of any consideration of the proposal championed in 2005 by 13 member states out of 25[4] to ensure that, in compliance with the principle of subsidiarity, regulation applied to services and not their providers:

  - either by providing that a member state's national regulatory authority (NRA) shall apply its domestic legislation to the services aimed at that state, even if the provider is established in another member state;
  - or by providing that a provider that supplies these services in several member states shall remain under the authority of the member state in which it is established but the NRA of that state shall apply the rules of the member state at which the services are directed;

- the mechanism for resolving conflicts of jurisdiction envisaged by the European Commission in its proposal for a directive of 13 December 2005 that limited intervention by the reception state to cases of "abuses and fraudulent behaviour" (in respect of which it was asked how the necessary proof could be furnished), which mechanism comprised numerous restrictions, established a particularly cumbersome procedure and entitled the European Commission at the end of this process to censure the NRA's decisions *ex ante*;

- the absence, in the last recital, of significant modifications to Art. 2, as shown by:

  - the almost identical wording of Art. 2.3a), the reference to the place where "the editorial decisions about the audiovisual media service are taken" and no longer to the place where "the editorial decisions about programme schedules are taken", which is just an adaptation of the new definitions in Art. 1, especially the definition of a service provider;
  - the absence of a consideration of any other criterion than those already contained in the TWFD;

- the absence of details concerning the role of the contact committee (the scope of the deliberations and decisions of which remains uncertain) and the fact that there is no mention of the group of regulators (when it is the regulators and not the ministries that are responsible for ensuring compliance with, and the implementation of, the Directive);

- the only very partial consideration of the TV10 judgment.

III. Editorial responsibility

However, one of the major steps forward as far as the Directive is concerned is the legal development of the concept of editorial responsibility.

This notion is admittedly not new. In fact, it was already contained in Art. 1b of the TWFD, which defined the "broadcaster" as "the natural or legal person who has editorial responsibility for the composition of schedules of television programmes [...] and who transmits them or has them transmitted by third parties". However, it was not defined.

It is now defined in Art. 1c of the AVMSD as "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".

4) Proposal supported at the Council of European Ministers on 23 May 2005 by Austria, Belgium, the Czech Republic, Estonia, Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovenia and Sweden.

It seemed essential to provide as precise a definition as possible since it holds a central position within the regulatory framework. For example, according to Art. 1a it is one of the criteria that enables the question of the scope of application to be resolved – or, in other words, it is one of the criteria the absence of which means that a service falls outside the scope of the AVMSD and thus enables a reply to be given to the question "Is there a service provider?". This aspect of the question has, incidentally, already been analysed in depth by another European Audiovisual Observatory publication.[5]

However, editorial responsibility is an even more fundamental criterion as, according to Art. 1d, it is not **one of the** criteria but **the** criterion that enables a reply to be given to the question "If there is a service provider, who is it?", since this article defines the service provider as "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". And once that person has been identified, the reply to the last question ("where is it?") doubtless does not pose any insurmountable problems, since it is enough to establish where its head office is located in order to determine under which member state's jurisdiction it falls.

This notion is all the more important as, apart from the questions mentioned above, it concerns new questions relating to the identification of responsibility in both linear and non-linear environments, which are changing all the time:

- owing to the horizontal growth of the market (the development of both local and national or international players), the actual nature and subject of the control may raise doubts as to the possibility that such a control is carried out at the head office of a provider of several dozen services, sometimes in different languages (which brings us back to the question of "where");
- owing to the vertical integration of the market (the provision of audiovisual media services by legal persons that are, either directly or indirectly, operators of networks and distributors of services). This generally poses the question of the identification of editorial responsibility within the value chain (which brings us back to the question of "who") and more specifically the question of establishing the dividing line between a distributor of services without editorial responsibility (because it only provides a simple access service) and one with editorial responsibility (that exercises genuine control over the content). This question of this dividing line can be simply illustrated by the line between the two boxes marked in the middle of the following table:

Business	Function	Service
Editor	editorial	content
Distributor	**editorial**	access (without control)
Distributor	**economic**	access (sans control)
Operator	technical	transmission

As in the past, it will come down to the competent national authorities (such as the NRA) to answer these questions, but the fundamental difference between the TWFD and the AVMSD is that these authorities have up to now acted according to a conception of editorial responsibility that each has interpreted at will and in respect of which it has imposed varying degrees of control over extensive and less extensive activities, while they will now have to act according to criteria that are laid down by the Directive and, accordingly, constitute the core requirements to be met by all of them:

- the nature of the control, which must not be theoretical but "effective";
- the subject of the control, which must not be of a general character but relate to the "selection" and "organisation" of the programmes broadcast.

IV. Possible solutions for the transposition

In the light of these shortcomings and new developments, can the transposition and implementation process under way constitute an opportunity for member states to provide a more detailed response or one more appropriate to their specific national situation, as permitted by Recital 65 of the AVMSD,

5) Wolfgang Schulz and Stefan Heilmann, *Editorial Responsibility*, IRIS *Special*, European Audiovisual Observatory, 2008.

according to which states are "free to choose the appropriate instruments according to their legal traditions and established structures"?

As regards the establishment question, since the imperfections of the provisions are not unintentional, it is no doubt pointless to want to correct them: it is very clear from Recital 12 of the TWFD that it is impossible to consider that a service (or a provider of services) is established in the country of reception and not in the country of origin.

This aspect has been taken into account by the Parliament of Belgium's French-speaking Community, which, in the decree transposing the Directive, repealed section 2(7) of the Broadcasting Decree of 2003, which states: "The French-speaking Community has jurisdiction over providers of services established in a member state of the European Union or a party to the European Economic Area Agreement in the case where the Authorisation and Supervision Board, after consulting the Commission of the European Union, has ascertained that their activities are entirely or mainly directed at the general public of the French-speaking Community and that they have established themselves in one of these States with a view to evading the rules that would apply to them if they were under the jurisdiction of the French-speaking Community". This section had in any case never been applied.

Nonetheless, a number of adaptations to the directive could no doubt be considered when it is transposed, for example:

- the extension of the procedure for resolving conflicts of jurisdiction provided for in Art. 3 (paras. 2 to 5) to non-linear services;
- an explanation of what is meant by the expression "significant part of the workforce involved in the pursuit of the audiovisual media service";
- the simplification of the cumbersome mechanism provided for in Art. 3 (paras. 2 to 5), as the legislator in Belgium's French-speaking Community has done in section 156(5) of the transposition decree:

  "When the Authorisation and Supervision Board establishes that one or more linear television services supplied by a provider established in a member state of the European Union or a party to the European Economic Area Agreement are entirely or mainly directed at the general public of the French-speaking Community, it shall submit to the competent authority in the state in which the service provider concerned is established a reasoned request calling on that authority to instruct that service to comply with the provisions of Title II and of sections 40 and 41 of this decree.

  If the competent authority fails to reply or act within two months of the request being sent and if the Authorisation and Supervision Board believes that the service provider is established in the state concerned in order to evade the rules that would apply to it if it were under the jurisdiction of the French-speaking Community, then the Authorisation and Supervision Board may, after consulting the European Commission, impose sanctions on the service provider concerned in order to force it to comply with the provisions of Title II and of sections 40 and 41 of this decree.

  These sanctions shall be taken from among those provided for by section 156(1)(1), (2), (6) and (7). They must be objectively necessary, applied in a non-discriminatory manner and be proportionate in the light of the objectives pursued.

  The consultation of the European Commission referred to in paragraph 2 shall be organised in the following way:

  a) the government shall notify the European Commission and the state in which the provider is established of the sanction proposed by the Authorisation and Supervision Board, stating the reasons for this proposal;
  b) the Authorisation and Supervision Board is only authorised to order the sanction if the European Commission considers, within a period of three months following the notification, that the proposal in question is compatible with Community law. If the European Commission does not reply by the deadline specified, this shall signify its agreement."

Such a transposition provides the following clarifications in particular since it:

- makes no reference to "more detailed or stricter rules of general public interest" but only to "rules";

- eliminates the first stage of the procedure, which provides for the possibility for the receiving state to "contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed";
- provides for a case in which the member state with jurisdiction fails to reply;
- details the "appropriate measures" that may be taken by the receiving state;
- provides for a case in which the European Commission does not reply on the subject of the measures being considered by the receiving state.

With regard to editorial responsibility, member states have much greater leeway since they are able, pursuant to Recital 23 of the AVMSD, to "further specify aspects of the definition of editorial responsibility, notably the notion of 'effective control', when adopting measures to implement this Directive".

For this reason, national parliaments should be guided by a single watchword: effectiveness, which, it cannot be stressed too much, must underlie any legislative process. If the European legislator and, subsequently, the national legislators want the objectives of the directive to be achieved, the competent authorities have to identify the natural or legal person that, within an increasingly complex and fragmented audiovisual value chain, is best able to implement these objectives.

In accordance with the definition of editorial responsibility, which refers to effective control, that person could be identified by compiling a set of indicators that are directly linked to the aims of the Directive and the activities of the service provider and, when added together, will point towards the person actually responsible:

- what provisions, whether regulatory or self-regulatory, are implemented for the protection of minors (watershed, classification, use of signals, etc.) and who regularly implements them on an operational basis?
- what provisions, whether regulatory or self-regulatory, are implemented with regard to advertising ethics (Advertising Standards Authority, etc.)?
- what provisions are implemented with regard to fair information practice (press council, etc.)?
- are other provisions of self-regulation or co-regulation implemented and, if so, by whom?
- with regard to consumer protection, what other legislative provisions not associated with the audiovisual sector are sought (such as authorisation to broadcast games of chance)?
- what is the service provider's advertising agency?
- who are the distributors of the service?
- with what rights holders is the service provider negotiating?
- …

This approach, which is grounded in practice, does not seem very far from the method favoured by the British parliament and implemented by Ofcom, whose experience as an authority supervising the largest number of service providers in Europe cannot fail to arouse interest. For example, the Communications Act defines the service provider as "the person, and the only person, with general control over which programmes and other services and facilities are comprised in the service (whether or not he has control of the content of individual programmes or of the broadcasting or the distribution of the service)".

A similar approach underlies much of the discussion in the above-mentioned analysis of the concept of editorial responsibility recently carried out by the European Audiovisual Observatory. In that analysis, the authors state that "[e]ditorial 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. Editorial responsibility is accordingly associated with professional ethics and so with the rules on which journalistic action is based".[6] It is also in line with the conclusions of the round table organised in 2002 by the European Audiovisual Observatory, IViR and EPRA, where it was very opportunely pointed out that "the extent of the importance of editorial responsibility […] could usefully be elucidated" and that, in this connection, "[c]onsideration could be given to possible alternatives to head office and editorial control as the operative criteria for jurisdiction, particularly

6) Wolfgang Schulz and Stefan Heilmann, *op. cit.*, p. 18.

in light of increased moves towards content regulation. Essentially, the concern is about who is responsible for questions of programming, production quotas, youth protection, advertising and so on. The determination of editorial responsibility is important as it points towards the broadcaster who is responsible or can be made responsible for undesirable content. While technical qualifications could be useful, the ability to change programming (content) is the best indicator of editorial control".[7]

V. Conclusions

An approach based on effectiveness has significant advantages for all concerned:

- it is clear for the television viewers/consumers (who can contact those with operational responsibility for the programmes they watch);
- it is clear for the service providers (who know that it is their work of selecting and organising the audiovisual content that is regulated and no other activity), and it is also clear for those who do not exercise the function of a service provider (and cannot be described as responsible for content to which they only provide access);
- it provides the Community and national legislators with a guarantee of the effective implementation of the objectives laid down in the legislation.

If applied in this way, the directive should make it possible to identify fairly easily who is actually the service provider and, therefore, the latter's place of establishment, thus avoiding the majority of potential conflicts of jurisdiction, and the various indicators mentioned above, which provide support for the effective control over programme selection and organisation, only need to point in the direction of different persons in exceptional situations.

This analysis is supported today by Art. 2.3a) of the AVMSD, according to which the service provider is established in the member state where it has its head office and where the "editorial decisions" are taken. As the legal commentators unanimously state, the distinction between "editorial responsibility" and "editorial decisions" can only be semantic in nature. In this context, Arts. 2.3b) and 2.3c) will accordingly doubtless be of no use in the determination of the place of establishment.

If, by some remote chance, a distinction nonetheless had to be drawn between the editorial responsibility assumed by a service provider under Art. 1 and the editorial decisions that determine the place of establishment pursuant to Art. 2, then the way would be left open to every possible and imaginable legal fiction.

That would not be without its consequences for the tension between Community law and national law. This tension has admittedly existed since the beginning of European construction, but seems today to be assuming new dimensions, the extent of which we might not fully grasp: firstly it is now gradually (and more and more often) having an impact on the ballot box, as has been shown by certain referendums held in the last few years; secondly, it seems it is being reduced less and less by the principle of subsidiarity – or what is left of it when the European Commission asks member states to proceed with a "light touch" transposition, by which it means limiting national law to Community law, thus reducing the edifice to its foundations. Finally, and in particular, it is now affecting cultural policy, through audiovisual policy, and therefore the question of identity, as Karol Jakubowicz points out: "Promotion of 'European identity' cannot – and indeed does not need to – obliterate the fundamental core of national or ethnic identity – or that identity will [...] come back with a vengeance. One might say it already has. [...] Failure to understand and respond to new circumstances, and continued insistence on the promotion of 'European' culture and identity at the expense (or so it is perceived in many quarters) of national ones, may exacerbate existing, and growing, problems with European integration instead of alleviating them".[8]

That would not be without its consequences either on the outcome of the battle between commerce (or, in other words, the creation of an internal market from which all obstacles have been removed) and culture (or the possibility for member states to regulate their fellow citizens' cultural activities by establishing certain principles and values), a battle of which one of the protagonists could not only be declared the winner but also by an extraordinary knockout blow.

7) Wolfgang Schulz and Stefan Heilmann, *op. cit.*, p. 12.
8) *Audiovisual Media Services without Frontiers*, IRIS *Special*, European Audiovisual Observatory, Strasbourg, 2006, p. 39.

Product placement

A brief summary of the current and future legal position under the Audiovisual Media Services Directive

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The Audiovisual Media Services Directive (hereinafter: AVMSD),[1] which entered into force at the end of December 2007, permits product placement[2] – albeit subject to tight restrictions. The relevant provision in Art. 3g AVMSD should be transposed into German law by the end of 2009 through the *13. Rundfunkänderungsstaatsvertrag* (13th Amendment to the Inter-State Broadcasting Agreement).[3] The member states are granted a large degree of flexibility in terms of implementation.[4] The existing ban on product placement may be retained, the new rules may be incorporated word for word in the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement – RStV) or a distinction may be made between private and public broadcasters. The relevant consultations between the broadcasting experts of the *Länder* have already begun. The comparison drawn in the following article between the current legal situation and the one that will exist in the future under the AVMSD shows that, although old problems will be solved, new ones will emerge.

I. The facts

The portrayal of products or services in cinema and television films, entertainment and sports programmes is an everyday phenomenon. Everyone knows about the Aston Martin and the Omega watch in the "James Bond" films or the Manolo Blahnik shoes in the US TV series "Sex and the City". On the Internet, there are already websites on which users can keep check lists of product placements in productions and watch videos of them.[5]

The product placement business model is a successful one. Approximately EUR 2.3 billion is generated by the industry worldwide each year. One example is the agreement between Volkswagen AG

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/de/oj/2007/l_332/l_33220071218de00270045.pdf
2) Art. 3g AVMSD.
3) On 25 March 2009, the Broadcasting Commission of the *Länder* decided to authorise product placement in accordance with the AVMSD. However, under the self-imposed restrictions they announced themselves, the public broadcasters will only be allowed to show low-value items. The Broadcasting Commission will submit a draft 13th Amendment to the Inter-State Broadcasting Agreement, ready to be voted on, before the Conference of Minister-Presidents to be held in the summer, since the Directive must be transposed into German law by the end of this year. There will also be a public hearing concerning the 13th Amendment at the beginning of May.
4) See Recital 62 AVMSD.
5) See, for example, youtube videos relating to the film "Spiderman", available at: http://www.youtube.com/watch?v=3h0k80p8K2w, or "Casino Royale", available at: http://www.youtube.com/watch?v=P1lmAfy3c10 and lists of product placements in various films, e.g. the one available at http://www.listal.com/list/hall-fame-product-placement

and Universal Studios, under which the film studio is obliged to use only VW and Audi cars in its productions for a three-year period. In return, Volkswagen AG paid out around EUR 200 million. In this or a similar way, an average of around 10% of the overall budget of US productions is generated through product placement, while the equivalent figure in Germany is only around 1-2%, including for cinema films.

When the European legislative body states that "Product placement is a reality in cinematographic works and in audiovisual works made for television",[6] it is indeed describing reality. Although to a lesser degree, this reality has emerged not only in the USA, but also in Europe, despite the fact that surreptitious advertising has been prohibited there since 1989, at least where television productions are concerned.[7]

II. The current legal situation

Surreptitious advertising is defined in Art. 2 para. 2 no. 6 RStV as "the allusion to or representation of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising purposes and might mislead the public as to its nature. Such allusion or representation is considered to be intended for advertising purposes, in particular if it is done in return for payment or for similar consideration."

1. Intention to advertise

In practice, establishing a broadcaster's intention to advertise throws up considerable problems for various reasons.

1.1. Undue prominence

It is assumed that advertising is intentional if the allusion to advertised products is done in return for payment or similar consideration. In practice, however, the fact that payment has been made is rarely used to prove an intention to advertise, for the regulatory authorities are not aware of payments made to or by broadcasters. A great deal of investigative effort is required to detect secret payments made by advertisers for product or theme placements.[8]

Courts and regulatory authorities are therefore dependent on the development of additional criteria in order to establish a broadcaster's intention to advertise. One such criterion is known as "undue prominence" which, according to the European Commission, is often met if products or brands are shown particularly prominently or for an unnecessarily long time.[9] A rather stricter view is taken by some courts in various member states, which consider that an intention to advertise must be inferred unless the depiction of the product is unavoidable. The German public service broadcasters have opted for this strict interpretation in their respective advertising guidelines,[10] although they have not always abided by it in practice.[11]

1.2. Accountability

It is often not the broadcaster itself that receives payment for a placement, but the producer of the film or series concerned. In such cases, it is debatable whether the broadcaster can be accused of

6) Recital 61 of 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.
7) Art. 10 para. 4 in connection with Art. 1(d) of the "Television Without Frontiers" Directive (Council Directive 89/552/EEC of 3 October 1989 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/LexUriServ.do?uri=CELEX:31989L0552:DE:HTML
8) See Castendyk, *Marienhof und die Folgen – „Themen-Placements" als Schleichwerbung*, epd medien 82/2005, pp. 20 ff.
9) See Commission interpretative communication on certain aspects of the provisions on televised advertising in the "Television without frontiers" Directive, OJ 2004/C 102/02 No. 33.
10) See section 8 para. 3 of the ARD and ZDF advertising guidelines.
11) Fuchs, *Wer schleicht denn da? – Product Placement und Schleichwerbung im deutschen Fernsehen, Eine Analyse der ZDF-Show „Wetten dass...?"*, in: *Medien Wirtschaft 2005*, pp. 199 ff.

intending to advertise. Therefore, European case-law and regulations also take into account the broadcaster's potential influence on the production. They consider advertising to be intentional if a payment is made to the producer *and* the broadcaster is able to influence the production of the programme. This is often assumed to be the case where own and commissioned productions are concerned. Since broadcasters rarely have any influence on licensed productions, such as "James Bond" films, it must, in principle, be concluded that in such cases there is no intention to advertise. With regard to commissioned productions, the only way that broadcasters can refute the legal assumption that they can influence the production is by proving that they have contractually prohibited the producer from using surreptitious advertising and if the product placement is not so obvious that the broadcaster would clearly have noticed it when inspecting the programme.

2. Misleading viewers

Another problem concerns the act of misleading viewers. This is considered to take place when the general public is misled about the actual – not the editorial or dramatic – reason for alluding to or showing a product. This problem is particularly acute in relation to so-called "open placements", where there is no actual surreptitious element or misleading act. This can be illustrated by an example from a well-known Saturday evening show. During the programme, a famous presenter takes out his mobile phone and extols its attractive design, outstanding technology and other selling points. He then adds that, of course, he has been paid by the telephone manufacturer for saying all this. There is no doubt that the presenter's words can be categorised as an advertisement. However, since he expressly clarified that they constituted an advertisement, he has not misled viewers. Open, non-surreptitious integrated advertising therefore does not represent prohibited surreptitious advertising.[12] It is generally only inadmissible if it breaches the ban on influence (see III. 2.5, below).

III. The new legal situation

Under the new AVMSD, product placement is permitted under certain conditions.

Art. 3g of the Directive stipulates the following:

"1. Product placement shall be prohibited.

2. By way of derogation from paragraph 1, product placement shall be admissible unless a Member State decides otherwise:

- in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes, or
- where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme.

The derogation provided for in the first indent shall not apply to children's programmes.
Programmes that contain product placement shall meet at least all of the following requirements:

(a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
(b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
(c) they shall not give undue prominence to the product in question;
(d) viewers shall be clearly informed of the existence of product placement. Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

12) For another opinion, see Platho, *Die Systematik von Schleichwerbung und Produktplatzierung und ihre Verfehlung in der AVMD-Richtlinie*, MMR 2009, 582, 585; and *OVG Rheinland-Pfalz* (Higher Administrative Court of Rhineland-Palatinate), ruling of 17 December 2008, case no. 2 A 10327/08.OVG, p. 20, see IRIS 2009-2: 10.

By way of exception, Member States may choose to waive the requirements set out in point (d) provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.

3. In any event programmes shall not contain product placement of:
- tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products, or
- specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls."

1. The structure of Art. 3g AVMSD

The relevant provision of Art. 3g AVMSD is based on the following structure. The basic rule is that product placement remains prohibited. Two exceptions are then mentioned, for which an "opt-out" structure is provided, i.e. the exceptions only apply in a member state if the state concerned has not adopted stricter rules.

As the first derogation, product placement is permitted under the AVMSD in cinematographic works, films, series, sports programmes and light entertainment programmes. It is therefore actually permitted in around 80% of entertainment television. As a partial exception to this derogation, product placement is prohibited in children's programmes.

Under the second derogation, which applies to all programme genres, the provision of goods or services free of charge is exempt from the general ban on product placement.

The first derogation, i.e. the admissibility of product placement in the named programme categories, is also subject to additional requirements:
- no influence on the broadcaster's editorial responsibility and independence;
- no direct encouragement to purchase or rent goods or services;
- no undue prominence or advertising of tobacco products and certain medicinal products available only on prescription;
- an appropriate warning is required.

2. Application issues

Despite its relatively clear wording, the provision raises a number of problems.

2.1. The "serial" genre

First is the question of why the "serial" genre was not included in the list of programme categories in which product placement may be allowed. Serials consist of several productions in which the content is linked together. For example, this link may consist of the development of the same story from one episode to another or the reappearance of one or more characters in different episodes.[13] Even if it could be argued that a serial is made up of films made for television, it would have been better to adhere to the terminology previously used in the Television Without Frontiers Directive.

2.2. "Provision free of charge"

The Directive also does not explain what the provision of goods or services free of charge actually means. The rule should be interpreted in the light of Recital 61, which states that whether the provision of a production prop should be considered as product placement in the sense of the Directive depends on the value of the goods or services involved. Product placement within the meaning of the AVMSD only involves production props and prizes (provided for competitions) of *significant* value. Only in such cases must the other conditions of Art. 3g para. 2 AVMSD be met. If the value of the provided goods or services is considered *insignificant*, it is not considered to be product placement.

13) ECJ, C-245/01, RTL/NLM, Rec. 2003, I-12489, para. 108.

There are two possible ways of assessing the value of a product or service. The first is to use its absolute value. However, it seems preferable to use a relative calculation, which takes into account the relationship between the provided good or service and the production budget. For example, a production prop worth more than 1% of the overall budget could be considered significant and constitute product placement, in which case the other conditions set out in Art. 3g AVMSD would also need to be met.[14]

2.3. The required warning

Another problem concerns the warning that is required to inform viewers that a programme contains product placement. This provision is meant to ensure that product placement is recognisable and is an essential condition if product placement is not to be categorised as surreptitious advertising. To this end, the warning must be shown at the beginning and end of the programme, as well as after each advertising break.

It is questionable, however, what this warning should comprise. Can or should the goods or services and the relevant brands be expressly named? Are judgemental descriptions of the products allowed? Here a comparison with sponsor warnings may be relevant. These were also originally designed merely to inform viewers, who were then meant to decide for themselves whether or not the sponsored programme had been influenced by the sponsor. Nowadays, however, sponsor warnings are sold as mini-advertising spots. The actual purpose of informing the viewer has faded into the background.

2.4. Undue prominence of a product

It is also unclear how the criterion of "undue prominence" will be handled in the future. Since, in the past, only when products were given undue prominence could it be considered surreptitious advertising, a more liberal interpretation should actually be used with regard to its application under the new Directive. For otherwise there would ultimately be no scope left for admissible product placement. In other words: if, under the current monitoring system, a product is not considered to have been given undue prominence, it does not represent prohibited surreptitious advertising anyway, unless it can be exceptionally proven that payments have been made. The new rules would complicate matters from the broadcasters' point of view if a placement that does not represent undue prominence suddenly became subject to additional restrictions, e.g. with regard to unlawful influence (see below) and warnings.

2.5. Ban on influencing "editorial responsibility"

Finally, the ban on influencing editorial responsibility also gives rise to application difficulties. On the other hand, the ban on *endangering* editorial responsibility only plays a minor role, since the broadcaster is always legally responsible, regardless of whether programmes contain legal or illegal product placement.

Much more complicated is the question of whether, in an individual case, editorial independence can be harmed by product placement. There are several possible interpretations here: under a strict interpretation, editorial independence is influenced by any form of product placement. This interpretation is so narrow that it allows no room for differentiation. Under a broad interpretation, it depends on the broadcaster's final right of decision. If the broadcaster retains that right, there is no unlawful influence; however if that right is contractually transferred to the advertiser, editorial independence can certainly be considered to have been influenced.

2.6. The separation principle in the AVMSD

Finally, we should consider the question of the aim and object of the separation principle, which is broken by the restricted admissibility of product placement. This principle means that editorial content and advertising (or commercial audiovisual communication) must be clearly separated from each other; it is enshrined at European level, for example, in Art. 10 para. 1 sentence 2 of the AVMSD (for linear services such as television). Its protective purpose extends beyond the protection of consumers and

14) Castendyk, in: Castendyk/Dommering/Scheuer, *European Media Law*, *Commentary to Article 3g AVMSD*, para. 17.

competition and also includes broadcasters' freedom of programming and therefore the media's autonomy vis-à-vis the economic sphere. Expressed in constitutional law terms, it is therefore a matter of the programming freedom of broadcasters.[15] However, the question is: under what circumstances could this media autonomy be breached? In the author's opinion, this would be the case if editorial criteria were superseded by commercial ones, for example if it were no longer the rules of a good plot, a good dialogue or a well researched piece of journalism that took priority, but commercial interests.

This can be illustrated by an example from the world of sport. A football match is governed by a system of rules. These rules apply, irrespective of whether the players wear T-shirts with advertising printed on them or whether perimeter advertising is visible. Advertising therefore has no influence on the rules and is not problematic. If we apply this to journalistic and editorial independence, it means that such independence is violated if its rules and criteria are breached because advertising has an influence on content.

IV. Conclusion

The Audiovisual Media Services Directive provides both answers and questions. It remains to be seen how the legislative bodies in the European states will deal with their high degree of flexibility in terms of implementation.

15) See also Gounalakis, *Werbung im Rundfunkprogramm – Zwischen Trennungsgrundsatz und Schleichwerbungsverbot,* WRP 2005, 1476 ff.

Short reporting rights

Austria's experience

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The right to short news reporting is polarising television broadcasters, politicians, viewers' representatives and experts. Should the audience's right to information be asserted – which is the opinion of the supporters of that right and is also the official reason given for the existence of such right – or should a de facto "basic right to watch football" be introduced – which is what the critics say this boils down to? With a long series of high court decisions concerning this matter, Austria has some considerable experience of this legal situation. The most important decisions by the *Bundeskommunikationssenat* (Federal Communications Board – BKS) and the highest courts (final courts of appeal), which might also be interesting outside Austria, are briefly set out in this article.

If a television broadcaster acquires the exclusive right to report on an event of considerable public interest or if, due to the circumstances, it is the only television broadcaster that has the possibility of doing so and it broadcasts the event in an encrypted programme or one that cannot be received nationwide, then part of the population will be unable to watch it. One way of avoiding this problem is to grant a right to short reporting, that is to say to allow other broadcasters to transmit short extracts of all the audiovisual material themselves. The right of other broadcasters to broadcast the entire event serves the same objective. However, this right affects the right of the exclusive rightsholder to a much greater extent than the right to short reporting and is therefore only possible under even stricter conditions. Another alternative would be to restrict the exclusive right to access the event itself and make access available to other television broadcasters. However, with many events that would rarely work in practice owing to the limited space available on site and the costs involved in making a recording.

I. European legal bases

The right to short reporting entered European law for the first time with Art. 9 of the European Convention on Transfrontier Television.[1] The Council of Europe Committee of Ministers adopted its detailed Recommendation No. R (91) 5 on this right. As there was no comparable EU provision when the Convention came into force on 1 May 1993, it applied to all EU member states.[2] The Protocol amending the European Convention on Transfrontier Television[3] changed the wording of Art. 9, and the new version came into force on 1 March 2002. However, neither provision obliged the Contracting Parties to introduce a short reporting right but only to examine whether such a right was necessary for the protection of the right of the general public to information.

1) ETS 132. Promulgated in Austria in the Bundesgesetzblatt (Federal Gazette – BGBl) III 1998/164.
2) According to Art. 27(1) of the European Convention on Transfrontier Television, EU law takes precedence over the Convention in the relations between EU and EEA member states.

In the European Union, the short reporting right was not introduced until the adoption of the Audiovisual Media Services Directive (AVMSD),[4] which will have to be transposed by 19 December 2009. In contrast to the provisions of the European Convention on Transfrontier Television, Art. 3k(4) of the Directive obliges states to introduce a short reporting right unless they "establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means".[5] The rules of the Directive differ in several details from the almost twenty year old Council of Europe Committee of Ministers Recommendation No. R (91) 5, so that member states that have based their national provisions on the recommendation will probably have to adapt them.

II. The Austrian Exclusive Television Rights Act

Austria introduced the short reporting right together with the right to access events of major importance to society to which a television broadcaster has acquired the exclusive broadcasting rights[6] when it passed the *Fernseh-Exklusivrechtegesetz* (Exclusive Television Rights Act – FERG), which came into force on 1 August 2001. In the case of the introduction of the right to short reporting, (section 5 of the Exclusive Television Rights Act), it took its lead from Council of Europe Committee of Ministers Recommendation No. R (91) 5.

Extract from the Exclusive Television Rights Act:

"**Section 5(1)** A television broadcaster that has acquired exclusive rights to broadcast an event of general public interest or which, for reasons of circumstance, is the only one in a position to report such an event, must allow, upon demand, any registered television company in a country that is party to the EEA Agreement or to the European Convention on Transfrontier Television of 5 May 1989 (BGBl. (Official Journal) III. No. 164/1998) to show short reports on that event for its own broadcasting purposes on reasonable terms and conditions. An event is deemed to be of general public interest when it is to be expected that its importance will result in its being extensively reported in Austria or another Contracting Party mentioned in this provision.
(2) The short reporting right includes an entitlement to record the transmission signal of the television broadcaster that is under the obligation specified in paragraph 1 and to use it to produce and broadcast a short report within the meaning of paragraph 3.
(3) The short report is limited to a brief news item corresponding to the occasion. The permissible duration of a short report depends on the length of time needed to convey the news content of the event and should be no longer than 90 seconds unless an agreement has been reached to the contrary. If the event lasts more than one day, the short reporting right is limited to the daily broadcast of a short item. At any rate, the short report must not be broadcast before the beginning of the transmission by the television broadcaster under the obligation specified in paragraph 1.
(4) A television broadcaster that requests the grant of a right within the meaning of paragraph 1 may appeal to the Federal Communications Board (*Bundeskommunikationssenat*) in order to assert this right. The Federal Communications Board shall attempt to bring about an amicable agreement between the television broadcasters as quickly as possible. If such an agreement is not reached, it must give a ruling as to whether and on what terms and conditions the other television broadcaster must be granted the short reporting right.
(5) If proceedings pursuant to paragraph 4 cannot be completed in time owing to the particular topicality of the event, the Federal Communications Board may, in response to a request by a television broadcaster involved, subsequently rule on whether and on what terms and conditions the short reporting right would have had to be granted. In the event that it would have had to be granted, the television broadcaster obliged to allow it may be required to pay compensation in application *mutatis mutandis* of section 3, paragraphs 5 to 7."

3) ETS 171. Promulgated in Austria in the Federal Gazette (BGBl. III 2002/64).
4) Art. 3k of Directive 2007/65/EC 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, OJ L 332 of 18 December 2007, p. 27.
5) Art. 3k, paragraph 4 AVMSD.
6) The Exclusive Television Rights Act transposed Art. 3a of the Television without Frontiers Directive (BGBl. I 2001/85). 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, OJL 298 of 17 October 1989, p. 23, as amended by Directive 97/36/EC, OJL 202 of 30 July 1997, p. 60.

The Federal Communications Board, an independent administrative authority consisting of three judges and two lawyers with the necessary experience, is responsible for the legal supervision of television broadcasters as far as the short reporting right is concerned.[7]

III. Initial situation in Austria, taking football as an example

In Austria, the broadcasting of private terrestrial television was prohibited by law until 2001. The first private television broadcaster that could be received virtually nationwide by terrestrial means was ATVplus[8] whose ATV channel went on air in June 2003.

The Austrian Football Bundesliga is an association that runs the highest and second-highest divisions of the Austrian football clubs (which are members of the Bundesliga) as well as some other football competitions and handles the central marketing of the clubs' exclusive rights. Before the launch of ATV, it had virtually no alternative but to sell rights to the public service broadcaster *Österreichischer Rundfunk* (Austrian Broadcasting Corporation – ORF).

Football is Austria's most popular sport and the top division, generally known as the Bundesliga, attracts the most attention. The second league and the cup competitions traditionally have less audience appeal. For many years, the Bundesliga has involved ten clubs in all. Four of the five matches in a round take place on late Saturday afternoons and the top game is played on a Sunday afternoon. Some rounds are played on Wednesdays.

IV. Background to the legal dispute between the ORF and Premiere/ATV

In 2004, the Austrian Football Bundesliga intended to sell the exclusive television broadcasting rights for the 2004-05 to 2006-07 seasons to one broadcaster. After long negotiations, the German company Premiere Fernsehen GmbH & Co KG ("Premiere Germany") was awarded the rights.

This German television broadcaster sublicensed the rights to its Austrian subsidiary Premiere Fernsehen GmbH ("Premiere Austria"), which broadcast extensive coverage of the Bundesliga matches via the cable networks on its Premiere Austria pay-TV channel. The reporting began on Saturday evenings just after the final whistle, which was a very attractive prime time slot.

Premiere Germany also licensed the broadcasting rights to ATV but on less favourable terms and conditions than to its subsidiary. For example, ATV was not allowed to show entire matches but only extensive highlights and the programme could not be transmitted until after 10pm, that is to say when the results had already been announced on the radio.

The ORF asked Premiere Germany, Premiere Austria and ATV on what terms and conditions they would be able to grant it short reporting rights pursuant to section 5 of the Exclusive Television Rights Act. All three television broadcasters first refused to grant these rights, so the ORF appealed to the Federal Communications Board, asking it to compel them to allow it to use the transmission signal.[9] The short reporting right, it said, should cover all the matches of the T-Mobile Football Bundesliga,[10] the Red Zac First League,[11] the Stiegl Cup,[12] the Hallen Cup, the Super Cup[13] and the Intertoto Cup.

7) Section 12 of the *KommAustria-Gesetz* (KommAustria Act).
8) Today, ATV Privat TV GmbH & Co KG.
9) This is provided for in sections 5(4) and 6 of the Exclusive Television Rights Act in conjunction with section 11 of the KommAustria Act.
10) The name of the top division in 2009 is "tipp 3-Bundesliga powered by T-Mobile".
11) This was the name of the second highest division in Austria at the time the rights were awarded.
12) That was the name at that time of the nationwide cup competition involving clubs belonging to the Bundesliga, the Red Zac First League, the Regional Leagues and the Provincial Leagues.
13) This was a match between the Bundesliga champion and the winner of the Stiegl Cup or the loser of the final if the Bundesliga champion had also won the Stiegl Cup.

Talks on a compromise deal failed despite the Federal Communications Board's involvement. Although the Board awarded the ORF short reporting rights in principle in 2004,[14] it said that only Premiere Austria was obliged to grant them. The three television broadcasters appealed against the decisions to the Administrative Court.

V. Decisions by the Federal Communications Board and the supreme courts

1. Event of general public interest

First of all, the Federal Communications Board had to decide whether the matches for which the ORF had requested short reporting rights were "events of general public interest", which may be sporting, cultural, social or political. According to the definition in section 5(1), last sentence, of the Exclusive Television Rights Act, an event is of general public interest when its importance is expected to result in its being extensively reported in Austria or another party to the European Convention on Transfrontier Television mentioned in this provision.

The Federal Communications Board allowed the ORF's application for the grant of short reporting rights concerning all the matches of the T-Mobile Football Bundesliga, the Super Cups, the Hallen Cup, the Stiegl Cup from the third round and the matches of the UEFA Intertoto Cup[15] but dismissed the application in respect of the Red Zac First League and the first two rounds of the Stiegl Cup.

The Federal Communications Board gave the following reasons for the distinction it had drawn: the decisive factor with regard to the extent of the interest in information is the extent of reporting to be expected in both the electronic media and newspapers. It cannot be said that an event is "extensively reported" within the meaning of the Exclusive Television Rights Act when the item concerned simply mentions the results of matches and the players' names. Rather, the reports published have to be in the form of substantial articles. Other features of "extensive reporting" are large headlines and the use of pictures, as well as references to reports on the front pages of newspapers. The reporting must take place in several of the Austrian provinces as regional reporting in one province would not be enough to qualify. However, it does not matter if some sections of the population have little or no interest in football.

With regard to the Super Cup, the parties to the proceedings agreed that this was an event of general public interest. In the case of the Hallen Cup too, it was to be assumed that it constituted such an event given the large number of participating Bundesliga clubs and the television reporting announced in advance. In the Stiegl Cup, the first two rounds do not constitute such an event because the matches do not involve clashes of T-Mobile Bundesliga clubs, which play against opponents from lower divisions. The reporting in the print media is normally limited to mentioning the results and the goal scorers. Some T-Mobile Bundesliga clubs do not enter the competition until the third round, so the event cannot be said to be of general public interest up until this point. On the other hand, this can be said to be the case for matches from the third round onwards as they often involve clashes between Bundesliga clubs and First League clubs. The same reasons applied to the UEFA Intertoto Cup: as this involves T-Mobile Bundesliga clubs, matches in this competition are of general public interest.

The *Verwaltungsgerichtshof* (Administrative Court – VwGH) rejected the complaint that the Federal Communications Board had wrongly assumed there was a general public interest in the case of the Hallen Cup, the Stiegl Cup from the third round and the UEFA Intertoto Cup. The expectation, based on the participation of top clubs, that the matches concerned would be given broad media coverage, could not, it said, be dismissed as unconvincing.[16]

According to Art. 3k (1) AVMSD, the right to produce short news reports must be granted for "events of high interest to the public". It is not clear whether this means that another (higher) threshold must be laid down for establishing the public interest than has so far been the case under the law. The recitals do not contain any indications as to how to interpret this notion.

14) BKS, 9 September 2004, 611.003/0023-BKS/2004 and BKS, 11 November 2004, 611.003/0035-BKS/2004.
15) This ruling was given with respect to the Bundesliga with Decision GZ 611.003/0023-BKS/2004 of 9 September 2004 and with respect to the other competitions with Decision GZ 611.003/0035-BKS/2004 of 11 November 2004.
16) VwGH, 27 January 2006, 2004/04/0234.

2. The event

According to section 5(3) of the Exclusive Television Rights Act, the right to short reporting comprises the right to report on an event for a maximum of 90 seconds a day. The ORF applied for the right to produce a short report on each individual T-Mobile Bundesliga match, so that it would have been permitted to broadcast a report of up to 90 seconds on Saturdays for each of the four matches and on Wednesdays for each of the five matches if its application had been allowed. The defendants proposed that each round be regarded as one event, with the result that the ORF would only have been able to run a 90-second report for all the Saturday matches and again for all the Wednesday matches.

The Federal Communications Board accepted the defendants' arguments and decided that the duration of the short report may not exceed 90 seconds per match day, stating as its reasons that it was permitted to report for 90 seconds in the case of events extending over several days, and such events also included bicycle races, where the right to short reporting existed for each day on which a stage was completed. A Bundesliga round, it said, corresponded to a single event. The spatial separation of the individual football matches did not alter that fact because the start and finish lines were often more than 100km apart in the case of bicycle races. The crucial aspects were the organisation of the matches under the umbrella of the Austrian Football Bundesliga, the common fixture list and the fact that the results were compiled in a league table.[17]

The Administrative Court did not share this view. It based its arguments on the prevailing opinion that the event was a single unit. Whether according to the prevailing opinion an individual event or an overall event made up of individual parts was relevant for determining a single unit was assessed according to the object "of general public interest", which in the case in issue was indisputably each individual T-Mobile Bundesliga match.[18] It was therefore unlawful to focus on the round and not the individual match when deciding on the right to short reporting.

3. Compensation for granting the right to short reporting

In the proceedings before the Federal Communications Board, the matter of the compensation to which defendants were entitled for granting the right to short reporting received considerable attention. Austrian law does not expressly provide for the payment of compensation but only requires the holders of exclusive rights to grant a right "on reasonable terms and conditions" (section 5(1) of the Exclusive Television Rights Act). According to the explanations given, no money is to be paid as a contribution to the costs of the exclusive rights but technical and staff costs must be taken into account.

The ORF agreed to pay EUR 600 per minute of a short report, whereas Premiere Austria demanded EUR 2,000. A witness stated that the normal rate for short reports in the case of the European football championships was between EUR 1,000 and EUR 9,000 per minute or part thereof, irrespective of the size of the country for which the right was acquired. The price of up to EUR 9,000, he went on, contained a payment for the costs of buying the exclusive rights. Another witness reported that transmission signal production costs of EUR 300 per minute were incurred by the broadcaster obliged to grant the right. Finally, the Federal Communications Board took into account the fact that Premiere Germany was paying an average of EUR 14 million per season for the exclusive rights to the Austrian Bundesliga.

The Federal Communications Board ordered the ORF "to pay EUR 1,000 per minute, with per-second billing for any part thereof, within two weeks of the billing date" as compensation for the right to short reporting. This payment applied to all matches for which the right to short reporting had been granted.[19] The reasons given were limited to a statement that all the aforementioned evidentiary findings had been taken into account, and it was unclear how it arrived at the figure of EUR 1,000 per minute.

The Federal Communications Board itself worked out that, "assuming two match days per round and full use being made of the statutory maximum of 90 seconds per match, a total of EUR 108,000 per season is payable". This amount seems modest when compared to the price paid by Premiere Germany (an average of EUR 14 million per season) for the exclusive rights, especially for the reporting of the football matches that were the subject of the short reporting right.

17) BKS, 9 September 2004, 611.003/0023-BKS/2004.
18) VwGH, 20 December 2005, 2004/04/199. Arguments endorsed by Stefan Korn, *Ausgewählte Fragen des gesetzlichen Kurzberichterstattungsrechts*, Medien und Recht 2006, 39 (41).
19) BKS, 9 September 2004, 611.003/0023-BKS/2004 and BKS 11 November 2004, 611.003/0035-BKS/2004.

The Administrative Court responded to the ORF's complaint that the Federal Communications Board should not have taken account of the costs of the acquisition of the exclusive rights, drawing attention to the need for proportionality. An interpretation in conformity with the constitution required that "when establishing the appropriate payment representing the value of the short report, account must also be taken of the payment for the acquisition of the exclusive rights, but only to such an extent that the right to short reporting is not thwarted. Accordingly, it is not possible to fault the respondent authority's taking account of the costs of acquiring the exclusive rights."[20]

In a subsequent decision on the same case, the *Verfassungsgerichtshof* (Constitutional Court – VfGH) saw no reason to disagree with this opinion of the Administrative Court on constitutional grounds, stating that the use of Premiere Austria's exploitation rights without payment was disproportionate and also breached the principle of equality.[21]

The AVMSD leaves it up to the member states to decide whether to provide for the reimbursement of costs. If they are to be reimbursed, they must not exceed the additional costs directly incurred in providing access.[22] Even passing on part of the production costs is not allowed. As the Administrative Court concluded that the Austrian constitution required that account should even be taken of the costs of acquiring the exclusive rights, the Exclusive Television Rights Act will have to be amended to comply with the directive with regard to the grant of a right to payment.[23]

4. Exclusive right of an Austrian broadcaster

The ORF's application for the transmission signals to be made available was directed against Premiere Germany, Premiere Austria and ATV Privatfernseh-GmbH.

The Federal Communications Board dismissed the application against Premiere Germany because the Austrian broadcasting laws were not applicable to this television broadcaster.[24] It also dismissed the application concerning ATV, stating that, although ATV was a television broadcaster, to which the Austrian Private Television Act, and therefore the Exclusive Television Rights Act, were applicable, it did not possess exclusive transmission rights.

However, the Federal Communications Board allowed the application against Premiere Austria. The company possessed a licence to operate private satellite television in Austria. In addition, Premiere Austria took the important decisions on the structure and content of the T-Mobile Bundesliga programmes and distributed these programmes. Ultimately, only a television broadcaster that has acquired exclusive rights to broadcast an event or has the exclusive possibility of reporting on it in a given situation is obliged to grant short reporting rights. In this particular case, the Federal Communications Board ruled that this applied to Premiere Austria because the exclusive broadcasting rights for Austria, which had initially been acquired from Premiere Germany, were licensed in such a way that "it was at any rate de facto made possible for (the Austrian company) to hold the exclusive broadcasting rights for Austria and thus carry out the first transmission of the matches to the Austrian television audience. The exclusive nature of the rights is not altered by the fact that a sublicensing agreement granting certain broadcasting rights exists between Premiere Germany and ATV." According to the Federal Communications Board, it cannot be claimed that the intention of the law is to avoid the possibility of legal action being taken when certain rights are assigned to a television broadcaster other than the one requesting the right to show a short report – "That would often make the right to short reporting no more than a theoretical right.": The television broadcaster that acquires exclusive rights in the event of such an assignment would be able to defend a legal action. This means the sublicensee can also be under an obligation to grant short reporting rights.

The Administrative Court confirmed this legal opinion.[25]

20) VwGH, 2004/04/199. Endorsed by Stefan Korn, *Ausgewählte Fragen des gesetzlichen Kurzberichterstattungsrechts*, Medien und Recht 2006, 39 (43 f).
21) VfGH, 1 December 2006, B 551/06 = VfSlg 18.018/2006.
22) Art. 3k(6), last sentence, AVMSD.
23) This view is also shared by the authors of the book Kogler/Traimer/Truppe, *Österreichische Rundfunkgesetze*^{2} (2008) 569, all of them members of staff in the Media Affairs Department of the Federal Chancellery's Constitutional Service. As the Austrian laws have to comply with both the AVMSD and the constitution, the transposition of the last sentence of Art. 3k(6) AVMSD will probably have to be in the form of a constitutional provision. It remains to be seen whether the ECJ will have an opportunity to express an opinion on whether the last sentence of Art. 3k(6) AVMSD complies with primary fundamental rights.
24) With reference to Art. 2 of the Directive 97/36/EC, section 3 of the *Privatfernsehgesetz* (Private Television Act) and section 1(1) in conjunction with section 5(1) of the Exclusive Television Rights Act.
25) VwGH, 2004/04/199.

VI. Transposition of the Audiovisual Media Services Directive into Austrian law

When this article was completed, no draft law on the transposition of the Audiovisual Media Services Directive in Austria had yet been published. The first measure in the Federal Act amending the Private Television Act and the Private Radio Act[26] was only to relax the rules on interrupting programmes for advertising, teleshopping windows,[27] programmes that only broadcast teleshopping and advertising, and self-advertising programmes.[28]

26) BGBl, I 2009/7.
27) See Art. 18a AVMSD.
28) See Art. 19 AVMSD

Promotion of European works in on-demand services

Incentives for action by legislators/regulators/industry

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I. Introduction

Art. 3i of the Audiovisual Media Services Directive (AVMSD) can be seen as a compromise between two possible policies when it comes to promoting European works in non-linear services: extending the application of Arts. 4 and 5 of the Television without Frontiers Directive (TWFD) to non-linear services, on the one hand, and not providing for any promotion obligations for such services, on the other hand. Before addressing in detail what Art. 3i AVMSD provides for, it might therefore be useful to go back to the scheme previously established for television broadcasting (and maintained as regards linear services) and its implementation by member states.

1. Promotion of European works under the TWFD (Arts. 4 and 5)

According to Arts. 4 and 5 of the TWFD, which are unaffected by the AVMSD, member states must ensure that broadcasters under their jurisdiction devote a majority of their transmission time to European works, and at least 10% of their transmission time or programming budget to European independent productions. This stipulation works subject to the famous "where practicable" qualification.

Despite initial scepticism as to the impact and efficiency of the scheme, to this day most member states use the discretion granted to them under Art. 3 of the AVMSD and apply stricter measures to broadcasters under their jurisdiction. This usually takes the form of requiring a higher percentage of European works or independent productions to be transmitted, a condition which is either imposed on all broadcasters or on public service broadcasters only.[2] Other requirements include broadcasting quotas for programmes produced in the national language(s),[3] investment obligations in European or independent programmes, or contributions to film funds. It is worth noting that the Court of Justice of the European Communities (ECJ), in its judgement of March 2009 in the *UTECA* case,[4] has held that such requirements may fall outside the scope of the TWFD, and, thus, will not constitute a stricter rule within the meaning of Art. 3 AVMSD.

1) This article is based on the oral presentation given at the workshop.
2) For example, French law requires broadcasters to reserve at least 60% of their transmission time to European works. Other Member States such as Finland, Hungary, Italy, The Netherlands, Spain and the United Kingdom, apply higher percentages to all or some broadcasters under their jurisdiction.
3) This is the case in The Netherlands, Portugal, Latvia, France, Hungary, Poland and Greece.
4) See Case C-222/07, UTECA v. Administración General del Estado.

In general, broadcasters monitor the fulfilment of these obligations. They submit reports to their relevant broadcasting authority, evidencing the share of European and independent producers' works in their broadcast time ("declaration"). However, a significant number of broadcasting regulatory authorities directly monitors broadcasts and has extensive power to check the declarations made by broadcasters.[5]

2. Justification / objectives of Art. 3i AVMSD

The idea of introducing obligations to promote European works on non-linear audiovisual services was strongly supported by France, Belgium and Romania during the negotiations of the AVMSD, and met with great support from representatives of film producers. In 2005, the ECJ had already established an interesting precedent for extending a promotional scheme beyond "classical" television services, by stating, in its *Mediakabel* case,[6] that Arts. 4 and 5 TWFD apply to near-video-on-demand services.

The AVMSD clearly justifies such an obligation by its objective to promote cultural diversity in the European audiovisual sector. The Directive itself contains many references to this objective, notably in its Recitals 1, 4, 5, 8 and 48.[7] The AVMSD makes also reference to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20 October 2005.[8] This strong emphasis on cultural diversity fails, however, to explain the more economic, and less "universal", rationale of Art. 3i AVMSD, which is clearly to protect the European film industry. This industrial objective is supported by the fact that on-demand services are becoming major users of cinematographic and audiovisual works, and will eventually replace the video and possibly the theatrical markets in the revenue stream for films.[9] Therefore, it seems quite logical that promotional obligations similar to those imposed on broadcasters, and in some countries on theatre owners or video publishers, be imposed on their successors.

3. The situation of existing non-linear services

An additional argument for introducing promotional obligations for non-linear services can be deduced from how existing VoD service operators distribute European works on their platforms. Not surprisingly, the conclusions of recent studies on the VoD distribution market[10] reveal that on most services available within the EU, US contents are generally given a primary position both in terms of screen share and of rank of appearance, and that pure VoD service operators push significantly fewer European titles to their audience than VoD services operated by broadcasters. This seems to justify the concern expressed over the prominence of European works on these platforms, and stresses the desirability of adopting at least a minimum and flexible legal framework for the promotion of these works.

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5) This is the case in Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, France, Ireland, Italy, the Netherlands, Spain, Poland and Portugal.

6) ECJ *2* June 2005, Mediakabel BV v. Commissariaat voor de Media , case C-89/04.

7) Recital 48 in particular, refers to this goal in relation to on-demand audiovisual media services in the following terms: "On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity. Such support for European works might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides. It is important to regularly re-examine the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports set out under this Directive, member states should also take into account notably the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services, and in the actual consumption of European works offered by such services."

8) On 18 December 2006, the European Community ratified the Convention alongside with 12 EU member states, which allowed the Convention to enter into force on 18 March 2007. The text of the Convention is available at: http://unesdoc.unesco.org/images/0014/001429/142919e.pdf

9) A consideration which is partly expressed in Recital 48 of the AVMSD ("On-demand audiovisual media services have the potential to partially replace television broadcasting").

10) See in particular the Report "Study on the application of measures concerning the promotion of distribution and production of European works in audiovisual media services, including television programmes and non-linear services", by Attentional Ltd., Oct. 2008, which provides an interesting and thorough analysis and description of the current market structure and revenue of non-linear services within the European Union, Preliminary final report available at: http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm

II. Analysis of the scope of Art. 3i AVSMD

This legal framework was instituted in Art. 3i AVMSD, which, at first reading, seems to be a "tuned down" version of Art. 4 of the TWFD:

"Article 3i AVMSD

1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.
2. Member States shall report to the Commission no later than 19 December 2011 and every four years thereafter on the implementation of paragraph 1.
3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity."

1. "On-demand audiovisual media services provided by media service providers under their jurisdiction"

Art. 3i AVMSD is aimed at audiovisual media services provided by media service providers. We know that the definition of media service provider excludes those service providers which do not have editorial control of the audiovisual content they distribute.[11] Therefore, the scope of the regulation implementing Art. 3i AVMSD depends on how one defines "editorial control". Certain service providers, for example some of those offering video sharing services, might be tempted to set up their services with a view to escaping the definition of editorial control for the content accessible on their platforms. One could wonder whether this would be a desirable result given that editorial content has nothing to do with the principle of contributing to and promoting European films, the latter being based on a "user / payer" principle (i.e. those whose economic model is based on the exploitation of audiovisual works must contribute to and promote the industry). This being said, nothing seems to prevent a member state from extending the scheme adopted in implementation of the AVMSD to platforms without "editorial control" or to impose similar obligations on them.[12]

2. "Where practicable and by appropriate means"

Obviously, the degree of freedom left to Member States in the implementation of the promotional scheme is far greater for non-linear than for linear services. This derives not only from the "where practicable" qualification, but also from the fact that in contrast to Arts. 4 and 5 TWFD, Art. 3i AMVSD is not prescriptive. Clearly, it is up to member states to decide if and how they will implement a promotional scheme. A member state may well take the position that such a scheme is not practicable in emerging markets and in a changing technological environment.

It would be exaggerated, however, to say that the "where practicable" qualification renders Art. 3i AVMSD ineffective. The provision is likely to have some effect, because first, Art. 3i para. 1 AVMSD gives examples of "appropriate measures", and therefore some guidance to member states as to a possible implementation of the scheme. Second, Art. 3i para. 2 and 3 AVMSD provide for specific reporting obligations on the part of member states (in addition to those already established pursuant to Arts. 4 and 5 TWFD) and for evaluation mechanisms by the European Commission. These reporting obligations may well raise awareness about the mechanisms actually implemented by member states and induce a wider acceptance possibly leading to a generalization of the approach adopted by most member states. After all, the provisions of Arts. 4 and 5 TWFD were said to be ineffective at the time of their adoption, but despite this they have been implemented by all member states. Lastly, it is important to point out that in relation to non-linear services the promotional objective can be satisfied by other measures than those applicable to linear services.

11) Arts. 1 (a) and (c) AVMSD.
12) Subject, however, to difficult jurisdiction issues, since the Directive only harmonizes the issue in relation to providers of audiovisual media services.

3. "Shall promote the production of and access to European works"

Art. 3i para. 1 AVMSD immediately adds that "such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works, or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service."

The meaning of financial contribution need not be analyzed in detail, as it is already a solution that several member states apply in relation to linear services. An obligation to contribute financially to the production of European films seems a bit unrealistic in the current context of non-linear services, given the actual state of the market for these services. However, financial contribution in terms of tax or percentage of income dedicated to the acquisition of European programmes has already been implemented or contemplated in certain member states, either through legislation or industry agreements. Other types of financial contributions not mentioned in the provision may include contributions to film funds, to advertising campaigns, etc.

Prominence is a more specific concept, tailored to on-demand services. The term could cover a broad spectrum of measures and procedures, based on a quantitative or qualitative assessment of the offer of European works on audiovisual media services. There seems to be a consensus, however, against overly prescriptive measures in this respect, and notably against "qualitative prominence" criteria, which could be difficult to monitor and too subjective to assess. Also, the monitoring of prominence obligations, be they quantitative or qualitative, could be more complex than the monitoring of the quantitative obligations with regard to linear services. As a consequence, most commentators find co- or self-regulation to be more adapted for the setting-up of undertakings and guidelines relating to prominence.[13]

4. Qualification for broadcasters

Recital 20 of the AVMSD also includes an important qualification to the scheme, by providing that: "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." Recent studies suggest, however, that today non-linear services operated by broadcasters reserve a greater proportion of their offer to European content than pure VoD players.[14]

III. Implementation so far

Member states must transpose the AVMSD by 19 December 2009. As of 1st January 2009, none of the member states had implemented Art. 3i AVMSD. However, several national provisions regarding on-demand audiovisual services exist, which have the effect of promoting European works within non-linear services in line with Art. 3i of the Directive. Also, regulations are currently being adopted in Belgium and France, which cover these issues and may give interesting hints as to the shape of the regulations to come in these countries and possibly in other member states.

1. Pre-existing legislation (cinematographic and audiovisual works)

An example of such pre-exiting legislation can be found in the 2003 legislation of the French Community of Belgium, which subjects non-linear television services to the same obligations as other television broadcasting services. This also applies to the promotion of European works. Another example is given by France, and takes the form of an extension of the video tax to VoD producers,[15] and of industry agreements.

13) An idea expressed in the above-mentioned report of October 2008 by Attentional, but also by the French regulator (CSA) in its opinion of 15 April 2008 on the implementation of the AVMSD.
14) See e.g. the above mentioned report of October 2008.
15) Since 2004 video-on-demand service providers are subject to a tax of 2%, calculated on the fees paid by consumers, exclusive of VAT. In Poland, the film fund levies instituted by an Act of 30 June 2005 also apply to on-demand services, in the form of a 1.5% levy on their revenues.

More concretely, the industry agreement of 20 December 2005 entered into between film producers associations, certain broadcasters and operators of on-demand cinema services may serve as an example of the kind of obligations which VoD service providers might assume under such industry agreements, which may be referred to or otherwise extended by the regulator.[16] The 2005 agreement requires, *inter alia*, an annual contribution to the development of European cinematographic works and French language cinematographic works. The contribution consists of 5 to 10% of the turnover of the service provider for European works, depending on the turnover. This agreement, initially concluded for 12 months, was not renewed, and is currently being renegotiated.

Also, in France new industry agreements between broadcasters and representatives of film producers and authors have been signed recently in order to set the financial contribution of broadcasters to audiovisual and cinematographic production. It is interesting to note that these agreements, which do not deal with quotas for on-demand services, include in the basis for calculation of the broadcasters' contribution their revenues from VoD services.[17]

2. Implementation of Art. 3.i AVMSD

In Belgium, the Decree of 27 February 2003 on broadcasting was recently modified in order to implement the provisions of the AVMSD. Concerning the promotion of works in non-linear services, the modified decree provides only for a general prominence obligation. Providers of non-linear services are obliged to publish the list of European works offered in their catalogues with an "attractive presentation".[18]

In France, the Law of 5 March 2009, which aims, *inter alia*, at transposing the AVMSD, leaves it to decrees to define the obligations applicable in this respect, as regards terrestrial broadcasters, on the one hand,[19] and pure VoD players, on the other.[20] Adoption of the envisaged decrees is not expected before Spring 2009. However, in its opinion of 15 April 2008,[21] the *Conseil supérieur de l'audiovisuel* (CSA), the French broadcasting authority, already expressed its views concerning the implementation of Art. 3i AVMSD. In this document, the CSA clearly advocates a flexible, progressive framework, and minimum obligations for non-linear services. More specifically, it proposes to use the discretion provided for by Recital 20 AVMSD and to refrain from imposing additional obligations on television on-demand services operated by broadcasters. Concerning pure VoD service operators (i.e. services not operated by broadcasters), the CSA advocates that prominence obligations be imposed on services that have reached a certain level of turnover or audience. For the CSA these obligations should be qualitative and, for example, include the requirement to present certain content on the access page. However, due to difficulties associated with a regulatory approach of qualitative standards, the CSA suggests to find contractual solutions following the model of the above-mentioned VoD agreement of 2005. Similar agreements could be concluded between operators of pure VoD services and rights-owners.

The CSA also insists that regulation should especially take into account the existing direct competition between VoD and television services, especially with premium film channels, where television services are currently highly regulated.

Furthermore, an exemption from promotional obligations should also be made for services that have adopted a theme around foreign cinema (e.g. Indian cinema, mangas, etc.). Lastly, the CSA considers that acquisition obligations for operators of on-line services should be imposed only if strictly necessary for maintaining equitable conditions for the competing markets (especially with a view to competing cinema services) and only beyond certain levels of income.

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16) *Protocole d'accord interprofessionnel sur le cinéma à la demande* of 20 December 2005. This agreement covers distribution of cinematographic films by streaming and downloading, through pay per view or subscription agreements.
17) See e.g. Pluri-annual agreement relating to the financing and broadcasting of patrimonial audiovisual production, concluded between France Télévisions (public broadcaster) / SPFA – SPI – USPA (Producers) SACD – SCAM (Audiovisual authors' societies), of 22 October 2008.
18) Art. 47 *bis* of the Decree provides : "*La RTBF et les éditeurs de services doivent dans leurs services télévisuels non linéaires assurer une mise en valeur particulière des œuvres européennes comprises dans leur catalogue, en ce compris des œuvres originales d'auteurs relevant de la Communauté française, en mettant en évidence, par une présentation attrayante, la liste des œuvres européennes disponibles.*"
19) Art. 46, which modifies Art. 27 of the French Broadcasting Act.
20) Art. 55, which modifies Art. 33-2 of the French Broadcasting Act.
21) See website of the CSA, available at: http://www.csa.fr/
See also opinion of 15 October 2008 on the draft Bill.

Implementing the Audiovisual Media Services Directive between world trade rules and cultural diversity

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I. Implementing a *carte blanche* provision?

Art. 3i of the Audiovisual Media Services Directive (AVMSD) extends to on-demand audiovisual media service providers the duty to promote European works, an obligation which Art. 4 of the Television Without Frontiers Directive (TWFD) only placed on traditional broadcasters. How Member States will in fact transpose Art. 3i AVMSD is, however, difficult to predict, for this provision, just like Art. 4 TWFD, gives considerable leeway to Member States at the stage of implementation.

As a matter of fact, the result to be achieved is not only qualified by the wording "where practicable and by appropriate means", which appeared as well in Art. 4 TWFD, but it is also framed in rather wide terms: member states are required to ensure that the on-demand audiovisual media services provided by operators under their jurisdiction "promote [...] the production of and access to European works".

Self-evidently, "promotion" is rather an open-ended expression, encompassing all kind of activities, from (co-)financing of productions to their marketing and advertising.[1] The Directive mentions some of the possible variants, such as financial contributions by on-demand service providers to the production and acquisition of rights in European works,[2] a minimum share of European works in Video-on-Demand catalogues, or the attractive presentation of European works in electronic programme guides.

The list set out in Art. 3i para. 1 AVMSD is non-exhaustive:[3] national legislators will thus be able to opt for one or more of these promotion schemes or to devise new solutions to promote European works. Their discretion, however, is not without limits. An analysis of the assumptions underlying Art. 3i, along with a stocktaking of the existing legal constraints, notably of international nature, can arguably provide a clearer picture of the potential post-transposition scenario.

II. The goals pursued by Art. 3i AVMSD

The *travaux préparatoires* reveal the Janus-like nature of Art. 3i, which has both a cultural and an economic justification. As to the latter, it is apparent from the Commission's Impact Assessment Document attached to the AVMSD Proposal that one of the main concerns was that traditional commercial operators, public service broadcasters, Pay-TV operators providing new linear services and

1) Castendyk, O., *Commentary to Article 3i AVMSD*, in: Castendyk/Dommering/Scheuer, *European Media Law* (2008), p. 906.
2) *Ibid* , suggests that, a simple solution for Member States could be to require the on-demand service providers under their jurisdiction to participate in the national film subsidy system (linear operators are already subject to this obligation in several Member States).
3) The expression *inter alia* in Art. 3i para. 1, arguably, appears to rule out a reading of that provision as a closed list.

linear Internet Protocol Television (IPTV) operators would suffer from the competitive advantage of non-linear service providers, which are not bound by the content obligations relating to the promotion of European works laid down in Art. 4 AVMSD.[4]

Even though in a first period the development of non-linear services could be hampered by content obligations, in the Commission's view that risk is minimal "given the nature of the obligation (promote by appropriate means)" set forth in the Directive. This suggests that the vagueness of the wording of Art. 3i AVMSD and the ensuing latitude given to member states is the outcome of a deliberate choice in favour of a hands-off approach, which in turn, is the result of the compromise struck by the European legislature between the creation of a level playing field between linear and non-linear service providers, on the one hand, and the development and growth of the non-linear services sector, on the other.

In this connection, the Commission's document goes so far as to suggest that the said approach will bring about "fair competition conditions", which in turn will stimulate efficiency and overall demand in audiovisual products and services as well as an increase in the offer of EU-wide non-linear services.[5] This statement is, however, rather unpersuasive: how are on-demand services expected to thrive as a result of content requirements being imposed on them, whilst their non-EU competitors are not bound by those obligations?[6]

This suggests that the main aim pursued by Art. 3i AVMSD might rather be the protection and promotion of cultural diversity. Recital n. 5 AVMSD, indeed, expressly stipulates that the Directive respects the principles laid down in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which in turn states that "cultural activities, goods and services have both an economic and a cultural nature".[7]

The link established by Art. 3i AVMSD between the value of cultural diversity enshrined in the UNESCO Convention and the promotion of European works is clearly illustrated by the Commission's Impact Assessment Document: "Introducing some kind of regulation at the EU level to 'encourage' EU content would be likely to have a positive impact on cultural diversity and on the development of the European audiovisual industry."[8] However, this begs the question whether, by implementing this provision, Member States may run afoul of their obligations under the WTO agreements.

III. The promotion of European works vs. GATT and GATS rules: the past and present situation

Measures designed to promote European works were not first introduced by the AVMSD. They long predate the very «cornerstone» of the WTO legal system, i.e. the GATT 1947.[9] Most notably, the 1989 version of the TWFD introduced a clear-cut airtime quota system, which now has been in force for nearly two decades. The compatibility of Art. 4 TWFD with the WTO agreements, namely the GATT is, however, far from being common ground.

4) Commission, staff working document, *Impact Assessment Draft Audiovisual Services Directive*, Annex to 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, SEC (2005) 1625/2, para. 6.3.
5) *Ibid*., para. 6.3.
6) It is worth recalling that even the quota system under Art. 4 TWFD was, according to the Amending Directive of 1997, "necessary to create conditions for improving the competitiveness of the programme industry" (See Recital 28). Generally, on the AVMSD impact on cultural diversity, see Mira Burri-Nenova, *The new audiovisual media services directive: television without frontiers, television without cultural diversity* (2007) 44(6) Common Market Law Review pp. 1689-1725; Thomas Gibbons, *The impact of regulatory competition on measures to promote pluralism and cultural diversity in the audiovisual sector* (2007) 9 Cambridge yearbook of European legal studies pp. 239-259.
7) Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Recital n. 17.
8) European Commission, staff working document, *Impact Assessment Draft Audiovisual Services Directive*, above, para. 4.2.3.
9) Regourd, S., *L'exception culturelle*, Paris, 2002, p. 27 recalls the following statement by Édouard Herriot, Minister of Education of the Poincaré Cabinet, dating back to 1926: "*Ce n'est pas seulement l'intérêt du bon ordre et de la moralité publique […] mais aussi l'intérêt de la conservation de mœurs et des traditions nationales qu'il s'agit de sauvegarder. Ce dernier intérêt serait compromis si le nombre de films de production étrangère projetés sur les écrans français continuaient de croître aux dépens des films français*."

Indeed, on 23 October 1989, the US House of Representatives passed a resolution denouncing the TWFD as "trade restrictive and in violation of the GATT" insofar as its quota system allegedly infringed (i) the Most Favoured Nation (MFN) clause under Art. I GATT; (ii) the national treatment requirement under Art. III GATT and (iii) the ban on quantitative restrictions set out in Art. XI GATT.[10]

Although the matter was the subject of protracted negotiations during the Uruguay Round, the dispute was not brought to a close. Instead, it spilled over to the WTO agreement concerning trade in services, the GATS. However, the peculiar architecture of that agreement, known as positive list or *à la carte* approach, afforded the EC negotiators the opportunity to bring the TWFD within a (relatively) safe harbour.

More to the point, the market access requirements under Art. XVI GATS and the national treatment obligation set out in Art. XVII GATS only apply to the service subsectors listed in every Member's Schedule of Commitments. The MFN clause in Art. II GATS, instead, applies horizontally to all service sectors except those listed by each Member in its Schedule of MFN exemptions.

Not surprisingly, the EC made no Arts. XVI and XVII GATS commitments in respect of the audiovisual sector, whilst under Art. I GATT it laid down a number of detailed MFN exemptions *vis-à-vis* the production and distribution of audiovisual works.[11]

IV. Possible Art. 3i implementation scenarios and WTO constraints

Turning to Art. 3i AVMSD, let us first deal with the question whether or not implementation measures might run counter to the GATS agreement. Let us imagine that an EU Member State transposes Art. 3i AVMSD by imposing on on-demand service providers the requirement to participate in its national film subsidy system providing funds for the production of European works. Pursuant to the definition of "European works" set out in Art. 1(n) AVMSD, works benefitting from such a scheme would include works originating in member states, in European States party to the European Convention on Transfrontier Television (ECTT), or in third countries within the framework of a bilateral co-production agreement entered into by a member state.

In theory, an implementation scheme such as the one described above would run counter to the national treatment principle set out in Art. XVII GATS, insofar as an American production could never benefit from the same subsidies granted to national works. However, as audiovisual services were not included in the EC schedule of commitments, the national treatment principle does not apply and is thus no bar to the implementation of such a scheme.

Moreover, the same scheme could give rise to MFN concerns under Art. II GATS insofar as it would discriminate among non-national works by favouring productions originating in EU member states (as well as in ECTT Parties and countries which have entered into a co-production agreement with the member state where the scheme is implemented) over works produced in other WTO countries. Again, this issue is only theoretical, as the Community list of MFN exemptions expressly allows for "Measures which define works of European origin, in such a way as to extend national treatment to audiovisual works which meet certain linguistic and origin criteria".

Let us examine another potential implementation scenario for Art. 3i AVMSD: the imposition by a member state of a catalogue quota, namely the requirement that non-linear service providers within its jurisdiction devote at least 50% of their offer of on-demand content to European works, within the meaning of Art. 1(n) AVMSD.

10) See 135 Cong. Rec. H7326-27 (23 October 1989), cited in Castendyk, O., *Commentary to Article 4 TVWFD*, in: Castendyk/Dommering/Scheuer, *European Media Law*, pp. 440-441.

11) For instance, in respect of the distribution of audiovisual works, the Community secured an indefinite exemption allowing it to impose redressive duties «in order to respond to unfair pricing practices, by certain third countries distributors of audiovisual works», which «may cause serious disruption to the distribution of European works». Moreover, the EC can selectively grant the benefit of any support programmes (such as Action Plan for Advanced Television Services, MEDIA or EURIMAGES) only to audiovisual works, and suppliers of such works, meeting certain European origin criteria. See also Peter van den Bossche, *Free trade and culture: a study of relevant WTO rules and constraints on national cultural policy measures* (Amsterdam: Boekmanstudies, 2007).

Once again, the scheme at hand would fall afoul of the GATS national treatment, and MFN requirements, which however are not binding on EU member states. Furthermore, a catalogue quota system is a clear-cut case of market access restriction banned by Article XVI GATS, but again the prohibition does not apply as no EC commitments were made in the audiovisual sector.

What if, however, the two schemes described above were also subject to GATT rules, as the Appellate Body ruled in *Bananas*?[12] This is almost self-evident in the case of the quota system: although it *directly* concerns a service (i.e. the provision of on-demand audiovisual content to end users), it *indirectly* affects the trade in films – namely in film exploitation rights – as goods.[13] As a matter of fact, if an on-demand provider's catalogue consists of 100 films, only 50 of which can be of non-European origin, a profit-driven undertaking would in all likelihood not purchase more film exploitation rights than it is allowed to broadcast to its subscribers.

Thus, the catalogue quota scheme would fall short of the national treatment principle under Art. III GATT, of the MFN clause under Art. I GATT and of the ban on quantitative restrictions set forth in Art. XI GATT. Unlike the GATS, these GATT obligations are binding on all EU member states.

The GATT, however, contains an express derogation from the national treatment principle: Art. III:10 *juncto* Art. IV GATT allow contracting parties to establish or maintain internal quantitative regulations in the form of screen quotas to the advantage of films of national origin.[14] But this derogation, arguably, cannot be relied upon to justify the catalogue quota system in question for two reasons. First, because if its wording is construed literally, it only applies to «exposed cinematograph films»– which nowadays are rather *passé*. Moreover, the said derogation does not allow the remaining screen time to be allocated, formally or in effect, among sources of supply.[15] This means that if the allocation of the quota is not reserved for national movies, States cannot differentiate among non-national works,[16] for instance by favouring an ECTT production over an American motion picture.

Thus, even if Art. IV were broadly construed so as to include on-demand audiovisual contents,[17] the breach of the MFN clause would still not be caught by the derogation insofar as it discriminates between foreign sources of supply.

V. The role of cultural diversity and of the UNESCO Convention

It is at this stage that the notion of «cultural diversity» can come into play. Following the UNESCO Universal Declaration on Cultural Diversity of 2 November 2001, the European Union was amongst the most strenuous supporters of the Paris Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20 October 2005.[18] From a public international law standpoint, the Convention is rather atypical, insofar as it imposes no significant obligations on its parties. Moreover, the Convention reaffirms some of the rights of the Parties, notably the right to adopt measures designed to protect and promote cultural diversity, which, however, are already implied in the notion of sovereignty.

12) In WTO Case WT/DS 27 the Appellate Body found that "[certain] measures [...] could be found to fall within the scope of both GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this category the measure in question could be scrutinised under both the GATT and the GATS".

13) Castendyk, *Commentary to Article 4 TVWFD*, above, p. 443.

14) According to Neuwirth, R., *United in divergency: a commentary on the UNESCO convention on the protection and the promotion of the diversity of cultural expressions* in (2006) Zeitschrift für ausländisches Recht und Völkerrecht p. 827, the inclusion of such a derogation in the body of the GATT 1947 shows that the need to provide for a special legal framework for cultural goods was felt from the very inception of the GATT system.

15) See Art. IV:b GATT. Unfortunately, the case law provides no guidance in respect of the interpretation of that provision: even though it was relied upon in the context of two disputes, on both occasion the parties withdrew their cases following an amicable settlement: see *Turkey-Taxation of Foreign Film Revenues* WT/DS43 (1997) and *Canada-Measures Affecting Film Distribution Services* WT/DS117/1 (1998).

16) Castendyk, *Commentary to Article 4 TVWFD*, *above,* p. 444

17) This argument finds no factual support in the history of negotiations, as the drafters of the GATT 1994, unlike their predecessors, were in the position, but chose not to amend the wording of Arts. III:10 and IV GATT.

18) The text of the Convention is available at: http://unesdoc.unesco.org/images/0014/001429/142919e.pdf

Looking at the content of the Convention, the right to adopt culture-related measures and policies is nothing short of a mantra: it is hinted at in Recital n. 9, it is referred to as a Convention "objective" in Art. 1(h), as a "guiding principle" under Art. 2(2), as the "General rule regarding rights and obligations" as per Art. 5(1) and as a "Right of parties at the national level" according to Art. 6, which then goes on to break it down into individual examples of permissible measures.

If the catalogue of the rights of the parties under Art. 6 of the UNESCO Convention is juxtaposed with the Community list of MFN exemptions annexed to the GATS agreement, the resemblance is striking. No wonder that the USA voted against the adoption of the Convention and did not ratify it: the US' main concern is that the instrument may be used in other multilateral contexts to slow down, or even stop, the opening up of the audiovisual sector to free trade.[19]

It is also not surprising that Art. 20, governing the «Relationship to other treaties», ranked among the most heatedly-debated provisions of the Convention. Again, the preparatory works constitute an invaluable source of information, as two versions of that provision had been put forward in the course of negotiations. One option, known as the "compatibility clause" and supported by the US, was that the Convention would not affect or should not be interpreted so as to affect rights and obligations of parties under existing agreements. France and Canada, conversely, favoured the second option, known as the "restrictive clause", whereby the Convention may affect rights and obligations under existing agreements, except for those dealing with intellectual property, if the enjoyment of those rights and the observance of such obligations would cause serious damage or threat to the diversity of cultural expressions.

Following protracted negotiations between the parties, a compromise was reached. The final version of Art. 20 of the Convention, without subordinating the Convention to any other treaty, firstly requires its parties to foster "mutual supportiveness" between the Convention and the other treaties to which they are parties (para. 1 (a)).[20] Further, it demands the Parties to take into account the UNESCO Convention when interpreting and applying the other treaties to which they are parties or when entering into other international obligations (para. 1 (b)). This proviso is, however, qualified by para. 2, which stipulates that "Nothing in the Convention must be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties".

VI. Putting the pieces together: the relevance of the UNESCO Convention in the framework of a WTO dispute over a measure implementing Art. 3i AVMSD

Returning to the Art. 3i AVMSD implementation scenario of a catalogue quota for European works, the question arises whether the provisions of the UNESCO Convention may be relied upon in a case pending before a WTO panel or the WTO Appellate Body concerning the compatibility of the said scheme with the GATT 1994.

At the outset, it appears unlikely that Convention rules can be *directly applied* by the WTO judiciary for the purpose of settling a dispute: on the one hand, the Dispute Settlement Understanding (DSU) clearly states that the panels' jurisdiction is limited to the "covered agreements", to the exclusion of non-WTO agreements;[21] on the other hand, Art. 20 para. 2 of the UNESCO Convention expressly rules out the possibility of interpreting its provisions "as modifying rights and obligations of the Parties under any other treaties".[22]

19) See, to that effect, Christoph Beat Graber, *The new UNESCO Convention on Cultural Diversity: a counterbalance to the WTO?* (2006) 9(3) Journal of International Economic Law, pp. 553-574; Michael Hahn, *A clash of cultures?, The UNESCO Diversity Convention and international trade law* (2006) 9(3) Journal of International Economic Law. pp. 515-552.

20) According to the lengthy report presented by the UNESCO Director of Legal Affairs, Abdulqawi A. Yusuf, «mutual supportiveness» between international treaties is what normally takes place in the framework of international relations: «it is not the conflicts or contradictions between the provisions of various conventions that is usually emphasized, but the mutual supportiveness of such conventions». *Presentation of the Legal Adviser on Possible Ways of Dealing with the Question of the Relationship between Successive Conventions Relating to the Same Subject Matter and Article 19 (Relationship to other instruments) of the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions on the occasion of the First session of the Intergovernmental Meeting of Experts on the Draft Convention on the Protection of the Diversity of Cultural Expressions* (20-24 September 2004).

21) See Dispute Settlement Understanding, Arts. 1 para. 1, 11 para. 1 and 19 para. 1.

22) Rubagotti, G., *La Convenzione UNESCO sulla protezione e la promozione della diversità delle espressioni culturali: quale coordinamento con le norme OMC?* (2007) 3 Diritto del Commercio Internazionale 206-207; Pauwelyn, J., *The UNESCO Convention of Cultural Diversity and the WTO: Diversity in International Law-making?* (2005) ASIL Insight.

Conversely, the recourse to provisions of the UNESCO Convention as guidelines for the interpretation and application of the WTO legal texts cannot be ruled out *a priori*. Indeed, a guiding function of the Convention is expressly envisaged by Art. 20 para. 1 (b) of the UNESCO Convention, and would be in line with the "mutual supportiveness" obligation set out in Art. 20 para. 1 (a).

In a hypothetical WTO dispute involving a catalogue quota requirement enacted by a Member State, the EC would seek to use the UNESCO Convention in order to interpret Art. XX(f) GATT,[23] which affords an exemption from all GATT obligations *vis-à-vis* measures "imposed for the protection of national treasures of artistic, historic or archaeological value". The EC argument would be that the UNESCO Convention's notion of "Cultural activities, goods and services", which includes audiovisual works, could be relied upon to flesh out the reference to "national treasures" so as to include on-demand audiovisual contents.

Bridging the gap between the respective legal systems of the WTO and the UNESCO is slightly more arduous. The major stumbling block is the fact that any such dispute would, in all probability, involve the United States, i.e. a country which has not ratified the UNESCO Convention. It is undisputed that the provisions of a treaty outside the WTO legal framework can be relied upon to construe a WTO agreement if both international instruments have identical memberships, i.e. if the non-WTO treaty is binding on *all WTO members*.[24] Indeed according to the rules on interpretation set out in Art. 31 para. 3 (c) of the Vienna Convention on the Law of Treaties, implicitly referred to in Art. 3.2 DSU, account must be taken of "any relevant rules of international law *applicable in the relations between the parties*" (emphasis added). Under this approach, therefore, the unwillingness of the US to ratify the UNESCO Convention could effectively prevent such an instrument from being used as a reference for the interpretation of WTO rules in the context of a dispute where the US is one of the parties.

Requiring a perfect congruence in the membership of WTO agreements and the ones which are sought to be relied upon for interpretation purposes, however, would have, as Marceau put it, the ironic effect that the more the membership of a multilateral treaty such as the WTO agreements expanded, the more those treaties would be cut off from the rest of international law.[25] It is thus no wonder that, in its report in the *Gasoline* case, the WTO Appellate Body held that the GATT is not to be read "in clinical isolation from public international law".[26] The *Shrimps* case further illustrates the breadth of that *dictum*.[27] The US sought to invoke Art. XX(g) GATT to justify its import ban on shrimps and shrimp products which conflicted with the GATT rules on quantitative restrictions. The US measure was designed to protect sea turtles. However, the wording of Art. XX(g) GATT only refers to "exhaustible natural resources". Nonetheless, the Appellate Body took the view that "the recent acknowledgement by the international community" of the importance of protecting living natural resources could, in line with "the principle of effectiveness in treaty interpretation", support a broad construction of Art. XX(g) so as to include both living and non-living resources.[28]

It is worth noting, that the Appellate Body proved such an "acknowledgment by the international community" by relying on some multilateral instruments which, as in the case of the UNESCO Convention, the US had neither signed nor ratified.[29] Moreover, in a recent report on the fragmentation

23) Germann, C., *Diversité culturelle à l'OMC et l'UNESCO*, in (2004) Revue internationale du droit économique, instead submits that the reference to 'public morals' contained in Article XX, letter a) GATT could be relied upon to justify quantitative restrictions aimed at protecting cultural products. However, Gattini, A., *La convenzione UNESCO sulla protezione e promozione della diversità culturale e regole WTO* in L. Zagato (ed) *Le identità culturali nei recenti strumenti UNESCO* (Cedam, Padua: 2008) p. 201, footnote 21, recalls that such an argument would still have to pass the "necessity" test laid down in that very provision and argues that the derogation set forth in Article XX letter d) for measures "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATT would be a viable alternative.

24) *EC - Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291-293/INTERIM, pp. 299-300, paras. 7.68-7.70. On the topic, see A. Gattini, *La convenzione UNESCO*, op. cit., at p. 203; Pauwelyn, J., *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, Cambridge: 2003) p. 257.

25) Marceau, G., *WTO Dispute Settlement and Human Rights*, in European Journal of International Law, vol. 13 (2002), pp. 757-779

26) Appellate Body Report of 29 April 1996, *United States - Standards for Reformulated and Conventional Gasoline* AB-1996-1.

27) Appellate Body Report of 12 October 1998, *United States - Import Prohibition of Certain Shrimps and Shrimp Products* AB-1998-4.

28) *Ibid.*, para 131.

29) *Ibid.*, footnotes 110 and 111.

of international law, the UN International Law Commission held that regard must be had to the extent to which the Treaty relied upon to interpret the provisions of another international agreement "can be said to have been 'implicitly' accepted or at least tolerated by the other parties in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the … term concerned"[30]

Whether the outcome of a WTO dispute on quota for audiovisual content would be similar to that in *US Shrimps*, however, is far from predictable. In the EU, the UNESCO Convention has been already relied upon in a number of soft-law documents,[31] as well as by the European Commission to declare a French measure introducing a tax credit for the creation of video games compatible with the common market.[32] The Court of Justice of the European Communities used it to justify a Spanish measure requiring broadcasters to invest in films the original language of which is an official language in Spain.[33] The probability that a WTO panel or the Appellate Body refer to the UNESCO Convention as a source of interpretative guidance depends, however, on the creation of a genuine and broad consensus. This consensus must be reached not only between EU Institutions and EU member states, but rather within the whole international community as to the notion of cultural diversity enshrined in the UNESCO Convention and to the scope of the powers sovereign states can exercise to protect and promote that value.[34]

30) *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law*, Report of the Work of the Study group of the International Law Commission, Finalized by Koskenniemi, M., Document no. A/CN.4/L.682, 18 July 2006, para. 472. It must be noted, however, that the conclusion to which such a report ultimately leads is that refering to a treaty as guide to interpreting another treaty should be permitted only if *at least the parties in dispute* are parties to both instruments.

31) See, *ex multis,* Conclusions of the Council and of the Representatives of the Governments of the member states, meeting within the Council, on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its member states, OJ C 320, 16 December 2008, p. 10–12; Council conclusions of 20 November 2008 on the development of legal offers of online cultural and creative content and the prevention and combating of piracy in the digital environment, OJ C 319, 13 December 2008, p. 15–17; Council conclusions of 22 May 2008 on Intercultural Competences, OJ C 141, 7 June 2008, p. 14–16; Council conclusions of 24 May 2007 on the contribution of the cultural and creative sectors to the achievement of the Lisbon objectives, OJ C 311, 21 December 2007, p. 7–9; Resolution of the Council of 16 November 2007 on a European Agenda for Culture, OJ C 287, 29 November 2007, p. 1–4; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world, COM(2007) 242 final.

32) 2008/354/EC: Commission Decision of 11 December 2007 on State Aid C 47/06 (ex N 648/05) Tax credit introduced by France for the creation of video games (notified under document number C(2007) 6070), OJ L 118, 6 May 2008, p. 16–29, notably paras 63, 70 and 72.

33) Case C-222/07, UTECA, nyr, para 33.

34) As to the direct commitment of the EU to that effect, see Armin von Bogdandy, *The European Union as situation, executive, and promoter of the international law of cultural diversity: elements of a beautiful friendship* (2008) 19(2) European Journal of International Law, p. 253-258.

Regulation, Co-regulation, Self-regulation

Protection of minors – the case of the UK

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I. Introduction

The revision of the Television without Frontiers Directive (TWFD) was a contentious process, but it seemed that common ground was to be found on the need to protect minors. The TWFD contained provisions regarding the protection of minors; the Audiovisual Media Services Directive (AVMSD) introduced protection, albeit at a lower level, with regard to non-linear services.

In recognising the significance of the protection of minors, the AVMSD follows the approach taken in other Community measures,[1] acts taken within the framework of the Council of Europe[2] and the UN Convention on the Rights of the Child (UNCRC). This latter convention considers children's rights broadly, but includes rights pertaining to the mass media. All Member States have signed up to the UNCRC and the European Court of Justice has recognised its status within the European legal order.[3] Crucially, Art. 3 UNCRC provides that the best interest of the child is a primary consideration. As well as relating to governmental action, this applies to all administrative authorities in all actions concerning children, which would seem to include media regulators introducing regulation to protect children, a fact that the Office of Communications (Ofcom), the UK regulator, accepted when dealing with the issue of junk food advertising aimed at children.

These considerations then give us the impetus for this article. Its aim is not to assess whether the political compromise at EC level "got it right", nor is it to discuss different forms of regulation, self-regulation and co-regulation, whether top-down or bottom-up.[4] It is rather to outline and to understand the approach taken in the UK to the implementation of the AVMSD, particularly the new provisions relating to the protection of minors, asking whether this approach gives primacy to the best interests of the child, or whether they have been subsumed in general considerations that reflect the views of other stakeholders, notably of the industry itself. In this context, we need to be aware of the potential impact of choices as to form – that is the choice as to who regulates and on what basis – on actual substantive levels of protection. To understand the changes required to implement the AVMSD, it is necessary to be aware of the requirements of the AVMSD as well as the existing regulatory framework in the UK, before looking at the approach to implementing the AVMSD indicated by the UK government.

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1) Council Recommendation 98/560/EC of 24 September 1998 on the development of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity OJ [1998] L 270/48. Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry OJ [2006] L 378/72.
2) See e.g. Recommendation (2004) 1 on the protection of minors from pornographic programmes.
3) ECJ, Case C-244/06 *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, judgment 14 February [2008] ECR, p. I-505.
4) For a discussion of the forms of regulation see e.g. Hans-Bredow-Institut/Institute of European Media Law (EMR), *Study on co-regulation measures in the media sector*, available at:
http://ec.europa.eu/avpolicy/docs/library/studies/coregul/final_rep_en.pdf ; Lievens, Dumortier and Ryan, *The Co-Protection of Minors in New Media: A European Approach to Co-Regulation* (2006) 10(1) UC Davis Journal of Juvenile Law and Policy 97.

II. Regulation at the EC level

The AVMSD does not limit the level of protection given to minors with respect to broadcasters, though it seems some member states may have stuck to the letter of the AVMSD more closely than others in this regard. Since the UK system already complies with provisions regarding protection of minors as required by the TWFD, this article will focus on the ways in which the system will be required to change.

The AVMSD extends the protection given to children, in terms of extending the scope of the TWFD to audiovisual media services (e.g. on-demand services). Thus, in addition to the general negative content requirements prohibiting hate speech found in Art. 3b AVMSD (which protects adults as well as children), there are rules specifically designed to protect minors viewing on-demand services. Art. 3h AVMSD requires member states to ensure that minors will not normally be able to access services which might seriously impair their development. Further, in addition to the advertising rules prohibiting surreptitious advertising and providing a base level of negative content rules for advertising (Art. 3e (1) (a)-(d), (f)), there are specific rules protecting minors. In general terms, audiovisual commercial communications are required not to cause physical or moral detriment to minors, and their credulity and inexperience should not be exploited (Art. 3e (1)(g)). Further, advertising for alcoholic beverages is not to be aimed at minors either. Apart from this, some provisions regarding sponsorship and product placement apply a more stringent regime to children's programmes, though it could be argued that this is in fact a relaxation of the previous regime, as the behaviour was precluded entirely previously (the position regarding product placement was, however, far from clear).[5] Additionally, member states are to "encourage media service providers to develop codes of conduct" regarding advertising of junk food (Art. 3(2) AVMSD).

III. The current UK regulatory structure: an overview

The UK regulatory system is not one coherent system, but a series of systems with some overlaps and gaps between its elements. We can distinguish the system relating to the British Broadcasting Corporation (BBC), that relating to commercial, terrestrial broadcasters who are subject to some (varying) public service obligations; and that relating to other broadcasters. All operate on broadcasting licences which, with the exception of the BBC, are granted by Ofcom; Ofcom, likewise, has the obligation to ensure broadcasters comply with the codes it drafts. These codes provide more detailed guidance about broadcasters' obligations under the Communications Act (e.g. the Ofcom Broadcasting Code). Ofcom has no jurisdiction with regard to on-demand services, marking yet another fault-line in the system of content regulation.

1. The BBC

The BBC is established under Royal Charter and has concluded an Agreement with the Secretary of State for Culture, Media and Sport concerning its obligations in terms of programme provision at a broad level. The BBC "exists to serve the public interest"[6] and is subject to the obligation to carry out specified public purposes by informing, entertaining and educating.[7] Originally subject only to self-regulation (within the terms of the Charter and Agreement), it is now subject to a form of double regulation via both the BBC Trust[8] ("the Trust") and Ofcom. The Trust acts as final arbiter in complaints brought to the BBC regarding programme content. As specified in the Agreement, the BBC must also comply with the Ofcom codes, with limited exceptions.

The BBC has drafted a number of editorial guidelines relating to content of programmes, including guidance on on-line services which apply to everyone who makes content for the BBC, and not just to in-house productions. The guidelines have a specific section dealing with content obligations regarding harm and offence. The BBC's general approach reflects the specific wording of the TWFD specifying that the BBC "will not broadcast material that might seriously impair the physical, mental or moral development of children" and the guidelines refer to the use of both watersheds and signposting/labelling. There are specific provisions regarding bad language, nudity, sex, drug abuse, dangerous behaviour and violence (to name but a few). These issues reflect those dealt with in the Ofcom Code.

5) The question of product placement is dealt with elsewhere in this publication, see article by Castendyk.
6) BBC Charter, 2006, Art. 3(1).
7) BBC Charter, 2006, Arts. 4 and 5.
8) BBC Agreement (Cmnd 6872) clauses 43-63 set out obligations with which the BBC must comply. These are given more detail in Producers Guidelines.

2. Ofcom

The broadcasting regime in general terms is found in the Communications Act 2003 ("the Act") which imposes obligations on Ofcom with regard to standards in the broadcasting sector. This includes the obligation to comply with international obligations, comprising requirements imposed by EC law and, presumably, also obligations under the UNCRC. Thus sections 3(4)(h) and 319(2)(a) and (f) of the Act reflect the requirements of Art. 22 TWFD. As part of its obligations, Ofcom has drafted a code with which broadcasters must comply, the most recent version dating from 2008.[9] Whilst commentators have noted that typically the UK system has been more concerned about offensive and harmful content in general (i.e. that which affects adults as well as children), the current version of the Ofcom Code does have a separate section for protecting the under-18s (as did the previous version), which must, however, be read in conjunction with the general section on harm and offence. These sections of the Broadcasting Code aim to fulfil the requirements of the relevant provisions of the Act, and Art. 22 TWFD, whilst being in accordance with Art. 10 of the European Convention on Human Rights (ECHR). Like the BBC Code, the text of the Ofcom Code tracks the wording of Art. 22 TWFD, by stating that "[m]aterial that might seriously impair the physical, mental or moral development of people under eighteen must not be broadcast".[10] Section 1.2 further indicates that, in addition to obligations arising from Art. 22 TWFD, "broadcasters must take all reasonable steps to protect people under eighteen". The section of the code then continues by imposing specific requirements with regard to the protection of children[11] by scheduling requirements.[12] There are provisions which reflect the fact that some material is not suitable for younger children, thereby introducing the possibility of graduated standards.

One interesting development concerns the rules for the broadcast of films,[13] which relies on the classification given to a film by the British Board of Film Classification (BBFC),[14] a co-regulatory body responsible for the classification of films for showing in theatres, as well as classifying them for release on video and DVD. Ofcom rules now permit the broadcast of BBFC 18-rated films on pay-per-view channels provided that adequate information is available and an appropriate protection system is in operation. The Ofcom Complaints Bulletins, which detail the adjudications of complaints against broadcasters, show that Ofcom has been unsympathetic to any technical failures on the part of service providers in this regard. Further, films rated R18 are prohibited, whether technical measures are in place or not.

3. Advertising on television

Under the Communications Act, Ofcom is under a duty to consider co-regulation. It exercised the power to contract out its regulatory functions in respect of broadcast advertising to the Advertising Standards Authority (ASA), a body set up by industry to regulate the advertising industry, but given subsequently statutory support.[15] The ASA Council adjudicates on potential breaches of the codes drafted by two industry committees, the Committee of Advertising Practice (Non-broadcast) (CAP) and, more recently, the Committee of Advertising Practice (Broadcast) (BCAP), and the system is administered by the ASA. Although some members have relevant industry experience, most Council members come from outside the advertising industry. As well as responding to complaints, the ASA monitors advertising. The industry committees have also drafted guidance notes to the industry, explaining the scope of the codes as understood in the light of ASA decisions. CAP's enforcement team are responsible for enforcing ASA decisions. In the event of a failure to comply, the ASA may refer the matter to trading standards officers. The ASA is funded by a levy (collected by the Advertising Standards Board of Finance ("Asbof") and the Broadcast Advertising Standards Board of Finance ("Basbof"), which are separate bodies so that there is no question that an advertiser's contribution to ASA finance could affect ASA decision-making) and, according to its website, had in 2008 an annual income of over GBP 7 million.

The British Code of Advertising, Sales Promotion and Direct Marketing drafted by CAP with respect to non-broadcast advertising has tended to focus on issues relating to misleading advertising, and the

9) Ofcom, Broadcasting Code, 2008 available at: http://www.ofcom.org.uk/tv/ifi/codes/bcode/
10) Ofcom, Broadcasting Code, section 1.1.
11) According to section 1.3 children are people under 15.
12) Certain types of content cannot be broadcast before the watershed: e.g. sex, nudity, drugs, alcohol, violence, dangerous behaviour, demonstrations of exorcisms, occult practices and the paranormal and offensive language.
13) Ofcom, Broadcasting Code, section 1.20 et seq.
14) http://www.bbfc.co.uk/
15) Control of Misleading Advertisements Regulations 1988; the ASA can refer advertisers who refuse to cooperate with the voluntary system to the Office of Fair Trading (OFT) for legal action.

confusion of editorial and commercial material, though the code has always recognised the need to protect children from commercial exploitation. The code also requires that advertising should not cause "serious or widespread offence" and advertisements must be prepared with a sense of responsibility to consumers and to society. In both cases, this requires an assessment which is based on the ASA's understanding of public expectation, which changes in the light of societal developments.

The system relating to broadcasting advertising was grafted on to the ASA/CAP system. It comprises two separate codes (one for radio and one for television) and a different committee drafting the code, BCAP. BCAP comprises representatives of broadcasters licensed by Ofcom, advertisers, agencies, direct marketers and interactive marketers. It has a responsibility to keep the codes up to date, and in fulfilling this responsibility it is advised by the Advertising Advisory Committee (AAC). The AAC is independent from industry and aims at providing independent, third party advice.[16] As with the system for non-broadcast advertising, decisions about compliance with the broadcasting codes are made by the Council of the ASA. There is a separate Broadcast Council, although there is some overlap in membership of broadcast and non-broadcast Council. Broadcasters are obliged by a condition of their respective Ofcom licences to enforce ASA rulings. If they persistently run advertisements that breach the codes, broadcasters risk being referred by the ASA to Ofcom. The BCAP has drafted advertising codes which go beyond the minimum required by the TWFD. Issues relating to the frequency of advertising breaks are still dealt with by the Ofcom content board, as are questions about political advertising and sponsorship. Although the ASA has a very broad remit, and regulates some advertising on new media, such as banner ads or an SMS message, statements made on companies' websites lie outside its remit, as the ASA does not rule on editorial content, save where space has been paid for to promote a product or service.

4. On-demand services

On-demand services fell outside the scope of the Communications Act; Ofcom does not deal with them directly. Much has been made of industry bodies such as the Association for Television On-Demand (ATVOD)[17] and the Independent Mobile Classification Body (IMCB)[18] as regulators in this area. This is not the whole picture, although we will start this section with a review of IMCB and ATVOD.

IMCB was appointed pursuant to a code of practice agreed by a number of mobile operators, known collectively as the Mobile Broadband Group (MBG). IMCB operates a classification system according to which commercial content providers self-classify their content. Mobile operators, according to the code, will impose access controls on material classified as 18, and unclassified material will be treated as 18. The terms of the classification system broadly reflect those of the BBFC, which took public expectations into account when reviewing its classification standards, and the IMCB's standards are set independently of the MBG. The mobile operators will enforce the terms of the code through their contractual arrangements with the content providers. It is this aspect which would give the determinations by the IMCB real impact, as content providers are dependent on the mobile companies to access the audience. Review is not carried out by the classification body, however, but rather as a result of complaints, although there is some evidence that the mobile content operators will monitor the classification of content.[19] Ofcom believes the code to be working well, being well understood by industry members, even given the inactivity of IMCB.[20] IMCB has heard one complaint (out of remit) since it was established in 2004, and has no separate annual report.

There are some limitations: crucially as far as the AVMSD is concerned, the IMCB system does not, for example, cover material on the Internet. The real weakness in the system is that it is essentially capable of distinguishing only between material suitable for those over 18 and that which is suitable for all ages. In contrast to the codes applicable to broadcasters, this means younger children may see content suitable only for older children. The MBG notes this difficulty, though it believes its signposting of which content is appropriate is sufficient.[21] It has, however, raised the question as to whether there is sufficient "granularity" in the content classification system. There is a clear tension in the MBG's assessment of the acceptability of the level of protection given to children, as it has identified a weakness in the protection of younger children. One explanation for this tension is that

16) A list of the AAC's membership is available under: http://www.cap.org.uk/cap/Advertising+Advisory+Committee/
17) The home page is available at: http://atvod.co.uk/
18) The home page is available at: http://www.imcb.org.uk/
19) MBG, Consultation on the review of the "UK code of practice for the self-regulation of new forms of content on mobiles", 8 August, 2008, p. 5.
20) Ofcom, Self-Regulation of New Forms of Content on Mobiles: Review, 11 August, 2008, p. 2.
21) MBG, Consultation on Code Review, p. 5.

the underlying preference for self-regulation, and the desire to allow industry systems a chance to work, is weighing in the balance as to whether adequate systems are in place. Whilst the TWFD does not require specific levels of protection to be awarded to different age groups, it is well accepted that children require different levels of protection depending on their development. Thus, given this undifferentiated approach, it is not a system which puts the interests of all children first and where priority is accorded to children's interests pursuant to the UNCRC.[22]

ATVOD also operates an information/classification system, based on a code. It contains no provisions prohibiting particular types of content or material (e.g. pornography or hate speech), which seems inconsistent with the terms of the AVMSD, although where ATVOD members have editorial control, the ATVOD code specifies that members should attempt to ensure that the use of material which infringes human dignity is justified. Interestingly, the ATVOD code does refer to standards used by other regulatory bodies, including the BBFC. The self-regulatory system run by ATVOD is voluntary and this is a weakness: key members of the industry have not joined. Current membership comprises BT, Channel 4, Filmflex, Five, ITV, Tiscali and Virgin Media. It is possible to do well in this sector without the imprimatur of ATVOD; companies such as Sky are not members. Furthermore, although the BBC is an affiliate member, complaints about the BBC on-demand services, which fall within the regulatory system established by the Charter and Agreement, should be taken to the BBC rather than to ATVOD.

ATVOD and IMCB are not the only potential bodies to consider. The BBFC, the UK film classification body, has entered the fray. It was an industry body which has subsequently been supported by statute.[23] It is funded by a levy on films classified, calculated by measuring the running time of films or video works submitted for certification and the tariff for which is approved by government.[24] The members of the BBFC's Council of Management are made up of leading figures from the manufacturing and servicing sections of the film industry. They have an interest in seeing the industry thrive, but no direct interest in the content of particular films. According to the BBFC, 84% of adults and 91% of parents want to see BBFC film and DVD classifications on downloadable digital audiovisual content.[25] To this end, the BBFC has introduced "BBFC.online" aimed at both content providers and aggregators, covering content available from websites, set-top boxes and portable media devices, and based on the classification already awarded to the material under the Video Recordings Act (at no extra cost per film). This system has the advantage for consumers of using familiar branding and classification terms. As well as containing an age-based classification, websites may have links back to the BBFC website to a page providing information which explains the categorisation. In its 2007 Annual Report, BBFC states that the following industry members have been involved with the BBFC.online project: Disney, Warner Bros, Sony Pictures, 20th Century Fox, Tartan, Arts Alliance Media, Entertainment UK, BT Vision, Tesco.[26] In contrast to ATVOD, which involves most of the broadcasters, and IMCB which depends on mobile telephony operators, those involved in the BBFC project seem to be content producers.

As noted briefly above, the BBC has already developed a set of guidelines to deal with its on-line services.[27] These take as their baseline the same ethical principles as the BBC in its broadcasting editorial guidelines. As regards the issues covered by the Directive, it seems that the principles relating to harm and offence are the most relevant. The BBC notes that, in contrast to the linear world, there is no watershed. The BBC guidelines also note that a range of services to different audiences with different expectations are provided, which may lead to difficulties as we have noted. The BBC guidelines emphasise the need to react to audience expectations; and also highlight the need for research in audience expectations.

Although there is a multiplicity of bodies involved in the regulation of audiovisual content, with many different codes, some cross-referencing of standards is occurring, notably in relation to the film classification system of the BBFC. The Broadband Stakeholders Group (BSG)[28] has also drafted Good Practice Principles. These, however, do not contain content standards but identify instead the different ways in which information can be communicated. Indeed, rather than trying to identify commonality, the

22) It is an interesting question whether IMCB would be caught by UNCRC, Art. 3; the Department for Culture, Media and Sport (DCMS) and Ofcom would be. Signatory states are under an obligation to put in place appropriate systems.
23) Video Recordings Act 1984; the BBFC has no statutory authority regarding the classification of films for theatre release but, in practice, local councils tend to rely on the BBFC's classification.
24) In its 2007 accounts, turnover for the year is given as in excess of GBP 7 million.
25) This report is available at: http://www.bbfc.co.uk/bbfcOnline/bbfcOnline.php. See also BBFC, Annual Report, 2007, p. 27 available at: http://www.bbfc.co.uk/downloads/pub/BBFC%20Annual%20Reports/BBFC_AnnualReport_2007.pdf
26) BBFC, Annual Report, 2007, p. 30.
27) The guidelines are available at: http://www.bbc.co.uk/guidelines/editorialguidelines/onguide/
28) The home page is available at: http://www.broadbanduk.org/

principles seem instead to highlight difference; they certainly do little to cover the gaps in protection arising from reliance on an *ad hoc* selection of bodies created by industry to avoid top-down regulation.

5. Advertising of junk food to children

Although Ofcom transferred the responsibility for the Television Advertising Standards Code to the ASA, Ofcom retains ultimate responsibility for all television advertising. Further, in performing its duties under the Act, Ofcom must have regard, amongst other things, to the vulnerability of children.[29] The Act permits Ofcom to set standards which prohibit certain advertisements and forms and methods of advertising or sponsorship.[30] Against this background, in December 2003, the Secretary of State for Culture, Media and Sport, asked Ofcom to consider proposals for strengthening the rules on television advertising of food aimed at children. This is more than what is now required by the AVMSD. Ofcom concluded that, given the multiple factors which affect children's choices and their obesity, banning such adverts would be disproportionate.

Contemporaneously, the Food Standards Agency (FSA) conducted work on nutritional profiling to help Ofcom reach decisions on the restriction of television advertising for less healthy foods. Ofcom then undertook consultations during 2006 (responses were from: consumer and health groups (17), advertisers and food manufacturers (16), broadcasters and related bodies (12) and individuals (8)) and came to the following conclusions:[31]

- scheduling restrictions would be confined to food and drink products that are assessed as "High Fat, Salt and Sugar" (HFSS) as defined by the FSA's nutrient profiling scheme;
- advertisements for HFSS products must not be shown in or around programmes specifically made for children, thus removing all HFSS advertising from dedicated children's channels;
- advertisements for HFSS products must not be shown in or around programmes of particular appeal to children under 16; and
- restrictions apply equally to programme sponsorship.

The scheduling restrictions came into force in two stages for all channels, except children's channels which benefited from a graduated phase-in period, with full implementation required from 1 January 2009. As with advertising in general, responsibility for interpreting the rules rests with the BCAP, while the ASA is responsible for securing compliance. Alongside the scheduling restrictions, BCAP introduced changes to its rules on the content of advertisements for food and drink products.

There have been criticisms of Ofcom's approach, as the introduction of the private members bill, Television Advertising (Food) Bill 2007, which sought to impose a 9pm watershed, suggests. The consumer organisation, "Which", has also been critical, although its report[32] itself was criticised heavily by the Food Advertising Unit, set up under the auspices of the Advertising Association.[33] Neither of these bodies are likely to be neutral on the issue of advertising, as both are set up to protect particular interests. At the end of last year, Ofcom published the results of its review of the success of the changes.[34] Its conclusion was that children seem to be watching fewer adverts advertising HFSS foods, although it will carry out a further investigation. Ofcom's conclusions have, again, been criticised by consumer organisations.[35]

What is noticeable in this context is the way Ofcom was stimulated to act. The initial impetus came from the government (based in quite general public concern), with the involvement of other government departments. Further, the process was based on research and involved extensive, repeated consultation, which had a comparatively large number of responses, particularly as regards those from private individuals. The debate, as might be expected in this field, has become polarised, with entrenched standpoints from both advertising industry and consumer and health groups. Whilst Ofcom expanded its original proposals, it also rejected the possibility of a pre-watershed prohibition and on this basis has been criticised for not giving children's rights priority as required by the UNCRC.

29) S. 3(4)(h) Communications Act 2003.
30) See s. 319, 321(1)(b) and 322 Communications Act 2003.
31) Ofcom Statement, available at: http://www.ofcom.org.uk/consult/condocs/foodads_new/statement/statement.pdf
32) Available at: http://www.which.co.uk/advice/how-tv-food-advertising-restrictions-work/index.jsp
33) Available at: http://www.adassoc.org.uk/Interim_Review_of_Media_Landscape.pdf
34) Available at: http://www.ofcom.org.uk/research/tv/reports/hfssdec08/hfssdec08.pdf
35) Available at: http://www.sustainweb.org/news.php?id=237

IV. Implementation of the AVMSD

The government, in the form of the Department for Culture, Media and Sport (DCMS), issued a consultation document last year regarding mechanisms for the implementation of the AVMSD. As noted above, the current regulatory framework does not cover all services required to be regulated by the AVMSD; leaving the current system unchanged was therefore not an option. Although a summary of the responses to the consultation has been published,[36] and the Secretary of State made a Parliamentary statement outlining the government's intentions with regard to implementing the AVMSD,[37] final details (particularly as to the on-demand regulator) are still not known. One key point for an analysis based on protection of minors is that, despite the importance of the issues, the need to protect minors was not identified separately for consultation and seems still not to be identified as a particular point of concern. The omission may arise from the fact that the need to protect minors was accepted; other issues were much more contentious and therefore the focus of debate. Thus, the main issues identified concerned the scope of the AVMSD and how to extend the Communications Act regime to non-linear services (a discussion which falls outside the scope of this paper); whether to adopt co-regulation or a regulatory model; how to deal with advertising, especially as regards video-on-demand (VOD) and the approach towards product placement. The issue of advertising of HFSS food to children was not raised; it is not required by the AVMSD and further, the UK system in this regard is still in the process of review. Some of these issues fall outside the scope of this paper (e.g. meaning of VOD, treatment of product placement). The following sections will, in line with the approach in the consultation, look at the institutional structure for VOD regulation (IV.1) and for advertising (IV.2). In addition to identifying the issues on which the UK government consulted, these sections will indicate the approach chosen by the government, as well as highlighting outstanding issues. Underlying this debate is the extent to which focussing on form affects, constrains or fails to deal with substantive issues relating to the level of protection afforded to children.

1. Choice of regulatory form for editorial content

Under the system introduced by the Act, it seems as if Ofcom has what might be termed a genetic pre-disposition for self-regulation over other regulatory forms. Certainly, the approach adopted in the Ofcom guidance[38] suggests that there is a rebuttable presumption in favour of self-regulation, as co-regulation is to be used only where self-regulation is ineffective, and top-down, traditional regulation introduced by statute where co-regulation is ineffective. Ofcom identified the following conditions as necessary for self-regulation to be appropriate:

- industry collectively has an interest in solving the issue
- industry can identify clear objectives for a potential scheme
- industry solution matches the legitimate needs of consumers and citizens.

It also identified circumstances when self-regulation would be unlikely to succeed, namely where there are incentives for individual companies not to participate or there are incentives for individual companies not to comply. Interestingly, the current self-regulatory system for VOD (ATVOD) is missing key industry players and a further significant player (the BBC) is subject to an alternative regime (see III.1 and III.3), quite apart from the duplication in systems at the moment.

The DCMS, in its consultation paper, took a different approach to assessing when to use co-regulation (or regulation) as opposed to self-regulation. Its list of factors was noticeably longer than those adopted by Ofcom and included:[39]

- need to implement the Directive effectively;
- transparency to the public and to industry;
- reasonable consistency with existing content standards for broadcast content and for advertising;
- incentives for video-on-demand providers to participate in the scheme;
- incentives for video-on-demand providers to comply with the rules;
- risk of creating new barriers to entry to the sector;

36) DCMS, Consultation on Proposals for the Implementation of the EU Audiovisual Media Services Directive in the United Kingdom: Summary of Responses, March 2009, available at: http://www.dcms.gov.uk/images/publications/summary_report.pdf
37) Available at: http://www.culture.gov.uk/reference_library/minister_speeches/5932.aspx
38) Ofcom, Identifying Appropriate Regulatory Solutions: principles for analysing self- and co-regulation – Statement, available at: http://www.ofcom.org.uk/consult/condocs/coregulation/statement/
39) DCMS, Consultation Document, para 9.

- public awareness and visibility of the scheme;
- consumer confidence;
- resources and workload;
- costs and funding mechanisms;
- existing relationships;
- flexibility and future proofing and complaints handling, appeals and enforcement.

Although Ofcom mentions some of these additional points, they are viewed as good practice for the functioning of the system when established, not as criteria for determining whether to adopt a self-regulatory system. This is significant, as some of these points are considerations often seen in terms of ensuring accountability and independence. Although DCMS identifies the impact on the viewer/citizen, at no point is the position of the minor and the need to protect minors mentioned, let alone given priority.

The consultation paper effectively excluded self-regulation of VOD editorial content as a possibility. DCMS concluded that while Art. 3 para. 3 AVMSD encourages member states to employ self- or co-regulatory solutions in transposing the AVMSD as regards on-demand editorial content, in view of the formal, legal obligations which the Directive creates, a system of self-regulation for on-demand audiovisual media services would not be sufficient to implement the Directive's requirements in the UK. The AVMSD requires member states to ensure that video-on-demand services are regulated by either a formal system of regulation operated by State institutions and/or a legally established regulator, such as Ofcom; or a system of co-regulation. DCMS therefore went on to assess three other possible models:

- one in which a co-regulatory body is designated with the responsibility for regulation by DCMS directly ("CR1");
- one in which Ofcom's powers are extended to cover on-demand services and in which Ofcom then devolves powers to a co-regulatory body, which in turn drafts and enforces codes ("CR2"). This model is similar to that currently used with regard to the ASA and advertising; and
- regulation by Ofcom itself, again using codes for detailed obligations.

Essentially, this is the model used for broadcasting. The consultation paper expressed a preference for the CR2 model, without identifying any particular body for the role of co-regulator, although it is unlikely that there will be more than one co-regulator. To adopt an approach which envisages more than one regulator for exactly the same field is at the least inviting confusion, which is not conducive to an effective system.

The Broadband Stakeholders Group (BSG) (the members of which include Ofcom and bodies such as ATVOD) was hugely critical of the government's assessment that self-regulation was insufficient. BSG did not give any reasons why, and did not address questions about the need to protect fundamental rights, such as those guaranteed by the UNCRC or ECHR. Another interesting point about the intervention of the BSG is that it gives some stakeholders the option for multiple responses in different guises: the BBC is a member and no doubt also responded directly to the consultation, likewise ATVOD. Whilst the DCMS is most certainly aware of the BSG's membership, multiple responses from the same bodies do have a faintly unsavoury air about them, a sense of illicitly taking a second bite of the cherry.

A further question is whether ATVOD or IMCB are desirable models. As we have seen, despite the focus on ATVOD, it is not the only contender for this role. The performances of ATVOD and ICMB have not been particularly impressive, though that in part may be a consequence of the nascent nature of the industry they are regulating (though note that the players in this industry are well-established businesses in related sectors). In this context, and given the factors the DCMS highlighted, it is relevant to note that neither ATVOD or IMCB have a particularly high profile, with consequent problems for recognition and trust and both are industry-focussed, rather than viewer-facing bodies. Contrast, for example, the BBFC which seems to be more securely funded, is well established and better known (as are the standards it applies) and which engages to a greater degree in research into audience expectations. It is the BBFC's standards which are referred to not just by ATVOD but also by the Ofcom codes, a fact which suggests that the system is to some degree authoritative.

One of the criteria recognised by DCMS was consistency between standards for different forms of audiovisual content. Such an approach also favours a system based on BBFC standards, given that they already find their way into the Ofcom and ATVOD codes. Interestingly, the BSG criticised DCMS for including consistency of standards, but again did not explain why, pointing out that instead consumers are aware of differences between different forms of communication. Consistency of standards (even if the intensity of

regulation differs) is important. While the boundaries drawn in the AVMSD may make sense from a technological and service provider viewpoint, the distinction is much less clear from the perspective of the viewer. It may be too late to argue about this point now, but we might note that the services and categories are potentially porous, and that the inner boundaries of the AVMSD are as open to blurring as its outer ones.[40] The suggestion here is that the lack of an obvious distinction should be taken into account when coming up with a regulatory system, so that there is not a disconnection between linear and non-linear services. Despite the fact that Ofcom suggests that viewers anticipate different systems, this does not mean that systems have to be that different, or that it is desirable that they should be. This author's suggestion is that the voluntary system recently established by BBFC[41] could easily be extended, allowing a common system of classification to be applied to the same content across different distribution mechanisms. The same principles of age-based classification could be applied to other forms of audiovisual content.

As a final issue with regard to content standards on video-on-demand, the consultation paper is silent on the question of how (given the availability of some programmes to be downloaded any time, anywhere) the codes (whether those relating to general content or to advertising) will "ensure" protection for children whether in normal or any other circumstances. This is left for a future discussion, which is somewhat worrying as, although the status of the bodies entrusted with implementing the requirement is important, the content of the rules as well as the degree to which technical excuses can be accepted, are likewise of central significance to the protection of minors.

The response to the consultation suggested broad consensus about the acceptability of the criteria identified by the government in respect of the choice of a regulatory body for VOD. Indeed, some further suggestions were made, including the need for accountability and neutrality; good governance requirements were also seen as important.[42] From the statement to parliament, it appears that the government has opted for the CR2 model, though without specifying a particular body or form. The government is establishing an industry-led group to do further work on putting this system into place. It is unclear how much freedom this industry body will have as to the nature, form and structure of the body, and its membership. It is also unclear how the viewers' interests, particularly those of minors, will be taken into account in the system. One concern is that if the definition of standards is left entirely to industry bodies, the standards chosen may be the minimum permissible under the AVMSD.

In any event, a significant amount of detailed work remains to be done. DCMS has made clear that if the co-regulatory body is not ready in time for the due date for implementation of the AVMSD, Ofcom will regulate in the interim as the legislation will in any event need to be amended to give Ofcom those powers, even if the intention is that they be delegated. A statutory instrument in the form of an order will be laid before Parliament in the autumn. It will amend the Act to give Ofcom the necessary powers. A draft order should be available for consultation in July. Here we can see another advantage of the CR2 model; the government cannot be held to ransom by industry about timely implementation of the AVMSD, as the legislative amendments need to be implemented in any event, and should there be delay, Ofcom can ensure there is no regulatory gap.

2. Choice of regulatory form for advertising

The consultation paper took a similar approach to regulation of advertising as it suggested for regulation of VOD services. In this section, the consultation paper cross-referred to the discussion about when self-regulation, co-regulation or regulation might be appropriate for editorial content, and the resulting legal instruments to give form to the preferred approach. Without expressly tying the debate about appropriate form into the issues raised in relation to advertising, the consultation paper put forward four models with regard to on-line advertising:[43]

40) See the article by Nico van Eijk in this publication.

41) This is not to suggest that the system established by BBFC is perfect; it is not, but it is probably better than ATVOD from a transparency, access and public interest perspective – see L. Woods *"Legal and Extra-legal Regulation in the UK"* in Walden and Goldberg (eds), *Media Law and Practice*, (OUP), forthcoming.

42) DCMS, *Summary of Responses*, op. cit., p. 17.

43) Note that the consultation paper also identified that there was an issue of scope of regulation, depending on how Art. 3e AVMSD is interpreted. "Accompanying" could be seen as referring to advertising which appears within or adjacent to particular programmes. Here regulation covers just advertising to which the viewer is exposed as a result of selecting to view that particular programme. Alternatively, regulation could in addition apply to all advertising to which the viewer is exposed as a result of accessing the video-on-demand service. In his ministerial statement, Andy Burnham stated that the government's intention was that regulation would "cover all advertising in video-on-demand services, both that which is included in programmes and that which accompanies them." Speech available at: http://www.culture.gov.uk/reference_library/minister_speeches/5932.aspx

- to use the ASA as a co-regulatory body with delegated powers ("CR1");
- to use the video-on-demand content co-regulatory body as the co-regulatory body for advertising too ("CR2");
- to introduce a separate co-regulatory body ("CR3"); and
- to use the body with responsibilities for video-on-demand content, but require it to delegate the task of regulating to another body, such as the ASA ("CR4").

Of these options, CR3 and CR4 seem just to add to the complexity of the framework. The adoption of CR2 would mean that there was a single regulator for all non-linear content, which has some logic to it. Such an approach does not reflect a converged approach to regulation and may lead to unnecessary differences in approach to similar content (advertising) on different platforms. CR1 would take a common approach to all advertising; given the effectiveness of the ASA and the fact that the co-regulatory system for broadcast advertising seems to have worked well, this seems to be a logical choice. From the consultation paper, CR1 seemed to be the option favoured by DCMS and by the respondents to the consultation.

We can say that the approach adopted by the consultation paper was structural rather than substantive, looking for systems rather than detailed legal provisions, both here as regards advertising, but also as regards the regulation of editorial content. The precise obligations required by the AVMSD would be found in the code that the regulatory or co-regulatory body would be empowered to draft. Indeed, some consumer groups criticised the consultation in this regard. The consultation paper makes general references to certain "minimum standards" which should apply to advertising content without identifying any such standards. It was suggested that it would have been far more helpful if the "minimum standards" had been set out. Again this raises concern about the level of protection that will be awarded to minors.

Whether the difficulties of implementation with regard to advertising are as intense as for editorial content, of course, remains to be seen, but arguably there is less work to be done. In his ministerial statement, Andy Burnham announced that powers would be granted to Ofcom to regulate advertising in video-on-demand services and that "[t]he Government also expects that Ofcom will designate, and delegate powers to, the Advertising Standards Authority (ASA) to regulate [them]."[44] This comes as little surprise, as this approach seemed to be well regarded by most respondents to the consultation exercise. Given that Ofcom and the ASA already have a working relationship with regard to broadcast advertising, there is a model available to be used, minimising some of the "creative" work and discussions that will be required for editorial content. These changes to Ofcom's powers which form the basis of the system will be introduced into the Act via a statutory instrument, as detailed above. Nonetheless, points of detail remain to be defined (for example, will the Advertising Standards Authority (Broadcast) Limited (ASA(B)) be the responsible body) and as the Minister recognised, the ASA will have a role in determining the meaning of advertising and the standards to be applied including the level of protection to be awarded to minors. Before we criticise too strongly the government for seemingly abdicating its regulatory responsibilities, it should be noted that Ofcom will, in any event, retain backstop powers and that the ASA is generally regarded as a successful (co-)regulator.

V. Conclusions

What has been clear for some time is that the current system with regard to on-demand content is insufficient to satisfy the requirements of the AVMSD and that change is therefore necessary. Equally clearly, there are models in the UK system that work in terms of audiovisual content regulation that could be adapted for on-demand content, though some of the difficult questions about how to ensure effective regulation of such content in the face of practical difficulties have yet to be discussed. What is noticeable is that a central concern with regard to implementation of much of the AVMSD has focussed on who is to regulate and how. Whilst the choice of regulatory structure obviously has an impact on regulatory choices and the effectiveness of the regulatory system as a whole, the level or nature of content regulation is also significant. Indeed, the two issues are interconnected. It seems that the substantive implementation of much of the AVMSD will be determined by whichever body is chosen to be responsible for on-demand content via codes. Given the focus of this paper on the protection of minors, we should note two factors. The first is the impact of industry bodies in policy

44) Ministerial speech, "Written Ministerial Statement on the implementation of the Audiovisual Media Services Directive", 11 March 2009, available at: http://www.culture.gov.uk/reference_library/minister_speeches/5932.aspx

formation, particularly with regard to the industry-led approach determining the co-regulator and consequently to the substantive implementation of VOD provisions. Whilst the use of the experienced ASA may give rise to fewer problems, there are many open questions with regard to the VOD co-regulator. The second is the fact that the consultation document, with the exception of that relating to junk food, does not mention the protection of minors. We have noted that this omission may result from the fact that the protection of minors is not a contentious issue. A failure to consider issues may result in inadequate, or minimalist, protection levels being chosen, even though the AVMSD, as a minimum harmonisation measure, permits quite stringent requirements. Whilst Ofcom, as backstop regulator, will ensure that the codes meet at least the minimum requirements of the AVMSD, neither of these two factors seems conducive to ensuring the interests of children are given primacy as required by the UNCRC. Of course, given the current level of protection, and more particularly the gaps in protection, it could be said that the new system must be an improvement on the old.

Jurisdiction and Co-operation

The example of Luxembourg

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In the following article, emphasis is laid on the opinion of the Luxembourg regulatory body when it comes to implementing the Audiovisual Media Services Directive (AVMSD). In the field of jurisdiction and co-operation, the Directive's provisions have changed. Probably, the *Al Manar* case[1] was responsible for this change of paradigms, when it comes to the responsibilities of regulatory authorities in respect of programmes from third countries. Obviously, there are a number of questions involved that remain to be answered, not least by identifying and agreeing on practical steps to be undertaken by individual regulatory bodies as well as through exchange of information and co-operation among such bodies and with the European Commission. This topic has been dealt with, most recently, in the December meeting of the Contact Committee established under Art. 23a Television Without Frontiers Directive (TWFD).

In order to make clear, at the outset, the central idea of the present article, it should be underlined that with this new Directive, regulatory bodies in Europe will have to work closely together. This holds especially true for those countries which have a satellite capacity and/or up-link facilities, particularly in the case of capacity that is used for transmitting programmes from third countries, because a change in the competent regulatory authority might occur.

I. Determining establishment

The criteria for determining establishment are most important because they decide who may exercise jurisdiction over a given provider of audiovisual media services. Except for the ancillary criteria (see below), the AVMSD remains faithful to the principles applicable under Art. 2 TWFD to determine in which country a provider of audiovisual media services is established. Under Art. 2 AVMSD the criteria remain therefore: head office, editorial decisions, significant part of the workforce and stable and effective link. These elements are to be checked according to the following rules:

- The head office of the media service provider determines the place of establishment provided that this points to a member state and that the main editorial decisions relating to the service are taken in that same member state.

- If the editorial decisions are taken in another member state, the place of establishment is the member state where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates.

1) See Amélie Blocman, *Eutelsat Must Stop Broadcasting Al Manar TV*, IRIS 2005-2:12, available at http://merlin.obs.coe.int/iris/2005/2/article21.en.html

- If this does not lead to a clear decision, because the workforce operates in each of those member states, the place of the head office is decisive for determining establishment or, if the workforce operates in neither of the two countries, the place of establishment is the member state where the service first began its activity provided that there is still a stable and effective link with the economy of that member state.

- Should the head office and the place where the decisions on the service are taken point to different countries, and should only one of those be a member state, the media service provider will be deemed to be established in the member state concerned, provided that a significant part of the workforce criterion is also fulfilled for this member state.

A recent dispute concerning RTL[2] demonstrates clearly how difficult it can be to determine where a broadcaster is established in line with these rules:

TVi, which is a broadcasting company under Belgian law and a subsidiary of the Luxembourgish broadcasting company CLT-UFA, used to have a Belgian licence for its broadcasting services in Belgium. When its licence expired in 2005, TVi continued to provide its services in Belgium on RTL-TVi and Club RTL TV networks. It claimed that it could do so under the coverage of a CLT-UFA licence that the Luxembourgish government had granted that same year. TVi and CLT-UFA reasoned that the editorial work concerning RTL-TVi and Club RTL were now conducted by CLT-UFA and hence the broadcasting services came under the CLT-UFA licence.

In 2006, the *Conseil Supérieur de l'Audiovisuel* (the audiovisual regulatory body of the French-speaking Community – CSA) took the opposite view arguing that TVi continued to edit the programmes and that these editorial decisions were taken in Belgium. According to the CSA, TVi therefore needed a Belgian licence.

On 15 January 2009, the *Conseil d'État* (Belgian administrative court) overturned the decision of the CSA by which the CSA had fined TVi for broadcasting without a licence. The *Conseil d'État* did not engage in a review of whether or not the criteria of the TWFD had been correctly applied to the case. Instead, it based its judgment on the undisputed fact that RTL-TVi and Club RTL operated on the basis of a licence issued in Luxembourg. According to the *Conseil d'Etat*, the CSA had had neither the authority to examine whether the CLT-UFA licence had been issued in compliance with the jurisdictional rules nor the right to dispute its validity as to covering the services in question. Such an examination would be the privilege of "diplomatic or jurisdictional" investigations. The *Conseil d'État* therefore concluded that if the broadcasting was covered by a Luxembourgish licence, TVi could benefit from the EU principle of the free movement of services. It could not be subjected to a further licensing procedure in another member state. The *Conseil d'État* found that the question whether or not the licence had been issued in accordance with the legal requirements was irrelevant in that context.

The *Arrêt* of the Belgian *Conseil d'Etat* of 15 January 2009 shows that it is judges who have to find a solution to the relevant problems cutting the Gordian knot, by saying that it is not about who the editor of the programmes is, but about who has jurisdiction over the programmes:

> "Whereas the discussion on the question of who, CLT-UFA or TVI, is a service provider is irrelevant since the Luxembourg concessions relate to the programmes that they provide and not to the bodies that provide them".

Apparently, the judges knew how to use the sword like Alexander the Great.

In more general terms, if the media service provider has its head office in a given Member State and the editorial decisions about the audiovisual media service are taken in that Member State, then determining establishment is not difficult. It may become difficult, when the provider no longer has its head office in that Member State, decisions are being taken in another country and there are a number of employees working in that other country. But what does this mean? Is the relevant personnel number a hundred or two hundred? When referring again to the RTL case, given this insecurity, it seems that the discussion has not finally come to a conclusion with this *Arrêt* because a Gordian decision is always a disputable decision.

2) *SA TVi et S.A. de droit luxembourgeois CLT-UFA c. CSA, Conseil d'État*, section du contentieux administratif, arrêt n°189.503, 15 janvier 2009 (S.A. TVi and S.A. CLT-UFA (company under Luxembourgish law) v. CSA, Belgian Administrative Supreme Court, judgment n°189.503, 15 January 2009). See for more details, Philippe Laurent & Olivier Sasserath, [BE] *RTL Group Wins Battle against the CSA,* IRIS 2009-4: 5, available at: http://merlin.obs.coe.int/iris/2009/4/article5.en.html

II. Practical consequences of the inversion of ancillary criteria

While the main principles of the TWFD to determine the place of establishment have been adopted by the AVMSD, the ancillary criteria, which kick in if the above rules fail to yield any results, have been changed.

1. Current situation in Luxembourg

The AVMSD foresees in Art. 2 para. 4 an inversion[3] of ancillary criteria.

> 4. Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:
>
> (a) they use a satellite up-link situated in that Member State;
>
> (b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.

When it comes to the situation in Luxembourg, there is a large satellite capacity, operated by SES ASTRA. A small country, but a large satellite capacity; it was probably the small size of our territory that led us to turn to space with its unlimited possibilities . The question has been raised already under the TWFD: "how are we going to address, as a small nation, the problems attached to this"? There are quite a large number of programmes that come from third countries. The approach taken in the Luxembourgish legislation is that SES ASTRA must notify all channels transmitted by their systems to the Government Commissioner, who is not a member of the *Conseil National des Programmes* (National Programme Council – CNP), but a member of the *Service des Médias et des Communications* (Media and Communications Service – SMC), which is a Government body. What is also very important is that SES ASTRA requires from its different clients that they notify ASTRA of the competent authority which is responsible for the services transmitted. The motivation behind this might be that they attempt to encourage all their clients to be under the authority of a member state of the European Union, so they would not face the kind of problems that the French authorities had with Al Manar.

Regular meetings between the SMC and the CNP in order to clarify the situation of occupation of the ASTRA satellites' capacity are very important because these bodies need to be aware of any changes in this respect. There has not yet been a case where a third country channel would come under Luxembourg's jurisdiction. It seems, however, that in light of the new Directive's provisions, the Office of Communications (Ofcom) considered that some of the programmes from third country channels, which are transmitted by SES ASTRA, would no longer fall under its supervision. Instead, Luxembourg would have to assume jurisdiction, a prospect that caused significant turmoil. However, already in spring 2008 at the next meeting of the European Platform of Regulatory Authorities (EPRA) in Riga, it transpired that Ofcom reversed its decision and will continue regulating these programmes. As a result, Luxembourg will have no reason to intervene. Nevertheless, if Ofcom should change its views, programmes for instance originating from Pakistan, India or other Asian countries would fall under Luxembourg's jurisdiction.

2. The CNP in contact with ASTRA

The CNP is in close contact with ASTRA as regards every channel broadcasting programmes by its satellites using a Luxembourg frequency. Such programmes include non-animated erotic programmes. It appears that the German media authorities issued so-called *Unbedenklichkeitsbescheinigungen* for these channels. These are certificates stating that a channel is not considered broadcasting within the meaning of German broadcasting law (*Rundfunkstaatsvertrag*, Inter-State Treaty on Broadcasting) but

3) The TWFD, in its amended version of 1997, stipulated as follows:
"4. Broadcasters to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:
(a) they use a frequency granted by that Member State;
(b) although they do not use a frequency granted by a Member State they do use a satellite capacity appertaining to that Member State;
(c) although they use neither a frequency granted by a Member State nor a satellite capacity appertaining to a Member State they do use a satellite up-link situated in that Member State."

instead is viewed as a "Telemedia" (telemedia services), which does not require further authorisation. Hence, broadcasters may offer these channels to the public without a licence.

The CNP was asked by different authorities, including Ofcom, if it could provide the details of all the frequencies and also, much more importantly, the up-link details of the services in question. Obviously, the feasibility of collecting this information is key to the full discussion.

3. Monitoring under the TWFD

Only if a broadcaster had been established in a third country and no other member state was competent, could a channel fall under Luxembourg jurisdiction due to the satellite criterion. The necessity of monitoring was initially based, that is under the TWFD, on first the satellite capacity and second on the up-link criterion.

The competent Luxembourg ministry held the view that if a channel fell under the jurisdiction of any European state because it was vested with a proper authorisation or licence issued by that country it should always remain under that jurisdiction. In other words, jurisdiction would not change even if applying the Art. 2 rules would no longer result in the originally competent authority having jurisdiction. This position, however, seemed arguable.

The complexity of issues increased over the years because of the reselling of capacity, which, as claimed by ASTRA, meant that the final operator was unknown. Sometimes this may have been true, because a direct contractual relationship between ASTRA and the user of the capacity probably did not exist. Additional problems are linked to digitisation and the resulting increase in the number of channels made available within multiplexes. This is of very high importance because the switching off of one "illegal" channel by a multiplex might entail switching off 6, 7, or 8 "legal" programmes alongside this. This is the risk, indeed, if ASTRA switches off one particular channel for infringements of the applicable law and the multiplex contains other channels that fully comply with the law. The *Al Manar* case illustrates this problem: there was one Lebanese channel that incited to hatred but all other channels on that multiplex were in compliance with the law. A satellite operator switching off a multiplex might be confronted with a serious amount of legal problems.

4. Monitoring under the AVMSD

Inverting the ancillary criteria means that primary jurisdiction no longer lies with the state that has the satellite capacity. Jurisdiction falls, instead, on the member state where the up-link is located. In this case, it is seen as much easier to switch off a channel within the up-link facility than it would be if switching-off were to be made on the satellite (transponder) itself.

For the current situation, as notified by the Luxembourg Government to the CNP, this means that there are no third country channels up-linked by ASTRA and no third country channels up-linked in Luxembourg. This is not an entirely correct representation of the situation, since there are some third country channels being up-linked in Luxembourg. These, however, benefit from a licence from another European state. For example, as regards Aljazeera the up-link is in Luxembourg.

A hypothetical situation that could present itself should be addressed as well: let us imagine that there is a third country channel, that the up-link for it is in another third country but that its programmes are transmitted on ASTRA. In this case, the channel is undoubtedly under Luxembourg's jurisdiction. But what about the following case: if the up-link is made from a third country, but then the signals are transmitted by ASTRA downwards to another up-link station, then it would not fall under Luxembourg's jurisdiction. Therefore, it is important to know exactly where the up-links are located. The satellite operators must know exactly where the up-link is being made.

Furthermore, it may happen that a channel decides to migrate to another member state where more up-links are made. Some countries have larger up-link facilities and capacity than other states, for example, the UK. An exchange of information between Ofcom and CNP already takes place. Other regulatory authorities would also like to be included. Therefore, there is an intention to compile a list of all the up-links that is as up-to-date as possible. From this list, it will be possible to see that some member states have a large number of up-links, while in others, such as France and Luxembourg, there is only a relatively small number of up-links.

III. Perspectives

One has to keep in mind that it is easier to change an up-link than to change a satellite. Linked to this, one might argue that there is a downside to the new system: a channel broadcasting a programme that contains hate speech and which is faced with a member state authority assuming jurisdiction – because it is the state where the up-link is being made – and willing to act against this programme, might easily decide to go to another member state and have the up-link done there; the programme and the discussion on it would start all over again. And if, after having been chased by various authorities, the provider in question eventually decided to do the up-link from a third country, then it would again be up to the state to which the satellite capacity is attributed to assume jurisdiction.

In the Contact Committee meeting of December 2008 it was agreed to establish lists, until summer 2009, indicating operators susceptible of changing jurisdiction. In Luxembourg, the list is to be compiled by the Government. But, as mentioned before, it was underlined that not all the information concerning up-link providers was available because the situation is more or less constantly changing.

IV. Conclusions

Finally, it should be highlighted how important it is to improve the networks between the monitoring authorities and regulatory authorities in Europe, and also to seek to increase efforts on reliable and up-to-date databases including, which is a new element, a database of the up-links facilities, with an aim for such databases to eventually be converged.

Measures limiting the freedom to provide services

Incitement to hatred, human dignity and harmful content – Focus France

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I. Introduction

The main purpose of the Audiovisual Media Services Directive (AVMSD) is to promote the distribution of television broadcasting services and on-demand audiovisual media services within the European Union.

It functions on the basis of the country of origin principle:

- An audiovisual media service under the jurisdiction of a member state must comply with the rules of law applicable in that state, i.e. the minimum standards laid down by the directive, in addition to any stricter or more detailed provisions of national law (Art. 2, para. 1 AVMSD);
- In return, services should be freely available in the other member states, who must not restrict retransmissions on their territory for reasons which fall within the fields coordinated by the Directive (Art. 2a, para. 1 AVMSD).

For example, the French Freedom of Communication Act of 30 September 1986 particularly stipulates that television services under the jurisdiction of another member state may be broadcast without any prior formality.

However, if a service under the jurisdiction of a member state – either because it is established in that state or because, being established outside the European Union, it falls under the jurisdiction of that state in accordance with the technical criteria laid down in the directive – does not respect the applicable national law, the member state is entitled to take measures against the service provider concerned. It has a responsibility vis-à-vis its European partners to take such measures.

If, despite these precautions, a service established in a member state contravenes certain important principles of the directive, there is a safety clause allowing the receiving member state to take restrictive measures against the service. Such measures may only be taken in the case of serious infringements.

So much for the theory; what can we learn from the practice of a regulator such as the French *Conseil supérieur de l'audiovisuel* (Higher Audiovisual Council – CSA)? After explaining the European and French regulatory frameworks, we shall describe the CSA's experiences with regard to controlling television channels established outside the EU.

II. Reminder of the relevant provisions of the AVMSD

1. Fundamental principles that must be respected by all services under the jurisdiction of a member state

The AVMSD stipulates that the member states must ensure by appropriate means that audiovisual media services under their jurisdiction do not contain any incitement to hatred or programmes that are harmful to minors.

Art. 3b AVMSD states that audiovisual media services should not contain «any incitement to hatred based on race, sex, religion or nationality».

As far as the protection of minors is concerned, the directive imposes different rules for linear and non-linear audiovisual media services.

Under Art. 22 AVMSD, which is identical to the corresponding provision of the "Television without Frontiers" Directive (TVWF), television broadcasts may not contain "any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence". Neither should they include "programmes which are likely to impair the physical, mental or moral development of minors", except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors will not normally hear or see such broadcasts. When such programmes are broadcast in unencoded form, a warning must be shown.

With regard to on-demand audiovisual media services, Art. 3h AVMSD does not actually prohibit services "which might seriously impair the physical, mental or moral development of minors". However, such services must not be accessible to minors.

2. Failure to respect these principles can justify a temporary restriction of the freedom of reception

In the implementation of the Directive, a provisional derogation from the freedom of reception may only be justified in the case of a serious infringement, in particular a failure to respect the provisions on the protection of minors or the ban on incitement to hatred. The procedure is very closely supervised and requires close co-operation between the member states concerned and the European Commission.

Art. 2a AVMSD clearly explains the conditions and modalities for implementing the safety procedure that is available to the member states.

In respect of television broadcasting, a member state may restrict the retransmission of a television programme from another member state if the following conditions are fulfilled cumulatively:

- the television programme "manifestly, seriously and gravely infringes Article 22 (...), and/or Article 3(b)";
- the infringement has been committed on at least two prior occasions during the previous 12 months;
- the member state concerned has notified the broadcaster and the European Commission in writing of the alleged infringements and of the measures it intends to take;
- consultations with the transmitting member state and the Commission have not produced an amicable settlement within 15 days of the notification, and the alleged infringement persists.

The measures taken must be notified to the Commission, which must decide whether they are compatible with Community law within two months. If it decides that they are not, the Commission will ask the member state to put an end to them as a matter of urgency.

In respect of on-demand audiovisual media services, derogations from the freedom of reception are even more limited to exceptional circumstances.

Measures need to be necessary for reasons of public policy (criminal offences), the protection of public health, public security or the protection of consumers.

They must be taken against an on-demand service that prejudices these objectives or that presents a serious and grave risk of prejudice to these objectives.

They must be proportionate to these objectives.

Before taking these measures, except in urgent cases, the member state must have asked the member state under whose jurisdiction the service provider falls to take measures and have noted that this request has not been met.

It must also have notified its intention to take such measures to the Commission and the member state under whose jurisdiction the service provider falls.

The Commission examines the compatibility of the notified measures (proposed or already taken) with Community law in the shortest possible time.

III. What does French law stipulate?

1. What are the main principles of the 1986 Act concerning services under France's jurisdiction?

1.1. Scope

The new provisions of the AVMSD were incorporated in the Freedom of Communication Act of 30 September 1986 by the Act of 5 March 2009 on audiovisual communication and the new public service television.

The amended 1986 Act covers all so-called audiovisual communication services, which include television and radio services as well as on-demand audiovisual media services. The definition of these services is taken from the Directive and its preamble.

The Act applies to services established in France or non-European services broadcast in Europe using French satellite capacity (Eutelsat) until 18 December 2009. It is estimated that the latter amount to around 500. From 19 December 2009, when the new technical criteria governing jurisdiction will enter into force in all European Union member states, France will only be responsible for non-European services uplinked from France or outside the European Union. Many of these services, which are uplinked from another member state, will fall under the jurisdiction of the state concerned.

1.2. Applicable rules

Art. 1 of the Act lays down the general principle that «communication to the public by electronic means is free». The exercise of this freedom may be limited only to the extent required in particular for the respect of human dignity, the protection of children and adolescents and the safeguarding of law and order.

In accordance with Art. 3-1 of the Act, the *Conseil supérieur de l'audiovisuel*, an independent body, guarantees the exercise of the freedom of communication under the conditions defined by the Act. It particularly contributes to activities promoting social cohesion and the fight against discrimination in the audiovisual communication field.

Art. 15 of the Act specifically deals with the protection of minors and incitement to hatred.

Audiovisual communication services must not distribute programmes to the public that may seriously harm the physical, mental or moral development of minors. French law is therefore stricter than Community law insofar as this rule also applies to on-demand audiovisual media services. With regard to programmes that may harm the physical, mental or moral development of minors, the Act states that measures appropriate to the different services must be taken to ensure that minors cannot access such programmes.

Incitement to hatred or violence on the grounds of race, sex, morality, religion or nationality is prohibited in the programmes of television services.

As part of its power to make recommendations, enshrined in Art. 3-1 of the Act, the CSA has used recommendations to clarify the interpretation of the Act. These recommendations are mandatory; failure to comply with them can lead to the instigation of sanction procedures.

As far as the protection of minors is concerned, the following are particularly relevant:

- recommendation of 15 December 2004 to editors and distributors of television services broadcasting category V programmes (cinematographic works unsuitable for under-18s and programmes containing pornography or extreme violence);

- recommendation of 4 July 2006 concerning the television presentation of cinematographic or audiovisual works, video games, telephone and data communications services or Internet sites with restricted access to minors;
- deliberation of 22 July 2008 aimed at protecting children under the age of three from the effects of television, particularly services presented as being specifically designed for them.

In the latter deliberation, the CSA particularly requests that distributors of such services should show on their screen, and on that of the services concerned, a warning about the dangers of television for babies.

Furthermore, in relation to the issue of incitement to hatred, it is also worth mentioning the recommendation of 7 December 2004 to all television and radio services concerning international conflicts and their possible repercussions in France.

In future, the CSA will also be able to issue recommendations to on-demand audiovisual media services.

All of the obligations with which television services must comply are found in the agreements concluded between them and the CSA. On-demand services and non-European television services under French jurisdiction are exempt from any prior formality.

1.3. Applicable sanctions

Without describing in detail the various sanctions available to the CSA, it is important to remember that there are many of them: suspension, reduction of the duration of the licence or agreement, fine, withdrawal of licence or unilateral cancellation of agreement, broadcast of an announcement, etc. Sanctions must be preceded by a formal notice. Although they are not mentioned in the Act, warnings are sometimes issued by the CSA prior to a formal notice.

The most serious cases may be referred to the *Conseil d'État* (Council of State) for an interim order requiring the service provider to respect its legal obligations. Such a referral may be intended to stop the broadcast via Eutelsat of a non-European television service under French jurisdiction, whose programmes breach one of the principles mentioned in Arts. 1, 3-1 and 15 of the 1986 Act.

2. A safety clause vis-à-vis channels under the jurisdiction of another member state has been introduced

The conditions of Art. 2a AVMSD have been transposed into the 1986 Act which delegates responsibility to two decrees for defining how they should be applied to television services and on-demand audiovisual media services respectively.

IV. Exercise of control and possible restrictions by the *Conseil supérieur de l'audiovisuel*, particularly with regard to non-EU channels

As part of its responsibility vis-à-vis its European partners, the *Conseil supérieur de l'audiovisuel* closely monitors non-European channels under its jurisdiction that might breach the ban on incitement to hatred.

The table below summarises the various types of action that the CSA has taken in such cases:

2003	ESC (Egyptian)	Warning to broadcaster
2004	Al Manar (Lebanese)	Case referred to *Conseil d'Etat* for interim order stopping broadcast of service and cancelling agreement
2004	Al Alam (Iranian)	Warning to broadcaster
2005	Sahar 1 (Iranian)	Formal notice to Eutelsat to stop broadcasting service
2006	Iqra (Saudi Arabian)	Warning to broadcaster
2007	Al-Zawra (Iraqi)	Formal notice to Eutelsat to stop broadcasting service
2008	Al Aqsa (Palestinian)	Warning to Eutelsat

The recent Al Aqsa case particularly raised the question of France's jurisdiction over a service received on the fringes of Europe because it was broadcast via a Eutelsat satellite, Atlantic Bird 4, which mainly serves the Middle East.

As regards the protection of minors, the CSA has received several complaints in recent months linked to the increasing number of television services broadcast via Eutelsat satellites that carry unencoded erotic (or, more rarely, pornographic) content during the day, contravening European and French regulations.

In 2008, during the investigation of these complaints, a formal notice was issued to a Panamanian channel, requiring it to comply with the applicable regulations, and a warning was addressed to Eutelsat. This investigation is continuing and has brought to light a number of difficulties with the exercise of these controls.

The first difficulty concerns the establishment of territorial jurisdiction insofar as these channels include:

- services that have already been authorised in other member states;
- unauthorised services that, in principle, fall under the jurisdiction of another member state (e.g. "pirate" channels);
- "unidentified" services concerning which there is no available information;
- non-EU channels that fall under French jurisdiction.

It is important that France's jurisdiction over the services targeted by a possible action is firmly established, a process that requires a considerable amount of investigative work to be carried out, particularly in co-operation with other regulators.

A second difficulty concerns the establishment of factual jurisdiction insofar as some services only comprise still images or continuous repetition of the same animated sequences. Are these covered by the definitions of "audiovisual media services" contained in the Directive and in the French Act on audiovisual communication?

A third difficulty, which is a practical one, concerns the large number of services that need to be monitored, estimated at between 40 and 70, and their "volatility" inasmuch as channels seem to regularly appear and disappear, often changing frequency or name.

V. Conclusion

The European and French regulations are based on the principle of freedom: freedom to provide services, freedom of communication, freedom of retransmission and freedom of reception. Even so, this freedom must go hand in hand with respect for other, equally important principles, particularly those that protect human dignity. As it fulfils its legally assigned duty to assess possible infringements, the national regulator has a heavy responsibility both within France and vis-à-vis its European partners. In an environment with a large number of services, it is necessary to step up efforts to harmonise practices and encourage the exchange of information and analysis between regulators.

Rule making by regulatory bodies

Commercial communications regulation in Ireland

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I. Introduction

Section 19 of the Broadcasting Act 2001 mandates the Broadcasting Commission of Ireland (hereafter: Commission or BCI) to develop a range of codes and rules governing television and radio broadcasting. Four of these codes and rules have been developed, launched and implemented to date. These are the Children's Advertising Code, the Access Rules, the General Advertising Code and the Code of Programme Standards. The legislation requires that, in each case, the Commission conduct a public consultation on a draft code before it is finalised.

II. Approach to the development of codes and rules

The Commission has taken a particular approach to the development of its codes and rules. This approach is characterised by the use of phases of research, development and consultation, that incrementally build on the codes' development. The specific approach to each code is based on a review of previous approaches and the requirements of the code itself. These reviews are based on an assessment of the level of interest and engagement by stakeholders, the quality of the engagement, the ability of the process to enhance knowledge and understanding of all stakeholders involved and the likely contribution of this understanding ultimately to compliance levels, once the code is introduced.

The emphasis placed on reviewing these parameters is evidenced in the variety of approaches that have been used in the development of the different codes rather than the adoption of a uniform approach. This tailoring was further influenced by the complexity of the issues to be dealt with in the case of any particular code, the prior experience, if any, of both the broadcasters and regulator in addressing this type of issue and any specific requirements that the stakeholder groups may have. The approach has also been influenced by best practice guidelines such as the National Children's Strategy and the guidelines on consultation with people with disabilities issued by the National Disability Authority, as well as the Commission's own regulatory principles.

A sample approach is that used to develop the Children's Advertising Code which used three phases of public consultation as follows:

Phase I	Consultation on the approach, definitions and the proposed structure of the Code
Phase II	Consultation on key issues within the Code
Phase III	Consultation on draft Code

The development of this Code also included significant consultation with children between the ages of 6 and 17. Interestingly, the views of children were often the ones that occupied a somewhat middle ground in an otherwise very polarised debate. Significantly, the final Code reflects very many of the views put forward by children.

Consultation was undertaken using a variety of methods including consultation documents that provided background information, online consultation, workshops with key groups such as children and other consultative fora. The process took just over 18 months to complete. Decisions were taken following each phase of consultation and these outcomes were published along with a rationale for the decisions taken. This ensured a transparency to the process but also assisted understanding of the Commission's thinking. Submissions received in response to consultation were also made available to all stakeholders including the public.

The key benefit from this approach has been the level of compliance achieved with regard to the various codes. The processes used, albeit time consuming, have delivered an understanding of the codes, the intent behind the various rules and the interpretation of those rules. This is tangibly evident in the ease with which the broadcasting sector has both co-operated with the regulator during the stage of a code's development and implemented the code after its adoption.

III. Relevant codes in the present field

The Commission has developed two codes on commercial communications. The Children's Advertising Code launched in 2005 contains rules regarding standards pertaining to children's advertising.[1] The General Advertising Code contains standards relating to advertising, sponsorship, teleshopping and other forms of commercial promotion.[2]

1. Children's Advertising Code

Our approach to each code has been to define objectives for the code;[3] in the case of the Children's Advertising Code, these are:

- to offer protection for children from inappropriate and harmful advertising;
- to ensure that children's advertising acknowledges the special susceptibilities of children and does not exploit these susceptibilities;
- to ensure that children's advertising is fair and presents the product or service in a way that is easily interpreted by children and does not raise unrealistic expectations of the capabilities or characteristics of the product or service being offered; and
- to provide unambiguous guidelines to broadcasters, advertisers, parents, guardians and children on the standards they can expect from children's advertising on broadcasting services.

The key areas of the Code are:

- Social values
- Inexperience and credulity
- Undue pressure
- Special protection for children
- General safety
- Violence
- Diet and nutrition
- Parental responsibility
- Programme characters
- Product prohibitions and restrictions
- Identification and separation, and
- Insertion of advertising.

Since the Code was implemented in 2005, there have been very few breaches of the Code and no complaints have been upheld.

1) Available at: http://www.bci.ie/documents/childrens_code_oct_04.pdf
2) Available at: http://www.bci.ie/documents/BCI_gen_ad_code_mar_07.pdf
3) As regards the preparatory steps of its development, detailed information is available at: http://www.bci.ie/codes/childrens_code.html

The Children's Advertising Code was reviewed in 2008 and a number of areas were identified for inclusion in the subsequent revision of the Code. These included the area of diet and nutrition, in particular foods that are high in fat, salt and sugar. The Report on the review of the Code has been submitted to the Minister and work has commenced on the relevant areas highlighted for revision.

2. General Advertising Code

The objectives of the General Advertising Code[4] are:

- to ensure that the public can be confident that commercial communications are legal, honest, truthful and decent;
- to ensure that commercial communications do not impinge on the editorial integrity of broadcasts; and
- to provide clear guidance to broadcasters regarding standards expected and the standards the public can expect as well as providing a code that does not impede in an unwarranted manner the right to communicate commercial messages.

The General Advertising Code contains rules on a range of specific products and services. These are:

- Alcohol
- Betting services
- Cosmetic treatments and services
- Cosmetic products
- Financial products and services
- Foods
- Fortune tellers/psychic services
- Medical treatments, services and products
- Premium rate telecommunication services
- Prohibited communications e.g. tobacco
- Slimming products and services.

Both codes contain a range of general principles and rules that apply to commercial communications before providing rules relating to specific products and services.

IV. The Audiovisual Media Services Directive (AVMSD) and its implementation

The BCI was mindful of the AVMSD when developing both codes. This is reflected in the use of the term commercial communications, the use of definitions that drew on the draft AVMSD and the inclusion of key principles reflecting the AVMSD provisions in this area. Key issues that are now arising for the Commission relate to product placement, new models of sponsorship, transparency and undue prominence.

With regard to specific articles of the AVMSD relating to commercial communications, Arts. 3e, 10 and 15 are included in the content of the BCI's codes with Arts. 3g and 3h yet to be transposed.

It is expected that the approach to the transposition will be through legislation or statutory instrument. In some cases, policy may be developed at government level, in others, that responsibility may be devolved to the regulator.

Draft broadcasting legislation containing provisions designed to transpose elements of the Directive is expected to be passed mid-year. The draft legislation currently contains provisions designed to transpose aspects of the Directive concerned with programming and advertising codes, advertising minutage, HFSS food,[5] media literacy and provisions for the visually and hearing impaired.

4) For more information on the development phases of this code see: http://www.bci.ie/codes/gen_advertising_code.html
5) HFFS food refers to foods high in fat, saturated fat, salt and/or sugar.

The variety of approaches in the legislation that have been taken is evident in the example of HFSS foods. As the draft Broadcasting Bill in its proposed Art. 42 section (2) states:[6]

> "Broadcasting codes shall provide [...] (g) that advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any broadcasting service, in particular advertising and other such activities which relate to matters likely to be of direct or indirect interest to children, protect the interests of children having particular regard to the general public health interests of children."

How far a regulator may take this consideration is illustrated by Art. 42 section (4), according to which:

> "A broadcasting code prepared by the Authority under *subsection (2)(g)* may prohibit the advertising in a broadcasting service of a particular class or classes of foods and beverages considered by the Authority to be the subject of public concern in respect of the general public health interests of children, in particular those which contain fat, trans-fatty acids, salts or sugars."

This approach requires the regulator to consider a particular policy option.

In contrast, the approach to media literacy has been to adopt quite a broad provision with some discretion for the regulator to define the scope of the work.

The proposed Art. 26, section (2)(g) states:

> (2) The Authority has the following ancillary functions –
> (g) to undertake, encourage and foster research, measures and activities which are directed towards the promotion of media literacy, including co-operation with broadcasters, educationalists and other relevant persons.

Delegated legislation such as that envisaged by elements of the Broadcasting Bill, must in its methods of enactment apply basic fairness of procedures, be reasonable and not arbitrary, unjust or partial. The development of codes and rules governing commercial communications by the BCI is an example of the regulator developing not just the codes themselves but also a process for their development that is cognizant of these requirements and that facilitates stakeholder input and understanding.

6) Broadcasting Bill 2008, available at: http://www.oireachtas.ie/

Monitoring of compliance through member states' national regulatory bodies and co-regulatory bodies

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I. The importance of a correct implementation of the rules set out in the Directive for the proper functioning of the audiovisual media services markets (Arts. 10 and 249 EC)

According to Art. 10, para. 1 of the Treaty establishing the European Community (hereinafter: EC), member states

> "shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks".[1]

In the interpretation of the Court of Justice of the European Communities (ECJ), Art. 10 EC requires member states to observe a strict duty of "cooperation in good faith" with the Commission, and to provide it with all the information requested for that purpose.[2] The same applies in the relationship among member states' authorities, if such cooperation is necessary for the correct application of Community law.

These general principles have a horizontal scope in the whole context of Community law. Therefore, they apply also in the framework of European audiovisual law, including the rules enshrined in the Television without Frontiers Directive (TWFD), as well as in the new Audiovisual Media Services Directive (AVMSD). In this context, for a series of reasons which will be examined further below and which are strictly linked to the peculiar system of mutual recognition envisaged by the Directive's rules, the need for "cooperation in good faith" is particularly evident. On the other hand, the inappropriateness of the old and new rules which, at the Community level, are supposed to foster such cooperation, is equally apparent.

In the framework of the TWFD and the AVMSD, a "cooperation in good faith" among member states is the key element for the proper functioning of the system envisaged in those texts. Like other directives aimed at fostering the functioning of the internal market, the TWFD and the AVMSD, are based on the principle of "minimum" harmonisation combined with the principle of mutual recognition.[3] An audiovisual media service is entitled to circulate freely (Art. 2a) in the territory of the European Union if it complies with the rules applicable in the member state of jurisdiction (Art. 2).

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1) The second para of Art. 10 EC adds that member states "shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty". See Costantinesco, V., *L'art. 5 CEE. De la bonne foi à la loyauté communautaire*, in *Du droit international au droit de l'intégration: Liber amicorum Pierre Pescatore*, Baden-Baden, 1987, p. 97; Lang, J.T., *Community Constitutional Law: article 5 EEC Treaty*, in *Common market law Review,* 1990, p. 645; Due, O., *Article 5 du traité. Une Disposition de caractère fédéral ?*, in *Collected Courses of the Academy of European law*, European University Institute, Florence, 1991, p. 23 ; Blanquet, M., *L'article 5 du traité C.E.E. Recherches sur les obligations de fidélité des États membres de la Communauté*, Paris, LGDJ, 1993.

2) See*, inter alia*, Case C-33/90, Commission v. Italy, [1991] ECR I-5987; Case C-478/01, Commission v. Luxembourg, [2003] ECR I-2351, paragraph 24.

3) See Dommering, E., *Commentary to Articles 2 and 2a TWFD*, in Castendyk/Dommering/Scheuer, *European Media Law*, Alphen a/d Rijn, 2008, p. 337 et seq.

The proper application of these rules entails, in the first place, a clear picture of which member state has jurisdiction over what services. Mutual recognition of audiovisual media services requires strict monitoring of compliance, mutual assistance as well as a clear distribution of "jurisdiction" in order to prevent, to the fullest extent possible, conflicts among Member States in cases of "transfrontier" transmissions. As McGonagle and Van Loon correctly stated, "significant legislative differences at the national level represent a considerable impediment to the easy and expeditious resolution of disputes over jurisdictional matters (...). If regulators were to apply rules in the same way, it would be of little or no consequence which country would have jurisdiction over a broadcaster".[4] Needless to say, the extension of the field of application of the new AVMSD to non-linear services will render cooperation and monitoring even more delicate and complex.

On a more general level, the mere reading of the provisions of the AVMSD devoted to jurisdiction and mutual recognition is sufficient to render crystal-clear the crucial necessity of a *close cooperation* among member states' authorities as well as between these authorities and the Commission. The powers left to member states in particular fields covered by the Directive (Arts. 2, 2a, 3 AVMSD), in light of the relevant procedures laid down in the above mentioned provisions, require strict observance of the duty of cooperation.

The bottom-line question is thus: are the current cooperation structures envisaged in the audiovisual field adequate, or rather are there wide gaps to be filled? In practice, well-known examples of "conflicts" of jurisdiction in cross-border situations have been dealt with often in a bi-lateral, rather than multi-lateral context. Notwithstanding the intense work carried out by the European Platform of Regulatory Authorities (EPRA), on some occasions a lack of cooperation between the national bodies has caused frustration and delays in solving jurisdictional problems – not to mention the cases when licences were granted without any serious concern about the fact that the transmissions targeted the audience of a different member state.[5] This is due to a series of reasons, of which the diverging solutions given by member states to the question of domestic competence is only one. In addition, the TWFD allowed for different licensing procedures and the adoption of "countermeasures" (derogations to the country-of-origin principle).

In contrast, the procedures laid down in the AVMSD (Art. 2a, para. 2 and the brand new procedures enshrined in Art. 2a, para. 4 for on-demand services and in Art. 3 in respect of the adoption of stricter rules by member states) imply the need for a strong, effective and expeditious exchange of information among the national authorities and with the Commission. If it is true that such an obligation stems directly from Art. 10 EC, a provision which, according to the judgments of the ECJ, is often capable of direct effect,[6] it is also true that the Directive does not provide for specific sanctions in case national authorities breach the duty of cooperation: recourse to the general infringement procedure as laid down in Arts. 226 and 227 EC is, as everybody knows, no effective reaction, also because the ECJ is seldom ready to grant interim measures in disputes between member states.[7]

New rules and new structures, the latter with effective powers, could thus contribute to the solution of the problem. The proposal of establishing a new "European" permanent body (a committee of regulators) was not accepted even before the formal commencement of the legislative process that led to the adoption of the AVMSD.[8] Instead, the EC legislator decided to recognise expressly what had always been accepted implicitly, i.e. a duty on member states to adopt the measures necessary to provide one another and the Commission with the information required for applying the provisions of the Directive (in particular those set out in Arts. 2, 2a and 3).

II. Close cooperation in the ECTT ...

As is the case in other areas covered by CoE instruments and Community legislation, the European Convention on Transfrontier Television (ECTT) has acted in the present field as a primary source of inspiration for most of the choices made in the Directive.

4) Mc Gonagle, T., Van Loon, A., *Jurisdiction over Broadcasters in Europe. Report on a Round-table Discussion,* in European Audiovisual Observatory, *Jurisdiction over Broadcasters in Europe*, IRIS *Special*, Strasbourg, 2002.
5) See Botella i Corral, J., Machet, E., *Co-ordination and Co-operation between the Regulatory Authorities in the Field of Broadcasting*, in European Audiovisual Observatory, *Audiovisual Media Services without Frontiers. Implementing the Rules*, IRIS *Special*, Strasbourg, 2006, p. 13 et seq., at 16.
6) See European Court of Justice, Case C-453/00, *Kühne & Heitz NV v. Productschap voor Pluimvee en Eieren*, [2004] ECR, p. I-837; Joined Cases C-392/04 and C-422/04, *i-21 Germany GmbH*, [2006] ECR, p. I-8559.
7) Art. 243 EC. For a recent example of interim measures granted by the Court see Case C-503/06 R, *Commission v. Italy*, Order of 19 December 2006, [2006] ECR, p. 141.
8) See Scheuer, A., Palzer, C., *Commentary to Article 23b AVMSD*, in Castendyk/Dommering/Scheuer, p. 1000.

It was once again the CoE who set a model for regulating cooperation between member states: from its first adoption in 1989, the ECTT contains a Chapter (actually, a single article), especially devoted to "Mutual Assistance" (Art. 19). The main provisions in this Article are inspired by similar provisos in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) but have been adapted to meet the requirements arising from the subject matter of the ECTT.[9]

As indicated in the Explanatory Report annexed to the ECTT (para. 297), "the implementation of the Convention will be based essentially on co-operation between the parties". Therefore, Art. 19 (which, in the new text of the Convention currently under discussion, will become Art. 23) aims at reducing, as much as possible, the risk of conflicts arising between Parties as a result of providing television programme services across borders.

Paragraph 1 of the envisaged Art. 23 ECTT (which will replace Art. 19 para. 1 ECTT of the current version) lays down the basic principle whereby the Parties must grant each other mutual assistance in order to implement the Convention. For that purpose, according to Paragraph 2, the Contracting Parties must specify a "Contact point": more precisely,

> "[E]ach Contracting State shall designate one or more authorities, the name and address of each of which it shall communicate to the Secretary General of the Council of Europe at the time of deposit of its instrument of ratification, acceptance, approval or accession".

Should more than one authority be designated, a Party must specify in its communication the competence of each authority.

The Explanatory Report (para. 299) clarifies that where such specialised authorities do not yet exist the Convention does not require member states to establish them for cooperation purposes. It is recognised, however, that in many member states of the Council of Europe specialised authorities in broadcasting matters have been set up and to the extent that this is the case they could be chosen as contact point for the purpose of the Convention. Nonetheless, the Convention contains no obligation to that effect.

According to the information available,[10] the designations made by the Parties often refer to governmental bodies (such as in the Italian[11] and Czech[12] case), independent authorities (as in the case of the United Kingdom[13]) or both (as in the case of France[14] and Romania[15]). In certain particular instances, the designation refers to public broadcasters themselves (as in the case of the BBC in the United Kingdom).

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9) *Explanatory Report*, para. 298.

10) See in the website of the Council of Europe:
http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=132&CM=8&DF=3/11/2009&CL=ENG&VL=1

11) According to the Declaration contained in a letter from the Permanent Representation of Italy dated 12 May 1992, registered at the Secretariat General on 13 May 1992, the Authority for the purposes of Art. 19 is the Postal and Telecommunications Ministry («*Ministero delle Poste e Telecomunicazioni*«).

12) According to the Declaration contained in the instrument of ratification deposited on 17 November 2003 and completed by a letter from the Permanent Representative of the Czech Republic, dated 19 January 2004, registered at the Secretariat General on 19 January 2004, the Authority for the purposes of Art. 19 is the *Ministerstvo kultury Ceské republiky* (Ministry of Culture of the Czech Republic)

13) Declaration contained in a letter from the Permanent Representative of the United Kingdom dated 23 March 1992, registered at the Secretariat General on 1 April 1992: the Authority responsible for television broadcasts from the United Kingdom other than the BBC is the Independent Television Commission (ITC).

14) Declaration contained in a Note verbale from the Permanent Representation of France, dated 18 December 2006, registered at the Secretariat General on 22 December 2006: in accordance with Art. 19, para. 2, of the Convention, France designates the two following authorities:
- the *Conseil Supérieur de l'Audiovisuel* (CSA) - Pursuant to Law No. 86-1067 of 30 September 1986 on the freedom of communication, the *Conseil Supérieur de l'Audiovisuel* (CSA) "guarantees the exercise of freedom of audiovisual communication concerning radio and television (.), encourages free competition and the establishment of non-discriminatory relations between editors and providers of services, as well as quality and diversity of programmes".
- the *Direction du Développement des Médias*, under the authority of the Prime Minister (DDM) - Pursuant to Decree No. 2000-1074 of 3 November 2000, the *Direction du Développement des Médias* (DDM) defines and implements the government's policy for the development and pluralism of media and information society services; as such, it elaborates, *inter alia*, the legislation concerning audiovisual communication; moreover, the DDM takes part in European and international negotiations in relation to the regulation of media and information society services; in the framework of its functions, it participates to the meetings of the Standing Committee of the European Convention on Transfrontier Television which is responsible for following the application of the Convention.

15) Declaration contained in the instrument of ratification deposited on 13 July 2004. Romania designates the following competent authorities: a) the Ministry of Culture and Religious Denominations, as the authority to co-operate with, in accordance with Art. 19, para. 3, sub-paragraphs b-d, of the Convention; b) the National Audiovisual Council, as the authority to co-operate with, in accordance with Art. 19, para. 3, sub-paragraph a, of the Convention, and, for the provisions of Art. 19, para. 3, sub-paragraphs b-d, of the Convention, with the approval of the Ministry of Culture and Religious Denominations.

Finally, Art. 19 para. 3 ECTT (in its current version) enumerates the means by which Parties commit to grant each other mutual assistance through the contact points.

"An authority designated by a Party shall:
a) furnish the information foreseen under Art. 6, para. 2, of the Convention;[16]
b) furnish information at the request of an authority designated by another Party on the domestic law and practices in the fields covered by this Convention;
c) co-operate with the authorities designated by the other Parties whenever useful, and notably where this would enhance the effectiveness of measures taken in implementation of this Convention;
d) consider any difficulty arising from the application of this Convention which is brought to its attention by an authority designated by another Party."

As a result of the current revision of the ECTT, new provisions will be inserted in the text of Art. 19. The envisaged new Art. 23 para. 1 ECTT, will amend the basic principle set out in para. 1 Art. 19 ECTT (current version) by reference to the text of Art. 23b AVMSD (see further below):

> "The Parties shall render each other mutual assistance and take appropriate measures to provide each other with the information necessary for the application of this Convention, notably through their competent independent regulatory bodies".

In addition, para. 3 will be endowed with another proviso (new *lit*. d), according to which the designated national authority shall:

> "where appropriate seek the views of the authorities designated by another Party prior to issuing an authorisation, registering or concluding a contract with a broadcaster whose programme service is to be wholly or principally directed at the territory of that other Party".

This amendment was also inspired by the AVMSD (Preamble, Recital n. 66) – thus confirming the recurring mutual influence between the two instruments, as well as the intention to reconcile their texts as much as possible.

As to the new text of para. 1 of the envisaged Art. 23 ECTT, the reference to the "independence" of the regulatory authorities is remarkable. Although the Convention does not provide clear guidance as to the interpretation of such a delicate notion, the Explanatory Report contains a *renvoi*/reference to other (non binding) texts adopted in the context of the Council of Europe – namely the Committee of Ministers Recommendation No. R (2000) 23 on the independence and functions of regulatory authorities and the Committee of Ministers Declaration of 26 March 2008 on the same subject[17] – where the notion of "independence" is set out. It is easy to predict that the above mentioned texts will have a strong impact also on the interpretation of the notion of independence of regulatory authorities as inserted in the European Community Directive.[18]

III. ...and in the AVMSD

The final text of the AVMSD espouses more of a hands-off approach and is rather disappointing if compared both with the original intentions for the Directive (the establishment of a new permanent European group of regulators) and with the provisions enshrined in other European instruments.[19]

Art. 23b AVMSD, in its definitive version, contents itself with requiring member states to take *appropriate measures* to provide each other and the Commission with the information necessary for

16) This provision stipulates that information concerning the broadcaster must be made available, upon request, by the competent authority of the transmitting Party. Such information must include, as a minimum, the name or denomination, seat and status of the broadcaster, the name of the legal representative, the composition of the capital, the nature, purpose and mode of financing of the programme service that the broadcaster is providing or intends to provide.
17) See for a comment Mc Gonagle, T., *Committee of Ministers. New Declaration on Broadcasting Regulatory Authorities*, IRIS 2008-5: 2. available at: http://merlin.obs.coe.int/iris/2008/5/article1.en.html
18) See Court of Justice, Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 Reti Televisive Italiane SpA (RTI) and Others v Ministero delle Poste e Telecomunicazioni, in [1996] ECR, p. I-06471.
19) See for example, in the field of Electronic Communications, Art. 3 of Directive 2002/21/EC (Framework Directive); and, in the field of Database protection, Art. 28 of Directive 95/46/EC.

applying the provisions of the Directive, in particular its Arts. 2, 2a and 3. The task of informing falls mainly onto their respective competent independent regulatory bodies. In view of the key role that the Commission occupies in the context of the procedures laid down in Arts. 2a and 3 AVMSD, the Directive also refers to it as the recipient of the information. This provision appears to be complementary to that of Art. 23a, which is devoted to the composition and tasks of the Contact Committee. National authorities are considered as playing a specific and active role for the proper functioning of the whole system.

The new provision covers all fields coordinated by the Directive (see Recital n. 66, *in fine*) but a special emphasis is given to the traditional "cross-border" situations. Unlike other Directives, Art. 23b provides no clear guidance as to the actual tasks to be assigned to national regulatory authorities. It only refers to a general duty imposed on member states to provide information for the application of the Directive.

According to Recital n. 66, cooperation is required in particular: a) with regard to the impact which broadcasters established in a member state might have on another member state; and b) where licensing procedures are provided for in national law and if more than one member state is concerned (language, means of transmission, advertising market targeted).

In any event, with respect to the *effective* implementation of the Directive in the national legal systems, the central question appears to be the following: what is the "information necessary for the application of the provisions of this Directive"? This is not made entirely clear by the Directive's regulatory parts, while the Preamble goes a little bit further by indicating that it is "desirable" that contacts between the national bodies take place in the course of the licensing process and before licences are granted, in cases where more than one member state is concerned. Suggestions from the EPRA[20] appear very useful in this context, as their purpose is to facilitate the handling of jurisdictional problems. Information should cover, in the first place, the identification in any member state of the person or entity responsible for jurisdictional matters in the regulatory authority; in addition, the creation of a database including all the relevant information on the operators licensed in the member state is recommended. These proposals are inspired by practice (the *Al Manar* case concerning the determination of jurisdiction for a satellite service accused of hate broadcast[21]) and by the ECTT, the provisions of which were considered above, in particular the obligation to provide the information set out in Art. 6, para. 2, of its text.

On a more general level, it is fair to say that, in the light of its wording and of the whole context, Art. 23b of the AVMSD imposes on member states an *obligation de résultat*: indeed, if the measures they devise turn out to be unsuitable or inappropriate, they may be held responsible for acting in violation of Art. 23b AVMSD *juncto* Art. 10 EC. member states do enjoy a wide margin of discretion, but in order to implement Community law correctly (thus meeting the requirements under Art. 10 EC), the measures devised must ensure the attainment of the goal(s) set by the Directive.

IV. The role given to national regulatory bodies in Art. 23b AVMSD and in Recital n. 65

The final question concerns the correct interpretation of Art. 23b, read in the light of Recital n. 65, as far as the reference to "independent" regulatory authorities is concerned. It is worth recalling that, in the original Commission proposal, Art. 23b, para. 1, referred to the member states' obligation to "guarantee the independence of national regulatory authorities and ensure that they exercise their powers impartially and transparently". Recital n. 47 of the proposal made it clear that the notion of independence concerns the relationship of the regulatory authorities both with national governments and audiovisual media service providers. The same Recital also stated that such a requirement was intended to make the regulators "able to carry out their work impartially and transparently and to contribute to pluralism".

20) Botella i Corral, J., Machet, E., *op. cit.*, p. 17.
21) See Blocman, A., *France – CSA serves another formal notice to Eutelsat*, in IRIS 2005-3:11, available at: http://merlin.obs.coe.int/iris/2005/3/article19.en.html

Apparently, Member States (at least a majority of them) were not keen to accept such a far-reaching encroachment on their national competences; in addition, such a strict obligation placed on member states was not deemed appropriate given the absence, in the text of the Directive and contrary to what was decided in other fields, of clear indications as to the tasks with which national regulatory authorities were being entrusted.

The proposal was therefore significantly amended in the course of the legislative procedure. The reference to the independence of regulators made it into the final text of the Directive, although it was placed in the context of a provision the scope of which is limited to the duty of member states to provide information. It is also still included in the Preamble (Recital n. 65), in a more precise wording.

Since the final text of Art. 23b is the result of a compromise, it is rather complicated to determine how that provision is to be correctly construed. In particular, it is difficult to understand why the requisite of independence is referred to in a provision the only aim of which is to require member states to provide information. The basic question appears to be whether or not the transposition of the AVMSD, requires Member States to establish an independent regulatory authority. Arguably, this question should be answered in the negative, although the Commission considers setting up such an authority undoubtedly the "optimum". The use of the word "notably" in Art. 23b AVMSD seems to suggest that the goal of an effective system of exchange of information may be best fulfilled by way of the establishment of independent regulatory bodies.

More generally, as suggested by some authors,[22] the correct interpretation seems to be the following: if national regulatory authorities exist in a member state, they must be independent. The next question is: what is "independence"? Who can assess it? The basic starting point is that, by its inclusion in a Community piece of legislation, "independence" becomes a *European* notion, requiring a common *European* interpretation and is therefore subject to scrutiny by the European Community law system.[23] As to the meaning of the notion, in the absence of points of reference in Community law, related Council of Europe documents may prove to be very useful. Recommendation Rec(2000)23 and the Declaration of 26 of March 2008 refer to "independence" both from State influence and from operators. In addition, these documents adopted by the Committee of Ministers highlight that independence refers to a series of a) structural b) personal and c) financial elements. The structural safeguard is that regulatory authorities should not receive instructions from the Government or other political bodies. Concerning personal involvement, the Council of Europe documents foresee that rules on the appointment and removal of members, as well as on incompatibility, need to be clear and that conflicts of interest must be avoided. As to the financing of regulatory authorities, the documents stipulate that funding arrangements should be set out in statutes in accordance with a clearly defined plan, and with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently.

V. Co-regulatory bodies

In a number of member states, recourse to co- and self-regulatory systems is one of the tools used in order to implement the Directive's rules.[24] This is true, in particular, as far as the provisions on the protection of minors and on advertising are concerned, whereas a more cautious approach is taken in other fields where fundamental rights are at stake.

For the first time, the AVMSD recognises such systems by making a direct reference to them in Art. 3, para. 7:[25]

22) Scheuer, A., Palzer, C.,*Commentary to Article 2 b*, *op. cit.*, p. 996.
23) For a clear example of a Community scrutiny of measures adopted by a Member State in the context of Data protection, see pending Case C-518/07, Commission v. Germany; see also the infringement procedures established by the Commission against Poland and Luxembourg for incorrect implementation of the Framework Directive 2002/21/CE, as far as the "independence" of the national regulatory authorities is concerned.
24) See European Audiovisual Observatory, *IRIS Special: Co-regulation of the media in Europe*, Strasbourg, 2003.
25) See also the (unusually) long Recital n. 36 of the AVMSD, where also a definition of self- and co-regulation is introduced.

> "Member States shall encourage co- and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement".

The scope of this provision is not entirely clear, also because some of the terms used ("broadly accepted", "main stakeholders") appear rather generic.[26] More broadly, Art. 3, para. 7 does not oblige member states to create or even modify their co- or self-regulatory regimes.[27]

As to our direct concern, it may be considered that recourse to co- or self-regulatory regimes may prove to be useful even beyond a correct *implementation* of the rules. As indicated by Carmen Palzer,[28] co- and self-regulatory bodies may be entrusted with the task of *monitoring their compliance*, as long as the state, which holds final responsibility for adherence to the Directive's provisions, retains the right to intervene if the monitoring system proves to be inadequate.[29]

In my view, the intervention of co- or self-regulatory bodies may be positive, given that (in addition to their ability to meet other conditions for co- or self-regulation, such as the "effectiveness" of the action) their connection with the industry is based on a certain degree of independence. In practice, membership in co- or self-regulatory bodies should not only lie with representatives of audiovisual media services operators but also be accorded to civil servants and representatives of consumers' and viewers' organisations.

Finally, as to the interaction between co- or self-regulatory bodies and national regulatory authorities, the situation is rather different in the various member states. Some may argue that the very existence of independent authorities diminishes the necessity of recourse to co-regulatory bodies, since the former may be considered more equipped to deal with public interest issues. This conclusion is far from being compelling. However, it is evident that co-regulatory regimes may be a useful tool for the correct application of the Directive's rules concerning transfrontier services only if a certain amount of cooperation is being developed among the co-regulatory bodies established in the various member states.[30]

VI. Relationship of Art. 23b AVMSD and Regulation (EC) 2006/2004

A final comment should be dedicated to the relationship between Art. 23b AVMSD and Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, as amended by the AVMSD. Point 4 of the Annex "Directives and Regulations covered by Article 3(a)" is replaced in order to include a reference to the AVMSD, in particular to its Arts. 3h and 3i and Arts. 10 to 20.

Given that Art. 2 para. 7 of the Regulation expressly states that its application is without prejudice to Community law relating to television broadcasting services, one may conclude that the provisions of Art. 23b AVMSD are left untouched by the reference to the Regulation. In any event, it is not without importance that, at least in the field of protection of consumers, a network of national authorities is already in place. If the conditions set out in the AVMSD are met (especially the requirement of independence) this may facilitate the establishment of the cooperation system envisaged by Art. 23b AVMSD.

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26) See Dommering/Scheuer/Ader, *Commentary to Article 3 AVMSD*, *op. cit.*, p. 857 et seq., at 862.
27) Recital n. 36, *in fine*: "Without prejudice to Member States' formal obligations regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co- and/or self-regulatory regimes nor disrupt or jeopardise current co- or self-regulatory initiatives which are already in place within Member States and which are working effectively".
28) Palzer, C., *European Provisions for the Establishment of Co-regulation Frameworks*, in *IRIS Special, Co-regulation of the Media*, p. 3 et seq.
29) This is recognised in the Preamble of the AVMSD (Recital n. 36), "Co-regulation should allow for the possibility for State intervention in the event of its objectives not being met".
30) Cappello, M., *The Implementation and Enforcement of Co-Regulation Codes in a Transfrontier Context*, in IRIS *Special, Co-regulation of the Media*, p. 79 et seq., at 81.

Transposition of the AVMS Directive

The Latvian experience

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Without going into the details of the twists and turns in Latvian political life that finally, in March 2009, led to a draft Law on the Electronic Media, suffice it to say that this was the result of an initiative by the regulator to work together with government and industry to produce a document incorporating the requirements of the new Audiovisual Media Services Directive (AVMSD). Reaching a consensus was of the utmost importance because Latvia could not afford to repeat the previous experience of 2006 when some 400 proposals for amendments to the draft law had been submitted for its second reading in parliament but the proposed law was subsequently shelved because of the general election that same year. This time it is hoped that the new law will be passed by the end of the year but if the worst comes to the worst, transposition of the Directive will be achieved through amendments to the existing law – there is no choice in the matter.

I. Sources

The draft Law on Electronic Media was compiled using the following sources:

- Basis – existing Law on Radio and Television[2]
- Primary Inputs – AVMSD, European Convention on Transfrontier Television and the proposals for its revision and harmonisation with the new Directive
- Secondary Inputs – other directives, Latvian legislation, Council of Europe recommendations
- Tertiary Inputs – Contact Committee,[3] CDMC,[4] EPRA,[5] seminars and workshops, independent expert opinion.

The current law is based on the Television Without Frontiers Directive (TWFD). Secondary inputs include, for example, the Transparency Directive,[6] the Unfair Commercial Practices Prohibition Law,[7] the Advertising Law,[8] the proposed updated Broadcasting Communication,[9] and Council of Europe recommendations on the independence of regulatory authorities (Rec (2000) 23)[10] and on measures to

1) The views expressed above are the author's and not necessarily those of the National Broadcasting Council.
2) http://www.epra.org/content/english/press/papers/Current_Broadcasting_Law_latvia.pdf
3) See Art. 23a TWFD.
4) Steering Committee on the Media and New Communication Services of the Council of Europe.
5) European Platform of Regulatory Authorities.
6) Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.
7) http://www.ptac.gov.lv/upload/normativi_en/negodigas_komercprakses_likums.pdf
8) http://www.ptac.gov.lv/upload/normativi_en/reklamas_likums.pdf
9) Communication from the Commission on the application of state aid rules to public service broadcasting of 4 November 2008, available at: http://ec.europa.eu/competition/state_aid/reform/broadcasting_communication_en.pdf
10) See also the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector (adopted by the Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies).

promote media transparency (R (94) 13). It was particularly important to bring on board the Ministry of Justice in order to avoid unnecessary duplication and even conflicts with other laws. However, some duplication and overlaps have not been entirely avoided, mainly because of the perceived need to reinforce certain norms in the advertising rules, for example.

II. Transposition process

In many cases, it was possible to use the time-honoured copy-paste technique. However, it should be remembered that Latvia is not only a member of the EU and a party to the European Convention on Transfrontier Television, but that the National Broadcasting Council (which is not a converged regulator) is also responsible for regulating audio media services. To make matters more complicated, by law the Council is also the shareholder of the state owned public service broadcasters Latvian Television and Latvian Radio. This, as the commercial broadcasters rightly point out, means there is an inherent conflict of interest, whereby the Council regulates both private and public service media while at the same time promoting the interests (especially financial) of the public service broadcasters.

III. New terminology, new definitions, new problems

The existing Latvian law contains no mention of video on demand, junk food and self-regulation, media literacy and access for the disabled or even product placement. The new terminology has presented a problem in that the Latvian language, already crippled by 50 years of Soviet terminology, now has to cope with adapting that of the Directive in order to make the law, if not the most elegantly written, at least readable and understandable. Some of the relevant issues are addressed below.

IV. Non-linear Services

Simple copy-pasting plus provision for radio broadcasting led to the following definition:

> "On-demand audio and audiovisual media services (i.e. non-linear audio and audiovisual media services) means audio and audiovisual media services provided by a media service provider at the moment chosen by the user and upon individual demand of the user at his individual request on the basis of the catalogue of programmes offered by the media service provider."

In the operational part of the law, non-linear audiovisual media services will not only have to follow the same rules as in the Directive but also the Latvian Cabinet of Ministers' regulations on film classification, which means that films shown will have to be accompanied by a logo indicating their classification (see Recital 45 AVMSD). This, of course, begs the question of how the Council is going to monitor compliance? Given the current economic crisis and the severe budget cuts in the public sector, for the Council, with its already limited resources in terms of staff and equipment, this presents a real challenge that will have to be faced in the coming months.

V. Junk Food and Self-Regulation

In the first round of the Council's drafting process in 2007, the issue of so-called "junk food" advertising was not linked to self-regulation but the final draft requires all service providers to draw up their own codes of conduct, which must include the provisions of Art. 3e para. 2 AVMSD. This would appear to be a case of true self-regulation as no sanctions are provided for in cases of inappropriate advertising of such foods and beverages.

VI. Media Literacy

Strictly speaking, the question of promoting media literacy does not fall within the competencies of the National Broadcasting Council. However, this does not mean that the issue has not been debated in various round-table discussions with school children, teachers and the Ministry of Education and Science. It remains to be seen if Latvia will introduce this as an individual subject or as part of another

subject in the school curriculum. On the other hand, it is clear that adults also need information and guidance in this field. A mechanism for the reporting of media literacy levels as foreseen by Art. 26 AVMSD has yet to be devised.

VII. Access for People with Special Needs

Another innovation of the Directive is the requirement to "encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability" (Art. 3c). The current draft already obliges the public service media to produce broadcasts for people with special needs and an additional access element remains to be incorporated. This could be done by borrowing ideas and best practice examples from, say, Ireland's Broadcasting Commission's Access Rules. Of course the vagueness of the expression "shall encourage media service providers" does not help. The current economic situation that for some television broadcasters has already seen a drop in advertising revenues of up to 40% does not bode well for additional expenditure on audio description, signing etc.

VIII. Advertising Rules

The rules regarding "audiovisual commercial communication", a term seen by many as cumbersome and unnecessary, have been useful in that indirectly they have been instrumental in the elaboration of clearer definitions of various types of advertising, for example:

- Advertising spot – an advertising broadcast that does not exceed 90 seconds.
- Extended advertising spot **–** a commercial broadcast that exceeds 90 seconds and gives the public detailed information about goods, services, companies, persons, organisations, their activities or ideas.
- Interactive advertising – advertising that allows the user to access more detailed contents of the advertising message separately from the editorial part of the programme.
- Split-screen advertising – advertising that is shown at the edge of the screen simultaneously with the programme broadcast as scrolling text, logotypes, short advertising spots or other type of advertising.
- Virtual advertising – advertising that is electronically placed on an image in the screen during a broadcast.

The Directive defines audiovisual commercial communication as "images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity." The proposed text in the revised Convention goes further by including "images designed to advance a cause or idea, or to bring about some other effect". I mention this because the impending European Parliament elections and Latvian municipal elections and during the election campaigns we shall no doubt come across cases of surreptitious political advertising – candidates appearing on various game shows, opening new hairdressing salons or being interviewed at other events of little public interest, so-called non-events. In this context, the Convention's expanded notion of audiovisual commercial communication will be particularly useful.

IX. Product Placement

The initial feeling in the Broadcasting Council was that product placement should be prohibited but it quickly became apparent that the chances of a ban being accepted by the industry would be very low and given the inevitable and vigorous lobbying of parliament by the industry, the draft law and parliament will in all probability also allow product placement.

The UK's position raises some interesting questions. To quote from UK Secretary of State for Culture, Media and Sport Andy Burnham's statement of 11 March 2009 on Britain's final decision regarding product placement:

> "On balance, and mindful of the need to maintain public trust in television broadcasters and British television's reputation for high standards, the Government has concluded that no conclusive evidence has been put forward that the economic benefit of introducing product placement is

sufficient to outweigh the detrimental impact it would have on the quality and standards of British television and viewers' trust in it. Therefore, the Government has decided to maintain the status quo so that product placement will continue to be prohibited in television programmes made by and for UK television broadcasters."

A more cynical reader might infer from the above that in those member states that permit or will in the future permit product placement, the quality and standards of television are not as high as in Britain, viewers have less trust in it and that product placement will not have a detrimental impact. Another issue that springs to mind is the one of media service providers registered in one member state yet targeting the audience of another. In the case of the Baltic States there is the *First Baltic Channel*, which has been the subject of a long-running discussion with the UK's Ofcom. This satellite channel is licensed in Latvia under its Latvian name *Pirmais Baltijas Kanāls* yet it is also licensed in the UK under its English name "First Baltic Channel", although in the UK the holder of the license for the channel is a different company than in Latvia. The question is, of course, what would happen if there were to be product placement in the programmes made by and for the television broadcaster registered in Latvia where this would be allowed? If the UK regards this channel as being under its jurisdiction where all the major editorial decisions are made, then one could envisage certain problems. However, this is only a hypothetical case and it remains to be seen what happens in practice.

Once again, when drafting the law, care had to be taken when employing the copy-paste technique; if the definition of product placement refers to both the audio and audiovisual media then the subsequent rules should also refer to both. Compared with other regulatory authorities, the Latvian Council could be seen to be at a disadvantage in that it cannot issue guidelines or codes that are legally binding on the media service providers. With reference to product placement this may prove problematic when it comes to implementing such concepts as undue prominence, significant value, viewers and listeners being clearly informed and programmes containing product placement being identified as such. Latvia is not alone in having to think about defining these terms and reaching some form of agreement with the media service providers. What the Council could do is adapt its decision of March 2008 on how it interprets the advertising and sponsorship rules to cover product placement. For example, the current sponsorship rules foresee that the sponsor's name or logo that is heard or seen at the beginning or end of a broadcast must be of such duration that the viewer or listener is left in no doubt that the programme is sponsored and by whom. The indication of sponsorship cannot be overt or surreptitious advertising. It must not include any additional advertising message for example, by indicating the price next to the logo of a sponsor's product or some other encouragement to buy the product.

A couple of years ago, there was a cookery show hosted by one of Latvia's top chefs who travelled around the various capitals of Europe introducing the Latvian audience to the local cuisine. At the end of the show, this chef would say: "Watch again next week to see where I flew with AirBaltic using my Hansabank credit card!" This is obviously an extreme example of undue prominence and indeed the practice was promptly stopped , but the question is where does one draw the line? There is a good case here for international co-operation between regulators. Of course one cannot blindly transplant the laws and regulations from one state to another but the exchange of best practices is very useful and in this regard the EPRA is an invaluable resource. Although there are no current plans to enter into additional formal agreements with other regulators (there is already a tripartite agreement with neighbouring Estonia and Lithuania), this cannot be ruled out and an agreement on pre-licensing consultation regarding delocalised channels could prove very useful.

The transposition process, although long and arduous, has, nevertheless, been a useful exercise in the modernisation of existing legislation and in improving dialogue with the other stakeholders. It now remains to be seen how quickly parliament can put theory into practice.

No news, bad news

The AVMS Directive in Spain

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The transposition of the recent Audiovisual Media Services Directive (AVMSD) into Spanish law has not yet (April 2009) begun formally. The holding of a General Election shortly after the Directive had been adopted, and the overwhelming presence of economic difficulties (for the Spanish economy in general but also for the broadcasting sector) have driven attention away from the new regulation.

However, some developments are visible and they go in various directions. On the one hand, the cabinet returned to the Broadcasting Law draft which was under preparation in the autumn of 2005, but never reached the Parliament (except for the various sections relating to the status and funding of the public broadcaster, Televisión Española). The cabinet is currently considering options for updating its contents, in order to adjust to the new European framework set by the AVMSD. Discussions with the main commercial television broadcasters are already under way. And finally, the status of the national public service broadcaster, TVE, is being seriously reviewed – once again.

The three essential issues under intense discussion (taking place behind closed doors) are the current economic challenges in the television market; the search for a future model of digital terrestrial television (DTT); and the absence of an independent regulatory authority, which could handle issues relevant to audiovisual media services on a national level. All three are major issues and they reflect the reality to which any law transposing the AVMSD must adapt.

I. Size and rules of access to the television market

2008 has seen a decrease in advertising investment of around 11%; most worryingly, this recession entirely took place in the last quarter of the year. Therefore, prospects for 2009 look bleak. With analogue TV switch-off scheduled for April 2010,[2] the big question is: how many national broadcasters can the Spanish TV market sustain? The cabinet has finally given the answer: excluding the public service broadcaster, the magic number is three. As to commercial television broadcasters, the market is currently divided into two blocks: the two main private broadcasters, Antena 3 and Tele 5, with audience shares of around 18% each; and two minor, but quite aggressive, competitors, Cuatro and La Sexta, with audience shares of around 8% each. The national public service broadcaster's audience share amounts to another 20% of the market, while all regional broadcasters combined gather a relevant 15% of the audience. Minor offers (such as satellite, ADSL, cable, etc.) add up to 100.

1) Joan.botella@uab.eu
2) See Trinidad García Leiva, *(ES) Soria Completes Analogue Switch-Off*, available at: http://merlin.obs.coe.int/iris/2008/9/article11.en.html

Both the government and the broadcasters perceive this fragmentation as undesirable. A recent Decree by the government (turned, however, into a draft law by the Parliament, and therefore not yet in force) allowed stake-holders of any broadcasting company to acquire over 5% of the shares of any other broadcaster, provided that their joint audience would not reach 27%. In practical terms, this meant that the two big private broadcasters would not be allowed to turn to each other for an alliance, but that the two smaller commercial broadcasters could become partners to either of the two big ones, or even join forces. Any of these possibilities can be quite attractive: while La Sexta has the exclusive rights for the national football League, Cuatro has exclusive agreements with the US majors. Therefore, mergers are quite likely on the way, and multiple negotiations seem to be taking place.

II. The future model of DTT and the future of the public broadcaster

Television in Spain has traditionally followed a free-to-air model, with TV funded exclusively by advertising. With advertising shrinking, and the increase in the number of programmes, private broadcasters consider this model definitely unsuitable and plea for a pay-DTT, either on pay-per-view or subscription models. But this change requires changing the law, as the current Spanish legislation designs DTT as a public service, provided on a free-to-air basis.[3]

However, a more radical approach is being put forward by the commercial broadcasters – and increasingly accepted by the government: a change in the rules concerning the public broadcaster. These rules changed recently (Law 17/2006, on state-owned Radio and Television), with the Spanish broadcasting corporation, Radio Televisión Española (RTVE) becoming an independent body, with a Parliament-elected board, and a pledge to reduce the presence of advertising, at a rate of one minute less per hour every year (therefore, 11 minutes in 2008, 10 minutes in 2009, and so on). This law accompanied the covering by the government of the debt cumulated by RTVE since 1996.

But now a radical change is being considered: the complete elimination of advertising in the public television broadcaster's programmes (this is already the case for public radio broadcasting). Following the recent changes in France, RTVE would now be funded by a special tax on the income of commercial broadcasters and, maybe, a tax on the profits of telecom operators. An agreement has been reached between the cabinet and the commercial broadcasters, and a draft bill could be immediately introduced in Parliament, aiming at its approval in a few months.

III. The lack of an independent regulatory authority

The third line of discussion concerns the classic Spanish exception, which is best summarised by the question: can Spanish regulation for broadcasting be applied without an independent broadcasting regulator? The attempt of the Spanish cabinet to promote a self-regulatory code by broadcasters has turned into a complete failure. Instead of adhering to a consistent enforcement of the agreed code of self-regulation, broadcasters got entangled in scandals over a large number of programmes.

Private broadcasters are fighting against the idea of a national regulatory authority, while two different lines of reasoning compete within the cabinet: on the one hand, the Ministry for Industry seems to favour a strong regulator, perhaps converging with the "Telecommunications Market Commission" (CMT); the Prime Minister services, on the other hand, rather envisage a content regulator, focusing only on content issues (such as protection of minors) and with few powers concerning market regulation. Either way, a big question remains: how can a future national regulator relate to already existing regional regulators, the latter being recognized and accepted as equals by all other European regulators (within the EPRA framework), and by the European Commission itself (where they attend the regular meetings of the High Level Group of Regulators)? Some voices have observed that Belgium or Germany do not have nationwide regulatory authorities. However, this federal approach does not seem to be in the government's mind.

3) This is established by law: see Law 10/2005, dated 14 June 2005 (Law for the Promotion of DTT, Liberalization of Cable Television and Promotion of Pluralism).

The government, whose party enjoys only a relative majority in Parliament, may have a difficult time in gathering support from other parties. The main opposition group, the conservative Partido Popular, rejects the idea of an independent regulator; the small left-wing parties do not support the reduction of weight of the public broadcasters; and the regional and nationalist groups want to see public sector regional broadcasters protected.

All in all, the absence of a formal process of law-making opens the door to rumours, smoke-filled room negotiations and a general lack of transparency with regard to the transposition of the AVMSD. Together with the infamous tradition of weak regulation, and only a very "light touch" enforcement of the rules, this does not seem to be the best context for optimism concerning Spanish media regulation.

IRIS Special

Ready, Set... Go?

The Audiovisual Media Services Directive

Having undergone astonishing technological developments, the audiovisual sector has shown one of the most profound and rapid changes over the last decade. The changes it has undergone posed a challenge to the existing regulatory framework, and Europe took its first big step towards the adaptation of this framework by adopting the Audiovisual Media Services Directive. This adaptation process is of such paramount importance that we have already dealt with it twice in the IRIS *Special* publications "Audiovisual Media Services without Frontiers" and "Editorial Responsibility". You will also find analyses of selected aspects associated with the Directive in our IRIS *plus* series *(www.obs.coe.int/oea_publ/iris/iris_plus)*.

This IRIS *Special* complements these publications by considering a very important aspect: the transposition of the Directive into national law, which is the second, and crucial step in the adaptation of the regulatory framework for media services in Europe. It discusses the fundamental concepts of the Directive and their importance for the transposition. On the basis of these concepts, it looks at practical issues and possible solutions that are emerging in the transposition arrangements of the various EU member states. Finally, it examines a number of subsidiary regulatory and monitoring issues.

In this discussion, it becomes clear on the one hand how big the differences in the transposition of the Directive from one state to another are and to what extent the different legal traditions of individual states have an impact. Numerous examples make it clear that the, in some cases, broadly defined concepts and targets of the Directive leave room for different national solutions, especially in the case of non-linear services. On the other hand, attention is also drawn to the fact that the current regulatory culture in some EU member states will change since a number of the Directive's provisions will result in the lasting adaptation and simplification of their legislation.

A discussion of the aims of the Audiovisual Media Services Directive and the interests involved, taking as examples:

- The promotion of cultural diversity
- Protection against hate speech and other unacceptable content
- Protection for underage users in particular
- The limits to advertising
- Product placement
- The right to short reporting

The challenges of transposing the Directive into national law

- Intelligibility, acceptance, manageability of the solutions chosen
- Incorporation into existing media law of the concepts set out
- Drawing a distinction between linear and non-linear services
- Definition of editorial responsibility
- Actual conflict potential
- Co-regulation – for what areas and how is it organised?
- Delegation to (independent) regulatory authorities
- Rights of citizens and the industry to be heard or have a say in matters
- Monitoring of compliance with the law
- The roles of the regulatory authorities
- Responsibility for ensuring the implementation of, and compliance with, the rules in individual cases

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EUR 89 – ISBN 978-92-871-6665-4