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Special

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The Regulation of On-demand Audiovisual Services: Chaos or Coherence?



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The Regulation of On-demand Audiovisual Services: Chaos or Coherence?

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Director of the Publication:

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

Editor and Coordinator:

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

Contributing Partner Institution:



Institute of European Media Law (EMR)

Franz-Mai-Straße 6
D-66121 Saarbrücken
Tel.: +49 (0) 681 99 275 11
Fax: +49 (0) 681 99 275 12
www.emr-sb.de

Editorial Assistant:

Michelle Ganter
E-mail: michelle.ganter@coe.int

Marketing:

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

Translation/Proof-reading:

Sabina Gorini, Julie Mamou, Britta Probol, Nadja Ohlig, Erwin Rohwer, Anne-Lise Weidmann

Typesetting/Print:

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Publisher:

European Audiovisual Observatory
76 Allée de la Robertsau
F-67000 Strasbourg
Tel.: +33 (0)3 90 21 60 00
Fax: +33 (0)3 90 21 60 19
E-mail: obs@obs.coe.int
www.obs.coe.int

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**The Regulation of
On-demand Audiovisual Services:
Chaos or Coherence?**

The Regulation of On-demand Audiovisual Services: Chaos or Coherence?

Published by the European Audiovisual Observatory

It is common practice that the European Commission sends fact finding letters to ensure that national laws of all member states correctly implement all aspects of EU directives within the given time frame. The letters addressed in March this year to Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Greece, Ireland, Italy, Malta, the Netherlands, Romania, Spain, Sweden, Slovakia and the United Kingdom and in early September to Austria, Cyprus, Estonia, Germany, Hungary Latvia, Lithuania and Luxembourg with questions concerning the compatibility of national media laws with the rules of the Audiovisual Media Services Directive thus follow the envisaged procedures for clarifying transposition measures. Certainly they shall not be confused with the infringement procedures launched by the Commission against Slovenia and Poland for failure to transpose all or some parts of the Directive. Still, to a neutral observer the range of questions and level of detail of information sought for by the European Commission signal that transposing the AVMSD into national law and practice is as hard a job as ensuring the respect for its rules and spirit.

Special difficulties may stem from the fact that the regulation of audiovisual media services is a “twinset” undertaking in various aspects and that it deals with non-identical twins. With the “elder” twin, the linear audiovisual media services, member states are more or less at ease as they have had years under the “Television without Frontiers” Directive to familiarise with the services and possess national rules that they just need to adapt to certain new aspects of the European regulatory framework. The “younger” twin, the non-linear audiovisual media services, causes more of a head-ache. This is partly because member states are not sure how it will develop in reality: will it be strong and successful and possibly quickly outdo its sibling? Or will it need pampering for a prolonged period? Will it be easy to lead and guide or egocentric and wild?

The non-linear part is difficult to handle also because it has not yet been subject to specific content regulation and it seems unclear how the relevant national systems may be expanded or changed to accommodate it. As we know regulation of audiovisual media services shall comprise both twins and it shall be done as a set in the sense that linear services are subject to more and non-linear to less stringent rules but both regulatory parts together must provide for a “level playing field”, just like the twinset jacket must inevitably match the sweater.

This IRIS Special looks at the troubles caused by the new task of regulating non-linear – commonly referred to as on-demand – audiovisual media services. Similar to the fact finding letters of the European Commission, it starts with questions related to how member states defined on-demand audiovisual services in transposing the AVMSD. To this end, the publication

first explores the technical setting for Internet-connected devices and hybrid TV services that may potentially increase that particular regulatory challenge by turning linear and non-linear services into Siamese twins. The publication then recalls in some detail the very complex solution that the AVMSD has chosen to delineate the different kinds of media services, including those that might not be covered by the scope of the directive but possibly by other EU rules. Thereafter it turns to the special approach chosen by member states for their definitions and their struggle to find solutions that comply with EU requirements, are technology-proofed and compatible with the existing national legal systems. Ideally they should also appeal to common sense and be manageable in practice. Thereafter the IRIS Special concerns itself with the call of the AVMSD for increased use of self- and co-regulation. More precisely, it offers its readers first experiences with these regulatory forms. The examples stem from the United Kingdom and Germany and were gained in the areas of protection of minors and commercial communications. Another cluster of contributions summarises observations, comments, and questions that consumers, the industry or regulators may include in a fact finding letter were they to send one to the European Commission or a member state. In addition, the IRIS Special contains the essence of a round table discussion on all those issues and an overall summary of the presentations that were given to stimulate that discussion.

In short, this publication unites the experience and knowledge of 25 experts in audiovisual media law. It reflects their oral and written contributions shared and discussed at the occasion of a full day workshop named:

“Whose Boots Are Made for Walking?
On-demand services – a case for passing regulation,
entrusting self-/co-regulation or leaving it to general legislation?”.

The workshop took place on 20 April 2011 on the premises of the City University School of Law in London. Our special thanks go therefore to Lorna Woods and her team for hosting the event and moderating part of it; to the authors of the individual book chapters, Sebastian Artymiak, Mark D. Cole, Marcel Betzel, Roberto Viola and Maja Cappello, Chris Dawes, Vincent Porter, Erik Valgaeren and Lore Leitner, as well as Joan Barata Mir, for supplying their oral presentations in updated written format; to all other workshop participants, namely Emmanuelle Machet, Nico van Eijk, Peter Bourton, Marcel Boulogne, Ray Gallagher, Jussi Mäkinen, Juraj Polak, Anne-Catherine Berg, Thomas (Tom) Roukens and Francisco Cabrera, for sharing their knowledge and views. Our thanks also go to Olivier Hermanns and Peter Matzneller for their summary of the discussion in form of the workshop report. Last but not least we owe a big thank you to Alexander Scheuer and his whole team of the Institute for European Media Law for co-organising the event and supporting the making of this publication at all stages.

With the help of its partner institutions and its network, the European Audiovisual Observatory will continue to observe the latest developments concerning the regulation of on-demand audiovisual services (for example via <http://merlin.obs.coe.int/newsletter.php>) and strive to contribute to the coherence of the discussion.

Strasbourg, October 2011

Wolfgang Closs
Executive Director

Susanne Nikoltchev
Head of Department for Legal Information

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“Whose Boots Are Made for Walking?”

Regulation of On-demand Audiovisual Services

Report on the European Audiovisual Observatory and the Institute of European Media Law Joint Workshop Held in London on 20 April 2011

Olivier Hermanns and Peter Matzneller**
Institute of European Media Law (EMR)*

The (more widespread) rollout of hybrid television sets, which are primarily designed to enable viewers to receive traditional television channels and on-demand audiovisual services on the same screen, is currently bringing the question of suitable regulation of audiovisual services under the spotlight again. The Audiovisual Media Services Directive (AVMSD)¹ provides the European Union member states with a legal framework that deals with at least some audiovisual services.

Against this background, at the initiative of the European Audiovisual Observatory and the Institute of European Media Law (EMR), a joint workshop was held in London on 20 April 2011 in cooperation with the City Law School, City University London.² The workshop provided an opportunity to take stock not only of how and the extent to which the AVMSD has been implemented in the member states, but also of the legal framework – above and beyond the provisions of the AVMSD – that applies to audiovisual (media) services.

As a new phenomenon in a constantly changing media landscape, on-demand services throw up numerous questions which were tackled at the workshop in a total of nine lectures and discussions between the participants. Firstly, practical examples were used to demonstrate which on-demand services can currently be received using hybrid television sets in particular. The scope of application of the various European provisions on on-demand audiovisual services was then explained. The next four lectures looked at how these European instruments have been transposed into four different national legal systems. Article 4(7) of the Audiovisual Media Services Directive requires member states to encourage co- and/or self-regulatory regimes at national level to the extent permitted by their legal systems. The extent to which member states have taken such initiatives, and which co- and/or self-regulatory regimes are applicable to non-linear audiovisual services were therefore examined in detail. Examples of co-/self-regulatory systems were found in several member states, particularly in relation to commercial communication and the protection of minors. The final three lectures were devoted to the respective expectations of consumers, providers and legislators/regulators with regard to regulation.

* Dr Olivier Hermanns is a media law expert at the Ministry of the German-speaking Community in Eupen (Belgium).

** Peter Matzneller is a researcher at the Institute of European Media Law (EMR), Saarbrücken/Brussels.

1) Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version) OJ L 95 of 15 April 2010, p. 1, OJ L 263 of 6 October 2010, p. 15 (AVMSD).

2) The workshop was chaired by Dr Susanne Nikoltchev, Head of the European Audiovisual Observatory's Department for Legal Information, and Prof. Lorna Woods, City University London.

This report summarises the lectures in the order in which they were given at the workshop. It also presents the conclusions of the subsequent debates, which appear under the relevant lecture headings.³

I. The different forms of on-demand services

In his lecture, Sebastian Artymiak⁴ described new forms of on-demand services, which are currently or will soon be available. These offered consumers a host of possible ways of accessing audiovisual content. Such services could be watched, for example, on hybrid receivers (or “connected devices”). These were end-user devices capable of receiving television signals as well as being equipped with an Internet connection. Examples included flat-screen TVs, set-top boxes, games consoles and blu-ray players. Using these devices, which could be controlled with a remote control, keyboard, mouse or smartphone, viewers could receive and (simultaneously) watch non-linear services and other Internet content as well as traditional television channels.

Sebastian Artymiak drew attention to notable initiatives by device manufacturers on the one hand and television companies on the other. Device manufacturers had developed portals, such as InfoLive (Samsung) and Net TV (Philips), containing applications (or “apps”) and online video libraries. These services were known as unlinked or unbound applications, since they were independent from the content offered by the broadcaster (current and linear); they could therefore be used whatever channel was being shown on the screen at the time. The device manufacturer was positioned between the content provider and the customer and could therefore participate in the creation of added value and generate revenue. New business models were also emerging as a result.

Television broadcasters had seized the resulting opportunities to develop their services further. They had developed linked (or bound) applications, e.g. on the basis of the Hybrid Broadcast Broadband TV (HbbTV) standard⁵ or in the form of the YouView platform.⁶ This relied on a link (via a so-called widget) between the broadcaster(s) programme signal) and its services. The link could lead to commercial websites specifically geared to a product or service, particular forms of advertising or paid video-on-demand services, for example.

Services such as Google TV and Apple TV also offered access to non-linear audiovisual (media) services. Google TV required a hybrid device or set-top box and consisted of a link to audiovisual (sometimes paid) content. Apple TV was based on a set-top box (or streaming box, to be more precise) which was connected to the Internet on the one hand and the receiving device on the other, and provided access to iTunes. The Apple platform offered streaming of paid videos, films and music.

Television broadcasters were interested in Google TV and were proactively engaging with this new concept by launching “new” related projects. For example, they had provided the information contained in electronic programme guides (EPGs) in databases and in optimised form, as well as metadata on audiovisual content in video libraries. Consequently, search engines could access reliable information and display it accordingly. However, since Google TV could also include in the results list applications appropriate to the search request, the television broadcasters had produced specific “apps”. Finally, they had reacted to the fact that Google TV also showed users the results of the classic Google search engine, i.e. links to websites, by developing Internet sites designed specifically for TV screens. Google was also planning to offer a “market place” for television advertising from the end of 2011. Broadcasters needed to decide whether this could represent a meaningful addition to existing marketing models.

Finally, the speaker explained that IPTV (Internet Protocol Television, i.e. the distribution of television programmes based on signal transmission using the IP standard), unlike the above-mentioned services and technologies, was not offered on the open Internet, but via the so-called “managed network” of a telecommunications operator. The quality of apps and VoD services in managed networks

3) This report, which summarises the discussions rather than following the order in which comments were made, covers all the aspects of the theme that were mentioned by the participants.

4) Chief Technology Officer, *Verband Privater Rundfunk und Telemedien e.V.* (VPRT – Association of Commercial Broadcasters and Audiovisual Services), Berlin. See article by Sebastian Artymiak in this publication.

5) TV catch-up services are also available through HbbTV and YouView.

6) See http://www.bbc.co.uk/bbctrust/our_work/canvas/index.shtml and <http://www.youview.com>

was controlled by the network operator, which determined quality and bandwidth. This was an example of vertical integration, since the network operator controlled not just the network, but also the end-user device and all services.

The subsequent discussion looked firstly at the introduction of new business models. One participant, for example, asked to what extent device manufacturers themselves determined what systems – whether on the open Internet or via other means – were made available to the general public. He also wondered whether the device manufacturers were free to take these decisions, or whether they could only do so in consultation with media providers and network operators. The speaker noted that some device manufacturers (only) considered the cheaper option when deciding between the open Internet and other solutions. Philips, for example, had chosen the open Internet, while its competitors only provided access to a small amount of Internet content (“walled garden” principle). The speaker added that media content providers had to negotiate with device manufacturers if they wanted to sell their services not only via the open Internet, but also via manufacturers’ portals. These negotiations could be difficult and lengthy, partly because device manufacturers demanded payment of a certain percentage of the revenue generated each time an application was used. The speaker mentioned the example of the Apple firm, which required 30% commission on the sum paid for each downloaded application. The emergence of apps or portals of device manufacturers had therefore led to the introduction of a new business model.

Another participant asked whether device manufacturers were offering a common Europe-wide service, or different services divided up according to national markets. The speaker replied that, particularly for copyright reasons (linked to digital rights management – DRM), services were adapted or restricted depending on the customer’s location, which could be determined from their IP address.

The discussion then turned to the question of the expandability of the device manufacturers’ services, which were continually being updated; new or improved applications were being developed. Philips sent an update every night, for example. The next time the device was switched on, the update was automatically installed. Expandability was only limited by the hardware that was used. The speaker thought that practical difficulties were caused by the lengthy contractual negotiations between content providers and device manufacturers concerning the activation of applications. Nevertheless, more and more VoD stores were becoming available on these devices.

Referring to the new business models described by the speaker, one participant wondered how difficult it was for a television broadcaster to reach an agreement with a device manufacturer or a network operator (particularly an operator of so-called “managed networks”), and whether there were any differences between them. The speaker thought that the relationship between television companies and all other parties involved was difficult to a certain extent. When choosing a platform, the broadcaster would have to decide whether it was worthwhile adapting its service each time to make it compatible with the platform. There would be problems with device manufacturers since every television company had its own preferences with regard to digital rights management systems. Device manufacturers, for their part, only used one system for reasons of cost and were particularly careful about security. Television companies were often also confronted with cable network operators’ own ideas. Device manufacturers had to decide on a technical standard; there was currently no common European standard.

In response to a question about possible incentives for device manufacturers to develop new reception devices suitable for linked applications, the speaker confirmed that the existence of several technological solutions, which also varied from country to country, caused difficulties for device manufacturers. For example, there was HbbTV in France and Germany, YouView in the United Kingdom, and in future MHP (Multimedia Home Platform) in Italy as well as MPEG and MHEG-5. If most or all of these different specifications were accommodated, reception devices would be much more expensive.

Finally, one participant asked to what extent device manufacturers wanted to adopt the Apple business model, i.e. an integrated content, device and marketing platform, and commented that this would be detrimental from the consumer’s point of view. In fact, the role and possible influence of device manufacturers had changed considerably. In the new world, they could decide who could offer which applications via their portal.

II. The European legal framework for on-demand audiovisual media services

The presentation by Mark D. Cole⁷ dealt with the European Union legal provisions that regulated or might at least be relevant to the classification of a service as an on-demand audiovisual (media) service. He referred to the explanatory provisions of the various Directives and the case law of the Court of Justice of the European Union (ECJ). The aim of his contribution was to distinguish between the concept of on-demand audiovisual media services and other audiovisual media services (television programmes) on the one hand, and other on-demand (audiovisual) services on the other.

In order for a service to be defined as an on-demand audiovisual media service, it had to meet all the criteria set out in Article 1(1)(a)(i) AVMSD.⁸

Firstly, it had to be a service in the sense of Articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU). According to Recital 21 AVMSD, the concept should therefore “cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.” According to Recital 23, such media services should also be audiovisual, i.e. contain moving images with or without sound. They therefore included silent films, but not audio transmission or radio services. The concept also covered text-based content that accompanied programmes. Although this was not explicitly mentioned in the enacting provisions of the Directive, the services should be mass media, i.e. they should be “intended for reception by, and ... could have a clear impact on, a significant proportion of the general public” (Recital 21 AVMSD).

Secondly, a media service provider should have editorial responsibility for the service. According to Article 1(1)(c) AVMSD, the provider should exercise effective control “both over the selection of the programmes and over their organisation ... in a catalogue, in the case of on-demand audiovisual media services”. Persons merely transmitting programmes were therefore not considered audiovisual media service providers according to Recital 26 AVMSD. The member states could further specify aspects of the definition (Recital 25 AVMSD).

Thirdly, Recital 22 AVMSD stated that the main function of media services as defined in the AVMSD should be to provide programmes designed to inform, entertain and educate the general public. The same provision excluded services “where any audiovisual content is merely incidental to the service and not its principal purpose”, such as “websites that contain audiovisual elements only in an ancillary manner”⁹ and “games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines”.

Fourthly, on-demand services should be provided via electronic communications networks in the sense of Article 2(a) of Directive 2002/21/EC.

In response to a question, Mark D. Cole said that some of the criteria mentioned in the recitals, such as the characteristics of mass media, were difficult to incorporate in national law when transposing the European provisions because their practical application remained unclear.

7) Professor of law governing new information technologies, media and communications, University of Luxembourg. See article by Mark D. Cole in this publication.

8) The individual speakers used different methods of counting the number of criteria that an (on-demand) audiovisual media service should meet. This may be the result, firstly, of the fact that the individual criteria set out in Article 1(1)(a)(i) have been linked together or that elements of the recitals have been incorporated in the criteria. Secondly, it clearly depends on whether criteria from other legal definitions contained in Article 1(1) have also been taken into account.

9) As examples, Recital 22 AVMSD mentions “animated graphical elements, short advertising spots or information related to a product or non-audiovisual service”.

The speaker explained that electronic versions of newspapers and magazines were excluded from the definition of audiovisual media services under Recital 28 AVMSD. Non-linear audiovisual media services were “television-like” by their very nature. According to the European legislator, this meant that “they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive” (Recital 24). This was a sign that the user’s perspective was important in the Directive. However, the speaker doubted whether, in practice, the “user’s reasonable expectation of regulatory protection” was a true characteristic of a “television-like” service.

Non-linear audiovisual (media) services and commercial communication could also, if they met the relevant criteria, be considered as information society services. These were defined as services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient.¹⁰ If this was the case, the services were (also) subject to the E-Commerce Directive.¹¹

The speaker then mentioned other European Union legal instruments that explained how the regulation of (on-demand) audiovisual services should be approached.¹²

Mark D. Cole then explained that the criteria which the ECJ had laid down in its “Mediakabel” ruling¹³ for on-demand audiovisual media services had been incorporated in the AVMSD. In this judgment, the ECJ had differentiated between television services and on-demand services. The crucial characteristic of a “television service” was the broadcast of television programmes that were meant to be received by the public simultaneously. In examining this criterion, the ECJ had given priority to the service provider’s standpoint (para. 42 of the judgment). The concept of “television broadcasting” was defined independently in the Television Without Frontiers Directive (89/552/EEC) and not by opposition to the concept of “information society service” within the meaning of Directive 98/34/EC (para. 25 of the judgment).

Since the entry into force of the AVMSD, the ECJ had not issued any new rulings on the interpretation of this Directive. Even in case C-517/09, the ECJ had not clarified the concept of “editorial responsibility” because the referral had been deemed inadmissible.¹⁴ Although ECJ procedures relating to the provisions on commercial communication were pending or had already been concluded, these only concerned the

10) These concepts are then defined (see wording of individual concept definitions in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 204 of 21 July 1998, p. 37)).

11) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), OJ L 178 of 17 July 2000, p. 1 (E-Commerce Directive). Linear television services are not “information society services” in the sense of the E-Commerce Directive “because they are not provided at individual request” (Art. 1(2) of Directive 98/34/EC and Recital 18 of Directive 2000/31/EC). They are therefore not subject to the notification requirements laid down in Directive 98/34/EC.

12) For example, Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (OJ L 320 of 28 November 1998, p. 54), was designed to combat the manufacture and use of illegal devices that provide unauthorised access to protected services such as television programmes (in the sense of Art. 1(a) of Directive 89/552/EEC) and information society services (in the sense of Art. 1(2) of Directive 98/34/EC). See also the Telecoms Package, Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness 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 L 270 of 7 October 1998, p. 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 L 378 of 27 December 2006, p. 72 and OJ L 156 of 16 June 2007, p. 38 (Recommendation I No. 2)), and the Communication on the application of State aid rules to public service broadcasting (OJ C 257 of 27 October 2009, p. 1, Broadcasting Communication).

13) ECJ, case C-89/04, *Mediakabel*, European Court reports 2005, p. I-4891. Regarding this judgment, see Nico van Eijk, *Linear and non-linear audiovisual media services*, in: Susanne Nikoltchev (ed.), *IRIS Special: Ready, set ... go? – The Audiovisual Media Services Directive*, Strasbourg: European Audiovisual Observatory, 2009, p. 44.

14) ECJ, case C-517/09, *RTL Belgium SA*, judgment of 22 December 2010, not yet published in the ECR.

interpretation of the Television without Frontiers Directive.¹⁵ The ECJ was expected to rule shortly on the question of liability for on-demand services.¹⁶

In the speaker's opinion, editorial responsibility for traditional catch-up services, in which television broadcasters offered content that they had previously broadcast via their linear services to be viewed at individual request, lay with the broadcaster. Editorial responsibility for catch-up services could also lie with companies that assembled and, in some cases, catalogued the relevant content (so-called aggregators) if their role amounted to more than the simple organisation of different channels. On the other hand, it was doubtful whether Google TV had editorial responsibility. Recital 27 AVMSD suggested that there was no editorial responsibility if individual linear programmes were additionally made available by the same media services provider in the form of on-demand services. The possibility of combining different sources of information did not automatically lead to editorial responsibility. The speaker even doubted whether Google TV fell within the scope of the E-Commerce Directive. Apple TV was based on a catalogue compiled by Apple, which therefore had editorial responsibility. Under the YouTube model, which to date had essentially been based on user-generated content, YouTube/Google did not, in principle, have editorial responsibility in the sense of the AVMSD (Recital 21). However, this could change if editorial influence was increased (e.g. through the creation of specific channels).

The subsequent discussion looked first at the question of the transposition of the European concepts into national legal systems. One participant noted that the operative part of the AVMSD had largely been transposed into national law in the United Kingdom. He wondered how the relevant recitals of the Directive had been taken into account in the individual member states. These were primarily designed to assist the interpretation of the operative part of the Directive. The speaker replied that, when examining the transposition measures that had been taken by the member states, he had been surprised at how similarly the member states had adopted the Directive's provisions defining the scope of the Directive and how closely they had adhered to the wording of the Directive. This was probably due to the vagueness of certain concepts, such as the condition that the services should be mass media. The European Commission had asked some member states, including Italy, for information about their implementation of the Directive.¹⁷

One participant reported on the transposition of the Directive into Slovakian law and agreed that the criteria laid down in the AVMSD recitals were vague. He mentioned the example of the concept of "economic activity". The European Commission had also asked the Slovakian Government about its implementation of this criterion.

Another participant then explained the legal situation in Italy. He chose the example of the exclusion of the "electronic press" from the scope of the Italian legislation implementing the Directive as a result of the transposition of Recital 20 of the Directive. Under the Italian Constitution, the freedom of the press was protected in such a way that the press should not require authorisation of any kind. The inclusion of the electronic press in the system laid down by the EU legal framework was a sensitive issue for both the parliament and the media. The constitutional provisions were very clear and should therefore be strictly interpreted.

The speaker replied that it was very doubtful whether two identical services (on-demand services with audiovisual content) should be treated differently just because one was provided by an established press company and the other by a different provider. Mark D. Cole thought this would not be the case,

15) Concerning the definition of the concept of surreptitious advertising, the ECJ decided in case C-52/10 (*Alter Channel*, judgment of 9 June 2011, not yet published in the ECR), that the ban on surreptitious advertising in Directive 89/552/EEC should be interpreted as meaning that the provision of payment or of consideration of another kind was not a necessary condition for establishing the element of intent in surreptitious advertising. In case C-162/11, the ECJ has to decide, following a reference for a preliminary ruling submitted by the Austrian *Bundeskommunikationssenat*, whether the Directive should be interpreted as meaning that announcements of any kind made by a television broadcaster in its programmes and broadcasts and relating to its own (free-to-air) programmes and broadcasts are covered by the term "television advertising".

16) For example, case C-70/10 concerns the provision of a filtering system by Internet Service Providers in order to identify the sharing of electronic files containing a musical, cinematographic or audiovisual work, and subsequently to block the transfer of such files either at the point at which they are requested or at which they are sent (OJ C 113 of 1 May 2010, p. 20); see also Opinion of General Advocate Pedro Cruz Villalón of 14 April 2011.

17) See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/373&format=HTML&aged=0&language=EN&guiLanguage=en>

although he did not wish to draw any conclusions specifically about the Italian situation. He added that on-demand services were (usually) only subject to notification requirements rather than (state) approval. A further counterargument to the Italian solution was that the public expected to be told if a particular service was provided by a professional, economically active company. This expectation was recognised as a necessary characteristic of audiovisual media services in the Directive (Recital 21, see also Recital 45) and was also expressed in Article 5 AVMSD.

Another participant commented on this issue against the background of his own analysis of national transposition measures. In his opinion, the member states which had defined the scope of national regulations using concepts described in the AVMSD recitals had specifically chosen characteristics with a relatively clear scope of application. The exclusion of purely private websites was an example. In other, more sensitive or difficult cases, however, these member states appeared less inclined to adopt the explanations contained in the recitals of the Directive in their national provisions.

Two participants discussed the concept of “editorial responsibility”. One commented that the European approach was very different to that of the USA. He pointed out that, under the Digital Millennium Copyright Act, a so-called “safe harbour” was provided under certain conditions for service providers and intermediaries, exempting them from liability. In contrast, the approach taken in the AVMSD should be considered incomplete and premature, since it was currently still impossible to predict with any certainty what impact technical, economic and user-related developments would have on on-demand services. The other participant said that “editorial responsibility” was a key concept for public service broadcasters. She added that the concept of “programme”, which should be interpreted in a dynamic way according to Recital 24 of the AVMSD, could be too vague. The characteristic of being “television-like”, which was described in this Recital, could refer to a single element of a programme; however, it was also possible to consider that all programmes should be taken into account. The speaker replied that, according to his (provisional) evaluation, the Directive should rather be understood as requiring openness to the development of individual programme formats.

III. Examples of national implementation

1. Netherlands

Marcel Betzel's¹⁸ lecture dealt with the transposition of the Audiovisual Media Services Directive in the Netherlands. The 2008 amendment to the Dutch Media Act¹⁹ had entered into force on 19 December 2009, defining concepts such as media service, media offer and editorial responsibility. In order to explain the new Act, the *Commissariaat voor de Media* (CvdM, the Dutch regulatory authority for the media) had issued policy guidelines on procedures and monitoring. These contained criteria to determine whether a particular audiovisual (media) service was covered by the new regulatory framework or not.

The CvdM guidelines were limited to defining the characteristics of private or commercial on-demand audiovisual media services. Different provisions applied to public services. The criteria contained in the guidelines were based on both the operative part and the recitals of the AVMSD, as well as the 2008 Media Act and the practical experiences of the CvdM. Although the individual criteria should be applied cumulatively, they were not necessarily equally important.

Regarding the criterion that on-demand audiovisual media services should be programmes whose form and content were, in accordance with Article 1(1)(b) AVMSD, comparable to the form and content of television broadcasting, the speaker noted that the content of video-on-demand services was often not sufficiently comparable to television broadcasting. These videos were different because of their short duration and lack of features such as a title and opening and closing credits. Furthermore, it was difficult to gain an objective understanding of possible public expectations of the two types of service (particularly the expectation of “regulatory protection within the scope of this Directive” described

18) Policy advisor at the *Commissariaat voor de Media* (CvdM). See article by Marcel Betzel in this publication.

19) *Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet* (Mediawet 2008).

in Recital 24 AVMSD). For these reasons, video had been defined in the Netherlands as an electronic product including moving images which formed a single item, carried a unique title and was part of a catalogue. "Catalogue" was defined as the organisation of videos in a database through which they were made accessible to the user, usually with the help of a search function.

In practice, many websites contained both text and videos. It was difficult to determine objectively which of the two was the principal service and which was supplementary. In the Netherlands, therefore, when assessing the principal purpose of audiovisual media services, the tendency was to consider as on-demand audiovisual media services only videos that had no supplementary purpose and which consumers could use as an autonomous or isolated service. The functionality and presentation of a service and how it was used and perceived by the public should be taken into account.

It could also be difficult to assess whether a provider had editorial responsibility in the sense of Article 1(1)(c) in conjunction with Recital 25 AVMSD, since activities comparable to editorial work could be carried out by different service providers. In the Netherlands, this problem was addressed by assuming that, if programmes were selected by a different provider to the one that ultimately transmitted them, effective control over the selection of programmes was decisive as far as editorial responsibility was concerned.

When assessing the criterion of a service's "mass media character" in the sense of Recitals 21 and 22 AVMSD, it was difficult to measure whether the service had a clear impact on the audience. Video services could also be received by a large audience on the open Internet. However, if individual user groups could be identified, e.g. users from a closely defined geographical area, such as a local community, it was assumed in the Netherlands that the service was not a mass medium.

Finally, it was becoming increasingly common for websites of private individuals, schools, libraries or church organisations to contain advertisements (using Google AdSense, for example). A service could potentially therefore represent an economic activity if it (i) contained advertising or sponsorship, (ii) promoted a brand, product or service or (iii) was provided for remuneration. However, services offered by private persons or public authorities were, in principle, not classified as economic services unless they were offered for payment or had a clear commercial character.

However, Marcel Betzel did not consider the last two criteria to be critical, since almost all services available on the Internet could be considered as mass media and economic services.

The speaker explained that five main categories of potential services had been identified in the Netherlands. The first category comprised catch-up services,²⁰ which normally met all the criteria of an on-demand audiovisual media service. In practice, it was possible for a media service provider to be subject to the legal jurisdiction of one member state in relation to its linear audiovisual media services and to that of another with regard to its non-linear audiovisual media services. The second category online video stores, which was usually classified as on-demand audiovisual media services because the service provider could influence the selection and organisation of the videos in the catalogue. The third category consisted of video news websites or newspaper and magazine websites that included videos. Although the industry generally considered these services to be excluded from the scope of the AVMSD in accordance with Recital 28, the CvdM thought that they were audiovisual media services if the videos were included in a catalogue and if they made sense to a consumer who had not read the accompanying written articles. Regarding the fourth category, aggregator websites²¹ which collected and offered catch-up services of television broadcasters, the CvdM did not consider that the providers took editorial responsibility. However, this only applied if the removal of a video originally offered as a catch-up service automatically led to its removal from the aggregator website. The final category comprised video hosting sites, i.e. websites which provided storage space for audiovisual content uploaded by users and presented the videos in a portal linked to a search function, such as YouTube, Dailymotion or MyVideo. In individual cases, providers could have editorial responsibility if they had concluded agreements with content providers. Users who had uploaded content onto such websites could not generally be considered as media service providers, since there was either no catalogue or the service could not be regarded as an economic service.

20) Examples: www.rtlgemist.nl , www.uitzendinggemist.nl , sbsgemist.nl

21) Examples: tvblik.nl , allesgemist.nl

One participant then asked which provisions of Dutch law applied to services that were not covered by the national measures to transpose the AVMSD. The speaker explained that there were general civil and criminal law provisions that also applied to media, particularly in relation to liability. There could therefore be no question of freedom from regulation and this, to counter an argument that had often been heard, did not mean the Internet's days were numbered. One participant pointed out the danger that general regulations did not necessarily have to conform to the AVMSD. There was also a risk that on-demand audiovisual services, more so than television programmes, would deliberately be established outside the legal jurisdiction of an EU member state.

2. Italy

In Italy, the formal transposition of the Directive had been completed in 2010 through the adoption of a legislative act and two regulations drawn up by the *Autorità per le garanzie nelle comunicazioni* (AGCOM – Italian communications authority) concerning linear services distributed via non-traditional networks (e.g. IPTV) and non-linear services that could be provided on any kind of network.

The speaker, Roberto Viola,²² began by saying that the media landscape was constantly changing. Providers, users and regulators were assuming new roles. Providers, for example, had to adapt to technological developments (keywords: digitisation, convergence). There was competition between linear and non-linear services as well as between linear services on different platforms. Meanwhile, users (partly due to greater media literacy) had moved away from a passive approach towards providing their own content. The role of the regulators was also changing. Nowadays, their decisions needed to be transparent, reasoned and open to review by the relevant courts.²³

The speaker mentioned six²⁴ criteria for the existence of an audiovisual media service, which should be (1) an economic service (2) with a mass media character, (3) the principal purpose of which (4) was the provision of programmes (5) in order to inform, entertain or educate the general public (6) via electronic communications networks (except cinema and DVDs). The concept of audiovisual media services therefore excluded additional content such as online versions of newspapers and magazines, travel websites and online games, cinema and DVDs. The speaker thought that some obligations were more suited to linear than non-linear services. For example, providers of non-linear audiovisual media services, who were supposed to promote the production and distribution of European works, should be free to choose between investment and programme obligations. Finally, greater consideration should be given to co-regulation.

One participant thought that the exclusion of newspapers could lead to discrimination if providers in a similar situation were treated differently. This could represent a breach of the constitutional requirement for equal treatment and of EU law. Spain, for example, whose constitutional provisions were very similar to those of Italy, distinguished between the use and non-use of public property – in this case the frequency spectrum. According to the Spanish Constitution, an audiovisual service that did not use such public property could not be subject to an approval regime. Regarding the concept of “economic activity”, he stressed that economic interests were evident virtually everywhere.

The participant was particularly interested to see how existing and future regulations would deal with the fact that it was becoming almost impossible to separate purely private communication from “private” contributions to general discussions aimed at an indefinite number of members of the public (who in some cases were loosely connected to each other). While some workshop participants seemed to think that social networks were excluded from the scope of the AVMSD, he suggested that certain activities on social networks and audiovisual services that were provided through such networks could certainly fall within the Directive's area of application. He pointed out that the AVMSD had been written in the pre-Facebook era.

22) Secretary General of AGCOM. See article by Roberto Viola and Maja Cappello in this publication.

23) Paragraph 27 of the Appendix to Recommendation Rec(2000)23 of the Committee of Ministers of 20 December 2000 on the independence and functions of regulatory authorities for the broadcasting sector.

24) See footnote 8.

The fact, mentioned by the speaker, that services with an annual turnover of less than EUR 100 000 were excluded from the scope of the AVMSD also came under critical scrutiny. One participant said, with reference to this threshold introduced in Italy, that the concept of “economic activity” was interpreted very broadly in European Union law. The possibility of a separate definition just for the audiovisual sector seemed rather absurd. In addition, this could result in unjustified discrimination between services either side of the threshold. The participant concluded by asking how Italy would deal with services that were subject not to Italian legal sovereignty but to the regulations of a non-European country (such as US law).

The speaker defended the threshold in Italy, which he said represented a pragmatic, practicable system. It was proportionate because it was possible to check annually whether a service had exceeded the threshold; adjustments were therefore possible. With the aid of a threshold, it was possible to find out objectively and simply whether the provision of a particular service represented an economic activity comparable to traditional television services. Incidentally, the system met industry approval.

However, another participant emphasised that the Netherlands had proposed the introduction of such a threshold during negotiations on the AVMSD, but a consensus had not been reached.

3. Germany

Alexander Scheuer²⁵ examined co- and self-regulation in Germany using the example of commercial communication, the regulation of which was shared between the Federal Government and the *Länder*. He explained that the Federal Government was responsible for regulating certain aspects of commercial communication in telemedia and other types of media. He referred, for example, to the *Telemediengesetz* (Telemedia Act – TMG), the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG), laws on advertising for medicines, medical treatment and food and, finally, the *Vorläufige Tabakgesetz* (Preliminary Act on Tobacco).²⁶ The *Länder*, on the other hand, were responsible for broadcasting, content-related aspects of telemedia services and printed press. The *Rundfunkstaatsvertrag* (Interstate Treaty on Broadcasting – RStV), concluded by the *Bundesländer*, regulated aspects of broadcasting (i.e. radio and television) and so-called telemedia.²⁷ The *Jugendmedienschutz-Staatsvertrag* (Interstate Treaty on the Protection of Minors in the Media – JMStV), which applied to all the aforementioned types of media, also contained rules on advertising, sponsorship and teleshopping in relation to the protection of minors. The speaker stressed that the concept of telemedia was used in both the Federal Government’s TMG and the RStV of the *Länder*. The *Telekommunikationsgesetz* (Telecommunications Act) regulated the technical aspects of telemedia, while telemedia content fell under the scope of the RStV.

In terms of the protection of minors in telemedia and commercial communication for alcoholic beverages and food, the regulatory system in Germany was characterised by a graduated approach and a combination of state measures and new instruments, i.e. co- and self-regulation. The approach was graduated insofar as the intensity of regulation depended on the medium’s impact on the free individual and public formation of opinion. Television was subject to the strictest regulations, for example, whereas only a few minor provisions applied to simple (“private”) telemedia services.

Advertising should not be detrimental to the physical or moral development of minors (Art. 6(2) JMStV). This general rule, which applied equally to broadcast programmes and telemedia content, was based on the wording of Article 9 AVMSD. A co-regulatory system had been established to ensure compliance with the rules on the protection of minors, in which service providers formed a voluntary

25) Attorney-at-law, general manager and member of the Executive Board of the Institute of European Media Law (EMR), Saarbrücken/Brussels. See article by Alexander Scheuer in this publication.

26) Art. 21a (advertising in information society services) and Art. 21b (advertising in audiovisual media services) of the Preliminary Act on Tobacco.

27) Telemedia are defined as all electronic information and communication services apart from telecommunications services as defined in Article 3(24) of the Telecommunications Act consisting entirely of the transmission of signals via telecommunications networks, telecommunications-supported services as defined in Article 3(25) of the Telecommunications Act or broadcasting as defined in Article 2 of the Interstate Treaty on Broadcasting (Art. 1(1) of the Telemedia Act).

self-regulatory body, the FSM.²⁸ This in turn was monitored by a state authority, the KJM.²⁹ The *Länder* had also adopted specific regulations in the RStV, including a ban on product placement in children's programmes (Art. 44 RStV). Another step towards self-regulation was represented by the fact that the *Zentralverband der deutschen Werbewirtschaft* (German Advertising Federation – ZAW) had adopted a code of conduct on advertising aimed at children and young people, although this dated back to 1998 and currently only applied to radio and television.

A similar situation existed in relation to commercial communications for alcoholic beverages. Here also, there were general provisions, such as the rule that advertising for alcoholic beverages should not be aimed at minors (Art. 6(5) JMStV). The FSM and KJM were also responsible for this area. The speaker pointed out that, according to paragraph 2(4) of the *Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, die Produktplatzierung, das Sponsoring und das Teleshopping im Fernsehen* (Joint Guidelines of the Land Media Authorities on Advertising, Product Placement, Sponsorship and Teleshopping on Television – WerbeRL-Fernsehen), the relevant codes of conduct of the *Deutscher Werberat* (German Advertising Council) applied to television programmes.

Regarding commercial communications on food, the explanatory memorandum to the 13th Interstate Treaty amending the Interstate Treaty on Broadcasting, referred to the relevant codes of conduct issued by the German Advertising Council in July 2009.

In the speaker's opinion, the German approach in certain regulatory fields had created a so-called "level playing-field";³⁰ at least, this was true of the general provisions on the protection of minors and commercial communications for alcoholic beverages. For commercial communications for food, however, a level playing-field resulted from the fact that there was no relevant legislation or guidelines from the *Land* media authorities, but only self-regulatory measures taken by the German Advertising Council. However, other regulations were often relevant if video-on-demand services similar to television were included.

One participant asked about the importance and scope of the level playing-field principle and highlighted the differences that he thought resulted from the AVMSD rules on linear services on one hand and non-linear services on the other. For non-linear services, in terms of both the protection of minors and commercial communication, further differences could result if services were "only" subject to the E-Commerce Directive. According to another participant, the regulatory authorities should take into account whether viewers or users expected regulations to exist. Whether these expectations were actually taken into account was ultimately a political decision. The speaker explained that the expression "level playing-field" was not linked to a particular value judgement, but contained the simple observation that (in parts of the applicable provisions) there was a level playing-field for on-demand audiovisual media services, other audiovisual services and other services.

4. United Kingdom

In his lecture, Chris Dawes³¹ dealt with the question of co- and self-regulation, mainly using the example of the protection of minors in the United Kingdom.

The speaker began by stating that the wording of the European provisions had largely been adopted in the transposition of the Audiovisual Media Services Directive in the United Kingdom. It was then up to the regulators to determine how individual services should be categorised. Prior to 2003, the small number of on-demand services in existence had been considered as broadcasting and had therefore been regulated by the former Independent Television Commission (ITC). Following the adoption of

28) *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V.* (Voluntary Self-Monitoring of Multimedia Providers), www.fsm.de

29) *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media), established in accordance with Article 14 JMStV. It acts on behalf of the *Landesmedienanstalten* (Land media authorities), which monitor compliance with the JMStV.

30) In this connection, Recital 11, in conjunction with Recitals 10, 80 and 91, of the AVMSD refers to the need for at least certain basic rules to apply to all audiovisual media services in order to avoid distortions of competition and improve legal certainty.

31) Head of Broadcasting Regulation and Content Policy, Department for Culture, Media and Sport. See article by Chris Dawes in this publication.

the Communications Act 2003 and the creation of the Office of Communications (Ofcom – the British media and telecommunications authority), the question of the regulation of on-demand services had been re-examined with technological neutrality in mind. Some people had thought that only linear television, not on-demand services, should be subject to broadcasting regulations, since users of on-demand services were free to choose what to watch and when to watch it. A system of self-regulation by the operators of on-demand services had been called for.

Self-regulation was characterised by voluntary participation and the absence of state intervention. Specialist institutions could be created for this purpose (e.g. the Advertising Standards Authority (ASA), the self-regulatory body of the advertising industry in the United Kingdom). Codes of conduct could be drawn up. Self-regulation also had the advantage of being able to respond more quickly to change.

It was difficult when a branch of industry – such as the on-demand services sector – did not want to be regulated. If individual competitors did not want to cooperate with each other, co-regulation was needed. With co-regulation, it was also possible for the state to support the type of regulation suggested by the industry concerned.

Since a self-regulatory system had been deemed insufficient for the national implementation of the AVMSD requirements, co-regulation had been introduced. Regulatory responsibility lay with Ofcom, which in turn could delegate regulatory tasks to other bodies: the ASA dealt with advertising-related complaints (on television: ASA(B)) and the Authority for Television On-Demand (ATVOD)³² regulated non-linear content.

Some of the provisions that had been adopted in order to transpose the AVMSD, and compliance with which was monitored by ATVOD, concerned the protection of minors. Articles 12 and 27(1) AVMSD concerned measures to protect minors from services which might seriously impair their physical, mental or moral development. Article 12 covered non-linear services, while Article 27 applied to linear services. There were differences between the wording of the two articles. There was doubt in the United Kingdom whether “hard-core” pornography fell under the scope of Article 12, since the word “pornography” did not appear at all in Article 12 (but did in Article 27(1)). The debate mainly concerned content which, if it was not offered as an on-demand service but on a DVD, would be restricted insofar as it could only be sold or rented by a small number of video stores or sex shops that were only open to adults (so-called R18 classification of the British Board of Film Classification (BBFC)). Asked by the government to investigate, Ofcom had found that current national legislation had not created a clear enough basis for a ban on making such content or even more explicit material available through an on-demand service.

The UK Council for Child Internet Safety was responsible for the Internet in general, providing self-regulatory guidance and a monitoring system. However, it was clear that not all services had laid down guidelines on content and the protection of minors.

In view of the already apparent difficulties surrounding the interpretation of the AVMSD (whether related to its scope or the actual regulations), the speaker thought that, if the Directive were to be revised again, there should be a particular focus on selecting the best possible type of regulation. Based on the experience gained so far from the use of co- and self-regulation, it would then be necessary to consider whether such new regulatory instruments could play a greater role in future.

In the subsequent discussion, the scope of Article 12 AVMSD was again debated. One participant began by asking whether there really could be any doubt over whether so-called “hard-core” pornography fell under these regulations, i.e. whether it was actually questionable whether pornography contained in on-demand services could seriously impair the development of minors. The speaker replied that the protection of minors was a complicated issue. For a regulatory body, for example, it was very difficult to prove that something was seriously harmful to young people.

32) ATVOD is the co-regulatory authority set up by the British regulator Ofcom to monitor on-demand audiovisual media services.

In order to prove this, another participant suggested, it would be necessary to identify the possible effects of pornography and other harmful content on minors, which was impossible, not least on grounds of (research) ethics. The AVMSD was at least partly responsible for this situation because of the chosen terminology. There was little case law in the United Kingdom, for example, to help clarify the concept of “serious impairment”. Finally, it was important to choose an approach which legal experts could consider satisfactory.³³

A third participant thought it was important to bear in mind that the Directive offered clear guidelines on what “content that seriously impairs the development of minors” might be. In Article 27(1), pornography and gratuitous violence were mentioned as examples. If such programmes were available, there was therefore an irrefutable assumption that they had an impact that was seriously harmful to the development of minors. The only difference to the rules on non-linear audiovisual media services was precisely that there was no absolute ban on the transmission of such content via such services. There was “only” the requirement that it be offered in such way that it was inaccessible to minors. He was also surprised by the speaker’s description of the debate insofar as it appeared to ignore the issue (long discussed in the television sector) of what actually constituted pornographic content.

Another participant agreed: according to his own experience and related discussions with representatives of regulatory bodies in Central Europe, he did not have the impression that the wording of the Directive was too unclear in this respect. National case law was also available. He thought it was more problematic to determine what measures media service providers should take to prevent minors from hearing or seeing harmful content. According to the legal provisions, programmes should be labelled as unsuitable and made inaccessible to minors. The Directive did not give any further details. But effective protection could certainly not be guaranteed if users merely had to indicate that they were over the age of 18.

Another participant reported that harmful content for minors was an important theme of regulation in the Netherlands. Regulating pornographic websites was very difficult because there were so many of them; it was also conceivable that such services were excluded from media regulation if they were not based on a catalogue of programmes. The Netherlands also distinguished between content that was seriously harmful and that which was “only” or simply harmful to the development of minors. Although it was not always easy to determine precisely what kind of content should be categorised as seriously harmful, there was at least a need for effective technical measures to restrict access to such content in on-demand audiovisual (media) services.

One participant described the connection between youth protection provisions and commercial communication: trailers used by providers to promote their own services were, by definition, designed to have an impact on viewers. They were meant to grab their attention and convey a lot of information in a short time. They could also harm the development of minors. Two participants noted that, for years, trailers in the United Kingdom and Germany had been assessed independently of the films they were advertising. In both countries, they were checked by a voluntary self-regulatory body, the BBFC and *Freiwillige Selbstkontrolle der Filmwirtschaft* (FSK) respectively. The BBFC also classified audiovisual works that were available for download or streaming via the Internet. The FSK’s classification of films and trailers also included films shown in cinemas, distributed on media such as video and DVD and/or (finally) broadcast on television; this classification affected when television companies were allowed to broadcast the content (Art. 5(4) JMStV). Trailers (of television broadcasters) and other (television) programmes of commercial providers that were not checked by the FSK were the responsibility of *Freiwillige Selbstkontrolle Fernsehen* (FSF). There had been debate for many years over whether and, if so, in what circumstances, the broadcast time of a trailer should be strictly the same as that of the programme concerned, or whether trailers should be assessed on their own merit.

A fourth participant added that adequate protection of minors was also linked to media literacy. In a constantly changing media landscape, which in turn was driven by social changes, it was important that viewers were kept sufficiently and reliably informed. This was particularly true when a self-regulatory body assessed on-demand services according to different criteria to those used by supervisory

33) See item 7, “R18 Material on VOD Services”, para. 12-14, <http://www.ofcom.org.uk/about/how-ofcom-is-run/content-board/minutes-and-notes-of-content-board-meetings/content-board-20-september-2010/>

authorities or other self-regulatory bodies for films shown in cinemas or programmes broadcast on television. It was therefore important that the origins of rating symbols and classification criteria were recognizable, particularly if, for example, users were confronted with age classifications adopted by different institutions. However, even if this requirement was met, consumer protection was impossible if there was an unbridled proliferation of independent rating systems.

One participant remarked that minors could not be effectively protected if they could access television and on-demand services on the same screen, and these services were subject to different regulations. The public service broadcasters thought that clear information about who was providing content was essential. This had also been noted in the principles drafted by the European Broadcasting Union (EBU) on 15 April 2011.³⁴

One participant mentioned a case in the United Kingdom where a programme had initially been broadcast on the linear Channel 4 before being made available on demand. Numerous viewers and users (depending on the type of service) had complained to Ofcom and ATVOD about the programme. Whereas ATVOD had concluded, based on the law applicable to on-demand audiovisual services, that the programme did not seriously harm the development of minors, Ofcom had deemed it to be offensive and unjustifiable. It had therefore breached provisions of the Ofcom Broadcasting Code.³⁵

IV. Three-part “practical test” for the Directive

While the lectures and discussions on the morning of the workshop mainly dealt with the interpretation and transposition of the AVMSD, the afternoon was devoted to debate of the advantages and disadvantages of the legal situation it had created. Answers to questions about which expectations had been met by the Directive and which had not were given from the perspective of consumers, the industry and regulators.

1. Consumers’ expectations of the regulation of audiovisual services

Vincent Porter³⁶ began his talk by pointing out that the AVMSD contained a series of compromises which could be traced back to extensive lobbying by the television, advertising and telecommunications industries. The influence of these companies, which were affected by the Directive’s provisions, had resulted in the gradual reduction of viewer protection.

In the speaker’s view, the European legislator had particularly failed to provide a clear definition of on-demand audiovisual media services, which had resulted in the EU member states adopting different definitions and interpretations. France, for example, had drawn a clear distinction between two different types of on-demand service – the catch-up services of TV broadcasters (*télévision de rattrapage*) on the one hand and other video-on-demand services (*autres services de médias audiovisuels à la demande*) on the other – whereas the United Kingdom had merely adopted the general term “on-demand programme services”.

Another problem noted by Porter was that, in relation to the protection of minors in on-demand audiovisual media services, the Directive only referred to whole services and not to individual programmes within a service. The AVMSD did, in principle, allow member states to adopt stricter rules or prohibit the distribution of foreign services. However, it was doubtful whether such measures taken by member states were compatible with the principles enshrined in Article 10 of the European Convention

34) European Broadcasting Union (EBU), *Principles for Internet Connected and Hybrid Television in Europe*, 15 April 2011, available in English at: http://www.ebu.ch/CMSimages/en/Annex%20PR_15%2E04%2E2011_Principles%20for%20Internet%20Connected%20and%20Hybrid%20Television%20in%20Europe_tcm6-71718.pdf

35) This was the case of “Frankie Boyle’s Tramadol Nights”. For the ATVOD decision, see <http://www.atvod.co.uk/news-consultations/news-consultationsnews/210311-frankie-boyle>; for the Ofcom decision, see Ofcom Broadcast Bulletin, No. 179 of 4.4.2011, p. 5.

36) European media policy expert at the European Alliance of Listeners’ and Viewers’ Associations (EURALVA). See article by Vincent Porter in this publication.

on Human Rights (ECHR).³⁷ Article 10(1), third sentence, ECHR authorised member states to license TV services, but not on-demand audiovisual media services. Porter thought that classification systems and corresponding (voluntary) filter programs or (compulsory) technical access control mechanisms should be created. A combination of such self- and co-regulatory systems might be capable of creating a balance between the interests concerned.

With regard to product placement and the necessary identification, Porter explained that there were clear differences between the levels of protection provided in individual member states.³⁸ France, for example, required the relevant logo to be displayed for one minute, whereas Belgium required it to be displayed for only 10 seconds and the UK for just three seconds. Porter also criticised the fact that the Directive's provisions on the identification of product placement did not take into account the possibility that a user of pay-per-view on-demand services might want to know if they contained product placement before paying for them. Porter also thought that another concern for viewers was the possibility to embed images of products or brand names into programmes after production (so-called virtual commercial communication). This technique meant that the same programme could contain different product placements depending on the distributing country (or provider). In order to prevent consumers being misled, Porter suggested that national consumer protection bodies should use their powers under Regulation (EC) No. 2006/2004³⁹ and ensure that media service providers within the single market could not distribute different versions of the same programme.

In his lecture, Porter also criticised the fact that the Directive did not define the concept of "children's programme", even though a considerable number of its provisions concerned this sort of programme. The Directive provided no effective protection of children and young people because it did not distinguish between a children's programme and a programme watched by children. In other words, it made no provision for suitable restrictions on commercial communications aimed at children during family programmes. Here also, the speaker thought that self- and co-regulatory systems could be effective. For example, they could require the display of a logo identifying children's programmes so that parents could be sure that the programme did not contain product placements, in accordance with the Directive's provisions.

The subsequent discussion looked firstly at the scope of Article 10 ECHR. One participant said that the European Court of Human Rights regularly stressed in its case law that the Convention on Human Rights was a "living instrument" and should therefore be interpreted in the light of ongoing development. Under this principle, it could certainly be argued that the list contained in Article 10 ECHR was not definitive and, in view of technological progress, included other forms of media services, so that member states could also make the operation of video-on-demand services subject to a licensing system. However, even if this approach were followed, the case law of the European Court of Human Rights suggested that such interventions should have a legal basis and respect the additional provisions of Article 10(2) ECHR.

Another participant welcomed the speaker's call for a standard Europe-wide symbol for children's programmes. In view of the large number of negative symbols that identified certain programmes as being unsuitable for children and/or young people, the idea of a positive symbol was very interesting. However, the participant wondered how and by which body such an international symbol could be adopted, in particular whether it was possible on a self-regulatory basis or whether regulatory intervention would be necessary. In Porter's view, the kind of strict "top-down" approach to regulation adopted in the television sector was generally rejected in the field of video-on-demand services. Not least because of the different definitions of children's programmes in the different member states; self-regulation was therefore preferable. In this connection, Porter particularly mentioned the British

37) Article 10(1) ECHR states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

38) Article 11(3)(3)(d) AVMSD merely states, with regard to the identification of product placement, that reference to it should be made at the start and end of the programme, and when a programme resumes after an advertising break.

39) 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 (Regulation on consumer protection cooperation), OJ L 364 of 9 December 2004, p. 1, last amended through Regulation (EC) No 181/2011 of the European Parliament and of the Council of 16 February 2011, OJ L 55 of 28 February 2011, p. 1.

self-regulatory body in the advertising sector, the Advertising Standards Authority (ASA), and the European Advertising Standards Alliance (EASA), which had made positive efforts in relation to the protection of children and young people in the advertising sector. The speaker admitted, however, that cultural differences within the EU and often within an individual member state meant that a standard, positive symbol for children's programmes would not be easy to establish.

Finally, one participant – as Porter had done in his lecture – pointed out that most children and young people did not watch traditional children's programmes, so a positive symbol might lose much of its practical impact.

2. Requirements of regulation from the perspective of the industry and its strategies

In his lecture, Erik Valgaeren⁴⁰ reported on the difficulties that the industry was facing in its efforts to comply with the AVMSD and other applicable provisions.

In particular, he noted that the European legal framework for audiovisual (media) services relied heavily on directives, which were (or had to be) transposed into national law in different ways and therefore failed to produce a common, harmonised situation across Europe. The lack of a level playing-field was particularly difficult for media companies, which often operated at an international level and therefore came into contact with numerous different legal systems. In addition, for many companies, the individual areas of responsibility (such as for content, networks or data protection) were allocated to different parts of the business, so it was always difficult to ensure that the legal provisions were complied with by the right entity.

Valgaeren was particularly critical of the fact that most regulations were not aimed at digital media. At best, this was because they had deliberately been drafted in accordance with a technology-neutral approach, although the speaker was not convinced that this strategy would be successful in the long term. Valgaeren was critical of state regulations that were not adapted to technological progress.

As a result of these circumstances, the speaker believed there was no business model in the audiovisual sector that complied fully with all the different legal obligations. The need to carry out legal checks during the planning phase of a new service did not lead to strict compliance with (all) legal provisions, but tended to serve as a risk assessment on the basis of which corresponding compliance priorities were set.

Motivation to comply with legal provisions particularly depended on the degree of clarity and enforcement of the regulations. As examples of technological adjustments triggered by regulatory compliance, the speaker mentioned the content verification programme of YouTube⁴¹ and geolocation-based access restrictions.⁴²

With regard to cookies and behavioural advertising,⁴³ Valgaeren said that the new provision in

40) Attorney-at-law and partner of the Stibbe lawyers' office, Brussels. See article by Eric Valgaeren and Lore Leitner in this publication.

41) With this program, YouTube helps copyright holders to identify and report alleged copyright infringements committed using the video portal.

42) More and more Internet service providers have recently started to comply with the various legal obligations resulting from the different scopes of distribution rights by ensuring that content can either only be accessed from a particular country or cannot be accessed from a particular country. The origin of the access request is determined with reference to the IP address of the device used.

43) Cookies can be used to analyse individual users' behaviour on the Internet (previously visited pages, viewed or purchased items). On the basis of the user's supposed interests, advertisers can better target their advertising at the consumer and thereby reduce inefficiencies. The *Bundesverband Digitale Wirtschaft* specifically created the website *meine-cookies.org* in order to give users control over the use of behavioural advertising. It defines the effect of cookies as follows: "Someone who looks at a lot of cookery websites, but never visits car websites, for example, will then receive advertising for cookery products rather than cars". More detailed information on the technical and economic conditions can be found in Opinion 2/2010 on online behavioural advertising (WP 171) of the Article 29 Working Party: <http://www.dataprotection.ro/servlet/ViewDocument?id=719>, pp. 4 *et seq.*

the recently amended Directive 2002/58/EC⁴⁴ – replacement of an opt-out system with an opt-in one – put service providers in a difficult position. It was unclear how these highly theoretical provisions could be complied with in practice. Valgaeren also warned against a complete ban on services based on the recording and evaluation of consumers' Internet activity (e.g. search engine queries). For example, Google's "Flu Trends" service had proved extremely useful for the monitoring of flu outbreaks.⁴⁵

Valgaeren thought that stronger self- and co-regulation would have numerous benefits for legislators, state regulators and the industry itself. For the individual state, it would be less expensive not only to transpose the relevant provisions, but also to enforce them, since in the case of non-state regulation the industry was likely to be much more willing to comply with the regulations. For the industry, therefore, such self- and co-regulatory approaches were an advantage, since it had a better view of technological conditions and economic developments and was therefore more able to recognise the need for regulatory adjustments. They would also enable the industry to give a practical dimension to the theoretical regulatory approach of state authorities. The level playing-field mentioned at the outset was easier to achieve if the experiences of internationally active companies were taken into account.

In the subsequent discussion, one participant raised the issue of technology-neutral regulation and asked the speaker about an apparent contradiction: on the one hand, he had declared himself in favour of (truly) technology-neutral regulation, but then he had clearly expressed a preference for sector-specific, technology-based regulation. Valgaeren denied this, saying that he had merely wished to state that a deliberately chosen technology-neutral solution was preferable to regulations which had been drafted when analogue media had been predominant, which had not been adapted to technological developments and which, in principle, had (only) taken the characteristics of analogue media into account. He thought that provisions that professed to be technology-neutral but failed to live up to their claims were particularly problematic. For example, the AVMSD distinguished between linear and non-linear services, which repeatedly caused fundamental problems for media service providers. However, the speaker admitted that, in view of the fast pace of progress, technology-based regulation had to battle with the fact that it was impossible to predict what technology would look like in ten years' time. Such regulation could hardly, therefore, be designed for business models based on future technologies.

Replying to the participant, the speaker reiterated that his preferred solution was, in principle, technology-neutral rules which, where necessary and depending on the current status of technology, could be extended with provisions specifically geared to technology. However, such so-called "future-proof" provisions, which would have to be based on vague legal concepts, would inevitably result in a low level of harmonisation; this was particularly evident in the transposition of the AVMSD into national law. If every key concept were defined in a European legal instrument, there would again be a danger that the regulation would not be sufficiently future-proof. In any case, technology-neutral provisions needed to be interpreted in an authoritative, uniform manner, which, in the EU, would primarily be a matter for the ECJ. However, such ECJ procedures lasted a very long time and it was uncertain whether any such cases would ever be brought, since they were usually dependent on corresponding disputes at national level. In many cases, clarity would not therefore be achieved until technology had developed further and cases were no longer relevant, or, at worst, until the provisions concerned had been amended or revoked. This problem, which was occasionally described as the vicious circle or dilemma of regulation, raised the constant question (which had clearly not yet been answered satisfactorily) of whether there were other instruments with which (at least comparable) binding interpretations could be developed in order to resolve application issues.

44) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 2001 of 31 July 2002, p. 37, as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, OJ L 337 of 18 December 2009, p. 11.

45) Google evaluates flu- and health-related search engine queries made by users from different countries and uses them to draw up national profiles, which can be used, *inter alia*, for the early detection of flu outbreaks; <http://www.google.org/flutrends/intl/de/>

3. Legislators' and regulators' approach

The third and final part of the AVMSD “practical test” was presented by Joan Barata Mir,⁴⁶ who examined the issue from the perspective of legislators and regulatory authorities.

Barata Mir began by pointing out that video-on-demand services were protected constitutionally by the fundamental right to freedom of expression. As with other, traditional media, they could only be restricted under certain circumstances, in accordance with the proportionality principle.

Problems were already caused by the fact that it was difficult for state authorities to reach providers of such services. As other speakers had already remarked, Barata Mir thought that a distinction needed to be made between services offered by traditional television broadcasters on the Internet and those that provided independent content or merely offered access to such services. In contrast to the Internet services of broadcasting companies, where responsibility was easy to assign, there was a considerable distance between supervisory authorities and the parties involved in the latter types of service. This applied both to the relationship between the supervisory authority concerned and the “responsible party”, such as a video portal operator, and to that between the said authority and the “author” of the content, such as somebody who uploaded user-generated content. In the relationship between the authority and the responsible party, the problem was that internationally operating service providers often escaped the jurisdiction of a (single) national authority in the EU because they were based in another country. However, if services had to be subject to the legal sovereignty of all the states in which their content was available, their providers would find themselves subject to different laws, different case law and different regulatory authorities. “Authors” themselves appeared to be even further removed from the responsible authorities. In individual cases, in addition to the problem of deciding which country’s legal system applied, it was often difficult to identify the author of a particular video in an online video portal.

Barata Mir then referred to the definition of on-demand audiovisual media services and was particularly critical of the various exclusion criteria set out in the recitals. Some of these appeared very arbitrary and could easily lead to discriminatory interpretations.

Barata Mir said the extension of the scope of the AVMSD to non-linear services also reflected a new understanding of the informed and media-literate user. Whereas viewers of traditional television played a rather passive role, in which their degree of responsibility and ability to protect themselves from unlawful content was quite low, users of on-demand services were better placed to avoid unwanted content without the need for much external regulation. This different view was also reflected in the various recitals of the Directive, which suggested that the European legislator now presumed that users were extremely well informed. However, Barata Mir did not entirely agree with this approach. It was rather naïve to believe that users had changed in this way and there must be doubt over whether it was really true. Moreover, the excessive transfer of regulatory tasks to users led to the privatisation of responsibility, which could take on worrying forms.

The speaker then turned to so-called intermediaries, such as video portals, aggregators and search engines, which acted as “middlemen” between content providers and users. It could not be disputed that such services carried out tasks that were, to a certain extent, similar to those of a content editor. For example, they often selected, prepared and prioritised content. It would be possible to regulate such services, since the operators were more reachable than the actual content providers. Nevertheless, it was disproportionate to apply the same standards here as to the monitoring of traditional television broadcasters. Barata Mir considered what concepts and regulations could be created in order to ensure that network and access providers took responsibility for their actions. Although they could not be held liable for individual content, these providers carried out certain activities for which they should be held accountable and which could give them the role of a *cordon sanitaire* (a preventive balancing counterweight). It had to be clear that intermediaries should also accept certain liability rules. This raised the question of what type of legislation should apply. Since the speaker thought the online world was heavily characterised by so-called “gatekeepers”, which sometimes held dominant market

46) General secretary of the Catalan Broadcasting Council until spring 2011, now professor at the Blanquerna Communication School, Ramon Llull University. See the article by Joan Barata Mir in this publication.

positions, competition law was one possibility. In view of the speed of technical advances and the related regulatory unpredictability, the speaker also thought ex-ante regulation should be replaced by a more flexible ex-post system.

In order to take appropriate account of future development, network and content regulation should also be brought closer together in a form of hybrid legislation. Regulators, which would ideally be responsible for both spheres, would then have a more comprehensive view of the subject and could react better and more quickly to new business models. However, Barata Mir thought that authorities that were merged together in this way could rapidly become too powerful. This could, in turn, be countered by means of a so-called communications governance scheme, which would become more important as a result. It involved less state regulation and was based more on self- and co-regulatory systems. However, it was noticeable in Mediterranean member states in particular that the industry preferred to retreat into self-regulatory systems in order to distance itself from state regulation or guard against state influence. In order to counteract this trend, such systems therefore needed, firstly, to grant sufficient rights to consumers, and secondly, to provide adequate regulatory backstop powers.

In the subsequent discussion, several participants expressed surprise at the speaker's suggestion that the system of ex-ante regulation (e.g. through the AVMSD) should be replaced by ex-post regulation based on (EU) competition law, since they considered this to be a backward step. In particular, one participant disagreed with the speaker in relation to the consequences of ex-post regulation of the small number of "gatekeepers" under competition law. On the Internet especially, there were so many different stakeholders and service providers that none of them should be able to achieve a dominant market position. This problem was countered, for example, by the Access Directive,⁴⁷ in which certain obligations of providers of electronic communications networks and services applied irrespective of their ability to influence the market. This Directive had been drafted particularly with so-called bottlenecks, which were relevant to content providers and their customers, in mind. This was precisely why a level playing-field needed to be created by means of ex-ante regulation. It was the only way of subjecting all market participants to the same requirements and ensuring adequate consumer protection.

One participant then asked what the convergent authority mentioned by the speaker would look like and on what level (national or European) it would operate. Barata Mir thought the best solution was a convergent body at national level. However, as he had said, there was a risk that it might become too powerful, so a fully amalgamated authority would not be welcomed by the interest groups concerned. Nevertheless, Barata Mir thought that, ideally, the people responsible for network regulation and for monitoring content should sit together and be able to talk to each other directly. Metaphorically speaking, they should be able to drink coffee together in their breaks. In a similar vein, although less radical than the previous idea, one participant thought that a convergent authority was not necessarily required. It would already constitute considerable progress to be open towards "converging" the respective regulatory approaches.

Another participant wondered about the state of discussions in European countries, particularly whether there were (more) plans to create convergent authorities. Several participants commented that some member states – including France, Luxembourg, the UK and Spain in particular – had expressly indicated that they were opposed to such a merging of regulatory powers at European level. One participant said that the lack of will at European level was evident in the individual directives on telecommunications and media law. These merely referred to each other, without actually containing convergent provisions and concepts. The creation of "hybrid" institutions was therefore unlikely in the foreseeable future. It was also noted that, even if a convergent authority existed, there would not necessarily be the desired level of cooperation between the officials responsible for each area of regulation.

Regarding cooperation and consultation between media regulators in the member states, some participants asked whether there was any interaction between them and whether there was a need for harmonisation, maybe even the creation of a pan-European independent regulator. One participant thought that, in order to answer this, it was necessary to begin by identifying what was not working

47) Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108 of 24 April 2002, p. 7, last amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ L 337 of 18 December 2009, p. 37.

and what harmonisation was necessary. There was a willingness to share ideas and cooperate. For example, representatives of the Dutch regulator often consulted their colleagues from across the border, partly in an institutionalised way (Euregiolators); the European Platform of Regulatory Authorities (EPRA) also provided opportunities for discussion and exchange. One participant thought that a media regulators' group was a possible solution. These days, there was the BEREC⁴⁸ for telecommunications, the RSPG⁴⁹ for radio spectrum and the ERGP⁵⁰ for postal services, but strangely there was no such body for the media.

V. General discussion topics and outlook

The workshop concluded with a review of several key points that had been raised by individual speakers and in the subsequent discussions, particularly the question of how to deal with the (changed) role of intermediaries and the possibilities and prospects of success offered by self- and co-regulatory systems in the field of on-demand audiovisual media services.

1. Intermediaries in the current and future regulatory structure

One participant asked to what extent the regulation of intermediaries called for by Barata Mir was compatible with the rules limiting liability in Articles 12 to 15 of the E-Commerce Directive. Barata Mir replied that such regulation or clarification by the AVMSD was necessary because the intermediaries he had mentioned would move between the two relevant Directives. In many ways, the intermediaries' role in terms of selecting, making available and distributing content fully justified a form of editorial responsibility.

One participant commented that, in many cases, there was still doubt over the extent to which intermediaries held editorial responsibility for content made available via the relevant portals. Nevertheless, such intermediaries could clearly be included in the scope of the AVMSD if their activities were particularly oriented towards the selection and editorial preparation of individual content. The companies concerned had the power to decide either to limit their activities to the simple transmission of information, or to carry out additional editorial activities, in which case they assumed responsibility and the corresponding regulatory consequences.

In this connection, one participant stated that there were major discrepancies between the density of regulation in the press on the one hand and in broadcasting on the other. He observed that intermediaries did not claim to be totally exempt from regulation, but merely thought they should not be as strictly regulated as broadcasters. The first question to discuss was therefore whether traditional approaches to regulation and the intensity of broadcasting regulation should be reviewed, leading to deregulation. At the same time, the E-Commerce Directive should also be revised because its descriptions of intermediary functions were no longer in keeping with current technical and economic conditions. However, the participant admitted that such a plan appeared difficult and lengthy. Nevertheless, there was definitely a need for regulation, since national (lower instance) courts were currently struggling to interpret the relevant rights and obligations. However, since the interpretation of the national courts had very different results in many member states, the desired harmonisation was becoming more and more difficult to achieve.

48) Body of European Regulators for Electronic Communications, see Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337 of 18 December 2009, p. 1.

49) Radio Spectrum Policy Group, see Commission Decision of 26 July 2002 establishing a Radio Spectrum Policy Group, OJ L 198 of 27 July 2002, p. 49.

50) European Regulators Group for Postal Services, see Commission Decision of 10 August 2010 establishing the European Regulators Group for Postal Services, OJ C 217 of 11 August 2010, p. 7.

Another participant agreed and added that intermediaries were more likely to accept regulation of content shown on television screens (e.g. as part of their digital television platforms) than of activities carried out exclusively online.

Another participant said that not all intermediaries should be assumed to have the same level of editorial responsibility, so regulation should and could depend on their purpose and content. For example, whereas a platform operator could certainly be held responsible for the distribution of content that was harmful to children and young people, it was impractical to prosecute it because a film containing unlawful product placements had been distributed via its portal.

2. Perspectives and requirements of co- and/or self-regulatory systems

One participant asked Erik Valgaeren, who had explained the industry's view of the requirements of the various fields of regulation, whether the willingness to cooperate in relation to the protection of children and young people, which Vincent Porter had mentioned, was discernible in the industry. Valgaeren replied that social networks were already the subject of self-regulatory measures. Providers were aware that social networks could pose dangers for users under the age of 18 for several reasons. On the basis of initiatives at EU level, they were therefore trying to work closely together to organise their services in a way that provided appropriate protection for children and young people.

Two other participants then referred to the current status of co- and self-regulation in the EU. One pointed out that there was no tradition of co- and self-regulation in countries such as Poland or Slovakia. However, Slovakian broadcasters occasionally sought contact with the national regulator. The other stressed that, in many "west European" EU member states also, self- and, in particular, co-regulation were not firmly established or very rare.

Another participant reported that there was no actual co-regulation in Belgium. However, both the industry and other interest groups were heavily involved in the legislative process in the form of consultations in which their interests could appropriately be taken into account. As a result, draft legislation on which there was already a broad consensus could be submitted to parliament. The participant therefore suggested that such soft forms of cooperation should not be disregarded in discussions on co-regulatory measures.

One participant emphasised that audiovisual media service providers should not be compared to companies in the telecommunications sector with regard to possible ways of establishing co- and self-regulatory systems. Whereas there were virtually no such measures in the telecommunications sector, there had been positive developments in the television industry, for example, in relation to many aspects of advertising regulation. A system for supporting the technological implementation of youth protection provisions was currently being developed jointly with providers. New, economically important (in terms of competition), "sensitive" policy areas, such as quota obligations for non-linear audiovisual media services, were suited to successful cooperation between regulatory bodies and NGOs, such as industry representatives or associations. When new regulations had been introduced without prior agreement in the participant's country, there had always been a risk that too much would be expected of new emerging markets and that acceptance levels would therefore be insufficient.

One participant thought that the protection of minors in the traditional television sector was functioning relatively well, partly because it was a rather limited field with a manageable number of providers. In contrast, the world of on-demand services was characterised by a virtually unlimited number of services which minors could easily access. Effective regulation was therefore more difficult. Another participant added that the current multitude of on-demand service providers also made it harder to organise the market participants into self- or co-regulatory bodies. Politicians and/or regulators, as well as established or larger providers, had trouble identifying suitable points of contact.

Another participant then steered the discussion towards the question of the costs of co-regulation. Using the example of the British co-regulatory body, the Authority for Television On Demand (ATVOD), he explained that creating a co-regulatory system was much more expensive than state regulation. Although it was true that the cost of operating the system would be much lower than the initial investment, co-regulatory bodies often decided not to create a sanctions regime for financial reasons.

Another participant agreed and thought that the costs of establishing a co-regulatory system should be analysed in advance, including all costs incurred at all stages of the process (starting with the licensing/registration costs incurred by businesses and authorities, the cost of setting up and certifying a self-regulatory body, the cost of day-to-day processes including monitoring, etc., and ending with legal costs incurred by all parties in the case of procedures instigated by self-regulatory bodies or institutions following complaints or *ex officio*, including any additional court costs in the case of litigation). Another participant agreed, saying that the costs of co-regulation for service providers had a very negative effect on the industry's willingness to engage in self-regulatory activities.

Responding to one speaker's suggestion that the industry might withdraw into self-regulation in order to avoid state restrictions, one participant noted that the European Court of Human Rights, in its case law on the procedural principles (legal protection guarantees) enshrined in Article 6 ECHR, had created firm obligations that also needed to be respected in a co- or self-regulatory system.

Another participant wondered how there could be arguments for self-regulation at EU level when many member states were already unable to persuade the industry to form self-regulatory organisations at national level. On the other hand, paradoxically, the existence of a functioning national self-regulatory institution as part of a co-regulatory system could (at least) partially obstruct the introduction of a common Europe-wide system. For example, Pan-European Game Information (PEGI),⁵¹ which had been established at the initiative of the industry and some European states in which the sector was not (specifically) regulated, had not been accepted in some countries, such as Germany. In Germany, legal provisions had existed for a long time, the industry already had a reliable age classification system provided by *Unterhaltungssoftware Selbstkontrolle* (USK), and politicians had said there was no way they could support PEGI.

In this connection, one participant stressed that common Europe-wide classification and labelling systems would be ideal for service providers which operated at international level. Therefore, in states that did not yet have corresponding self-regulatory systems in place, incentives should be created to enable the industry to engage in self-regulation at supra-national level. Another participant expressed reservations about this idea and thought that, in view of the ever-increasing number of players in the media industry, it seemed more and more difficult to find a common consensus regarding self-regulation.

Another participant agreed that the image of the all-knowing, fully informed user was inaccurate. Even users of video-on-demand services needed to be informed about programme content and ways of blocking harmful material.

Finally, one participant was worried about the escalating use of labels and classifications. If, as is for example the case in the UK, broadcasters in addition to the BBFC⁵² and ATVOD also set up their own classification system, viewers would be faced with more symbols than they could cope with, which would be detrimental to the effective provision of information. Regardless of the inevitable protests on the grounds of different approaches and, in some cases, criteria, it was debatable whether a large number of symbols actually represented an improvement in the protection of children and young people.

VI. Conclusion

The workshop considered what represents the appropriate basis for the regulation of on-demand audiovisual (media) services. Participants were helped to gain an adequate understanding of the relevant themes by two introductory lectures, one dealing with the wide variety of existing and anticipated on-demand audiovisual services and the other with the EU legislative framework regulating such services. Further lectures looked at the transposition of the relevant provisions (particularly the practical scope of application) into national law (Netherlands and Italy) and the self- and co-regulatory

51) PEGI has provided an international age classification system for computer and video games since 2003. It currently operates in 30 European states (including all EU member states except Germany, as well as Norway, Switzerland, Iceland and Israel).

52) The British Board of Film Classification (BBFC) is a self-regulatory body for the age classification of films, DVDs and video games. BBFC.online, run by the BBFC, is the age classification system for content of video-on-demand services.

measures taken in selected member states (Germany and the UK) in specific areas covered by the AVMSD (commercial communications and the protection of children and young people). The lectures and the subsequent discussions showed that the regulatory content and scope of the AVMSD could lead to widely differing interpretations, with the result that uniform regulation of on-demand audiovisual media services appears difficult to achieve.

The discussions that followed the lectures of Mark D. Cole, Marcel Betzel and Roberto Viola particularly demonstrated the lack of a common interpretation of individual elements of the definition of an “on-demand audiovisual media service”. Some criteria, such as “editorial responsibility” or the “principal purpose” of the provision of audiovisual content, are interpreted very differently in individual national legal systems. In addition, the member states do not agree on the scope of application of national provisions adopted to transpose the AVMSD, e.g. whether services provided by newspaper or magazine publishers are included or at what point a service becomes an economic activity.

Finally, the workshop examined, from three different perspectives, some important opportunities and problems arising from the Directive. They were discussed in terms of the expectations of consumers, the industry and legislators/regulators. Concerning the central issue of the best possible structure for self- and co-regulatory systems, it became clear that all three interest groups, in principle, favoured greater use of such systems. However, it was also evident that the different groups, in some cases, harboured very different expectations about how such systems should be organised by or including non-governmental institutions. Consumer groups were critical of pure self-regulatory systems because the withdrawal of the industry into a certain state of non-regulation could seriously weaken consumer rights. In contrast, the industry was in favour of co- and self-regulatory measures insofar as they enabled it to react more quickly and efficiently to technological developments. In the subsequent discussion in particular, reasons were given for why a cross-border or even Europe-wide self-regulatory system, although desirable, did not always appear immediately achievable.

The role of so-called intermediaries was also discussed in depth. Everyone agreed that these companies could not be totally exempt from regulation. However, some participants clearly opposed the idea of imposing unreasonable monitoring and control obligations on these service providers with regard to the content made available via their respective portals. In any case, intermediaries could not claim to be acting merely as go-betweens if they were involved in editorial tasks such as preparing and selecting content for distribution. Responding to the call for more far-reaching regulation of such companies, several participants referred to the liability exemptions enshrined in the E-Commerce Directive. Nevertheless, it became clear that consideration should be given to the idea of amending the relevant provisions of this Directive in order to bring it into line with recent technological developments.

In a general discussion, some relevant areas of uncertainty surrounding the regulation of on-demand audiovisual (media) services were identified. The question of how these can be resolved – particularly in order to achieve a higher degree of harmonisation that would benefit companies, consumers and regulators alike – was the common theme of many of the comments expressed. The regulatory instruments that were discussed as ways of addressing these issues reflected, first of all, the idea of creating clearer provisions at European level, i.e. rules that are less open to different national interpretations, and providing greater consistency between the different legal instruments that are relevant to on-demand audiovisual services. Many participants called for stronger cooperation between regulatory bodies, whether at national level (if responsibility was shared by different bodies) or between media regulators at European level. Additional, more intensive efforts to promote pan-European co- and self-regulatory initiatives were also considered appropriate. The potential benefits of such initiatives were discussed, using the example of symbols for media content, which could either act as a warning against content that might harm the development of minors or, conversely, denote programmes specifically aimed at children. Similar thoughts were expressed in relation to the regulation of commercial communication, for example in order to inform viewers about product placements.

With 19 December 2011 – the date by which Article 33 AVMSD requires the Commission to report for the first time on the application of the Directive – fast approaching, there is clearly an enormous amount of information to report in relation to (the regulation of) on-demand audiovisual services.

Introduction to Different Forms of On-demand Audiovisual Services

*Sebastian Artymiak**
Verban Privater Rundfunk und Telemedien (VPRT)

After the first change from analogue to digital broadcasting which has immensely enriched the variety of media services offered and has brought about significant changes to the technologies by which these services are produced, distributed and received, we are currently witnessing a second phase of change: the introduction of Internet-connected devices.

But what do we understand by Internet-connected devices? A TV set is usually connected to a traditional broadcasting network like cable, satellite or terrestrial. Current devices are additionally connected to the Internet via WiFi or Ethernet. The Internet content is made available – in addition to broadcast content – on the same device. The flat screen itself can be connected to the Internet, or the connection to distribution networks, which bring the Web to the home, can be realised via an additional set-top box, a blu-ray player, a game console or other additional device.

In the following, we will discuss the various ways to have access to on-demand audiovisual services.

I. Access to audiovisual services via the open Internet

Only a limited number of devices have access to the open Internet without any restriction. They enable the user to insert into the header of the implemented browser a www.-address (URL of a webpage) so that the site becomes visible. As a result, the user can principally access any Internet content in the world. It is quite tricky to implement this easy access mode via a connected device because this requires use of a whole set of different technologies.

The success of accessing information presented on a webpage will depend on the (range of) technology implemented in the connected device. For instance, the user might not be able to retrieve pictures or videos if the device manufacturer has not implemented technology needed to display video content based on flash technologies. There may also be other reasons why video services might not be accessible.

Currently only a couple of devices exist which allow the users to have full access to the open Internet. Most of the TV reception devices presently marketed or expected on the market in the next few years, will not have full access to all content on the Internet.

* Head of Media Technology, *Verband Privater Rundfunk und Telemedien e.V.* (VPRT – Association of Commercial Broadcasters and Audiovisual Services, Germany)

II. Unlinked applications

For connected devices, we can observe that the device manufacturers are starting to offer additional services. These services are called “over-the-top content” (OTT) because they add content, available from the Internet, to the broadcast content. Every manufacturer has its own offer of Internet-based applications (“apps”) and Video-on-Demand (VoD) services, which are made available to the device user via the manufacturer’s portal, such as InfoLive (Samsung) or Net TV (Philips). These offers may be titled “unlinked (or unbounded) applications” since they are independent from the content which is offered by the broadcasters via traditional broadcast networks and because they can be accessed irrespective of what programmes are actually shown on TV.

Another kind of such unlinked applications are the so-called “widgets”. These are special applications with an auto-update function, so that all information available is automatically shown within the app’s display (e.g. news on stock exchange markets or the weather). As with OTT content, here too, there is no link to any content broadcast.

Some of these services overlay the broadcast signal. The content offered via such applications becomes visible in addition to the broadcast content.

These widgets and apps on portals are changing the previously established business models, because they add a business-to-business (B2B) relationship where in the “old world” only a connection between the content provider and the customer (B2C) existed. Today, the device manufacturer takes a strategic position between the content provider and the customer, because it controls the portal and may limit the amount of apps that can be retrieved. It exercises control *inter alia* through service contracts that it concludes with the entity responsible for the app (Flickr, a VoD store, for instance). Besides, the manufacturer obtains the information on how customers access and use the portal and its adjacent services. This is a new phenomenon, which further strengthens the position of the manufacturer (who can develop its business based on this information). It explains the nascent discussion about the effects of the manufacturers’ new gatekeeper position.

III. Linked applications

The traditional example of a linked (or bounded) application from the broadcast world is teletext. Teletext is linked to a broadcast signal, and if the user changes the channel, then the available teletext offer changes as well. Teletext is based on a technology that dates back 30 years and many efforts have been made to upgrade the technical solution for teletext.

In Germany and France, based upon the HbbTV (Hybrid broadcast broadband television) standard, “teletext 2.0” has been started where pages are loaded from the Internet. Teletext 2.0 differs from other apps and portals mentioned above because, technically speaking, access to the platform underlying its provision is linked to the individual programme of the broadcaster. The user may obtain (non-broadcast) content and videos from the broadcaster’s databases in a way which is independent from the broadcasting signal. Using the HbbTV technology a signal is delivered over the broadcast network (satellite or cable) which serves to identify whether additional content is available. If the user presses a dedicated button on his/her remote control, for example the teletext button or the web button, then the linked applications start and their contents are shown simultaneously with the broadcast content. These additional contents are for instance on-demand video libraries (*Mediatheken*), electronic programme guides (EPGs), advertising, games and voting mechanisms (HbbTV and its backward channel allow interactivity). It is worth noting that the libraries can contain paid VoD programmes.

New business models are starting to emerge at the moment. They are mainly centered around different possibilities to include commercial communication.¹ For example, while watching an advertising spot in the linear programme, the user can press the red button on the remote control, as a specific

1) Descriptions of the different forms of commercial communication mentioned below can be found at: <http://www.ip-deutschland.de/ipd/basics/medialexikon.cfm>

sign appears on the screen, in order to open a so-called microsite (or an additional commercial content pop-up), where more information about the product can be found. A video-on-demand library can contain video advertising, and pre-roll ads or sponsoring announcements can be shown before the start of the actual video content. With the HbbTV standard, the user can access the broadcaster's video library, which is not offered as an independent library of a third party, but is indeed "linked" to the broadcast channel. This gives the broadcaster the opportunity to offer its own (paid) VoD services.

More new business models are conceivable. For example, there might be advertising for individual goods, even virtual goods, paid content, paid services, additional advertising to the programme, product placement, betting and so on.

IV. Google TV

Google TV is a search platform, based on the well-known Google desktop and mobile search engines. The Google TV search tool represents an expanded version of the former search engines and allows the overlay of a combined or "meta" search engine over the broadcast content on the screen. Google TV, with which the user can interact in a way similar to how he/she uses the company's web search tool, retrieves audiovisual content (also that which is subject to the user paying a fee) from different sources as well as information related to the searched-for item. Therefore the user can search the web for original programming and related videos, have access to information on films etc. The service started in November 2010 in New York, but it has not yet become operational in Europe.

V. Apple TV

Apple TV is different from Google TV because in essence it is just a streaming box. The user plugs the box into the TV screen, connects it with the Internet and can then search on iTunes. He/she can have music, videos and blockbusters streamed to his/her TV set against remuneration. The process does not entail local storage of the media files on the set-top-box and there is no hard drive disc. Apple follows the very "simple" business model to have iTunes not just on the PC or the iPhone, but also on the flat screen.

VI. Apps in managed networks

The services and technologies presented so far – open Internet content, unbounded applications and bounded applications, and Google TV – have in common that access is realised with open Internet connections. In contrast, other Apps and VoD services exist in so-called integrated managed networks. IPTV is a good example of a so-called "managed network". These networks, also known as "walled gardens", are characterised by the fact that (only) specific content is available within such a network, which is most frequently deployed by telecommunications operators. Apps and VoD services are offered in these managed networks under the control of the network operator. "Managed" signals means that the exploitation of the service takes place with a quality-of-service (QoS) approach via a closed network. It thus differs from the (still) prevailing so-called best-effort-principle which characterises the open Internet insofar as transport of every data package is given the chance to find the fastest way to the routers and, finally, the end-users' terminal equipment. The managed-network strategy leads to the discussion on net neutrality.²

The network operator has a huge influence on the business model: because the network is under its control as are the end-user devices as well as all services, this represents an example of a vertical integration.

2) For further information see IRIS *plus* 2011-5 "Why Discuss Net Neutrality", European Audiovisual Observatory (Strasbourg, 2011)

VII. Conclusion

The merging of television and the Internet on the same screen is one of the most important media trends of the future. The market of hybrid television devices is expected to grow significantly over the next months and years. The vision is that TV will be considered as a “jack of all trades”, as a digital all-rounder. It offers new opportunities for users, broadcasters and device manufacturers as well.

With HbbTV, television broadcasting services can be placed next to certain Internet services including services such as the media libraries of the public service broadcasters and other kinds of information that might be retrieved while watching a TV programme.

HbbTV should be accepted as the standard for hybrid television by all device manufacturers, in order to ensure a “non-discriminatory access” to the new technology. It must be ensured that the most popular channels are available at all times, regardless of the device manufacturer or the operator of the corresponding portal.

The European Legal Framework for On-demand Services: What Directive for Which Services?

Mark D. Cole*
University of Luxembourg

The phenomena of convergence and digitalization and the accompanying emergence of new media services have led to an attempt of legislators to pass laws which are able to keep up with the rapid pace of change.¹ On-demand services have become a common form of consumption. Yet, they appear to be so varied and difficult to bring under a common framework that different regulatory regimes exist in parallel.

This contribution will therefore shed light upon the different notions used by several legal acts of secondary European Union law. More specifically, the definition and character of audiovisual media services according to the Audiovisual Media Services Directive (AVMSD)² and an information society service as included in the E-Commerce Directive (ECD),³ are examined in detail. Some potentially relevant provisions of other legal instruments will be highlighted in an attempt to find further criteria which can be helpful to establish the scope of the EU legislative framework. The elements of an on-demand service identified in these sections will then be checked in view of some examples of new media services.

* The author is Associate Professor of Law (Law of the New Information Technologies, Media and Communications Law) at the University of Luxembourg since March 2007. He would like to express his gratitude to *Jenny Metzdorf, LL.M.*, who is his research associate on the AVMSD project (www.medialaw.lu), for the valuable help in the preparation of this contribution.

- 1) On the historical development see Harrison/Woods, "Regulation and the viewer in a changing broadcasting environment" in: *European Broadcasting Law and Policy*, Cambridge University Press, 2007, pp. 41; Ariño/Llorens, "Back to the Future: New Media, Same Principles? Convergence Regulation Re-visited" in: Ward, *The European Union and the Culture Industries, Regulation and the Public Interest*, Ashgate Publishing, 2008, p.125.
- 2) 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 of 18 December 2007, L 332, p. 27, as codified by Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ of 15 March 2010, L 95, p. 1. Corrigendum published in OJ of 6 October 2010, L 263, p. 15.
- 3) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ of 17 July 2000, L 178, p. 1.

I. The framework for on-demand services in secondary EU law

1. Audiovisual Media Services Directive

1.1. Article 1(1)(a)(i) Audiovisual Media Services Directive

The adoption of the AVMSD in 2007 brought forth a new term defined in Article 1(1)(a) AVMSD.⁴ This provision distinguishes between (i) a novel concept of an audiovisual media service and (ii) audiovisual commercial communication. Thus, an “audiovisual media service” with respect to the first sub-definition, refers to a service in the sense of the Treaty on the Functioning of the European Union (TFEU) which is “under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks”. This definition outlines several criteria to be fulfilled cumulatively. Each element of the definition is further specified either by a provision of the AVMSD or in its recitals. The latter, however, must be employed with caution as they are not in the operative part of the legal act and therefore not directly binding. But, although they mainly serve to clarify the motivation and purpose of a certain wording or provision, in reality, through application by the courts and certainly by the Commission, they come close to being a decisive element of the Directive⁵ which has to be read in conjunction with the operative provisions. It is striking that some member states, notably Italy, France or Estonia, when transposing the AVMSD into their national legal systems, have taken recourse to the recitals by including them in the text of the definition of an audiovisual media service in the respective laws.⁶ In addition, the fact that many member states have transferred the definition of the AVMSD almost verbatim into their media laws instead of adjusting it to their legal traditions may hint at a certain level of uncertainty which member states chose to resolve by literal transposition rather than risk becoming the subject of infringement procedures by the Commission under Article 258 TFEU or creating potential disadvantages for service providers under their jurisdiction if compared with other member states’ rules. Therefore, uncertain content of the provisions analysed in the following, is likely to be subject to interpretation by the Court of Justice in the coming years; due to the transposition being close to the Directive’s wording in most member states as far as these criteria are concerned, such interpretation will then likely serve as conclusion of the open questions for all member states’ provisions.

The first element of the definition is thus the notion of a “service” which must be read in light of Articles 56 and 57 TFEU. Such a service is provided for remuneration and may be differentiated – in cases where the service is offered on the territory of a member state other than the provider’s country of origin – from the concept of establishment (Article 49 TFEU) on account of its temporary nature.⁷ Some examples of activities which constitute a service may be found in Article 57 sentence 2 TFEU. Most importantly, and as highlighted with respect to audiovisual media services by Recital 21 AVMSD, it must be an economic activity which includes public service broadcasting irrespective of their

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- 4) See also Chavannes/Castendyk, “Art. 1 of the AVMSD (Definitions)” in: Castendyk/Dommering/Scheuer, *European Media Law*, 2008, paras 1 et seq.; Kleist/Scheuer, “Audiovisuelle Mediendienste ohne Grenzen”, *MMR*, 2006, p. 127; Stender-Vorwachs, “Die Richtlinie für audiovisuelle Mediendienste, ‚Fernsichtlinie reloaded?’”, *ZUM*, 2007, p. 613; Schulz, “Medienkonvergenz light – Zur neuen Europäischen Richtlinie über audiovisuelle Mediendienste”, *EuZW*, 2008, p. 107; Valcke/Stevens/Lievens/Werkers, “Audiovisual Media Services in the EU, Next Generation Approach or Old Wine in New Barrels?” *Communications & Strategies*, 71, 2008, p. 103; Valcke/Kuczerawy/Lefever/Lievens/Stevens/Werkers, “The EU Regulatory Framework Applicable to Broadcasting” in: Garzaniti/O’Regan *Telecommunications, Broadcasting and the Internet, EU Competition Law & Regulation*, Sweet & Maxwell, 2010, pp. 263-330; Woods, “Jurisdiction in the Television without Frontiers Directive” in: Ward (ed.) *The European Union and the Culture Industries, Regulation and the Public Interest*, Ashgate Publishing, 2008, p. 145; Ariño/Llorens, op.cit. (fn. 1), p.125; Cole, “Audiovisuelle Mediendienste als neuer Schwerpunkt”, in: Fink/Cole/Keber *Europäisches und Internationales Medienrecht*, C. F. Müller, 2008, paras. 81 et seq.; Hartstein/Ring/Kreile/Dörr/Stettner, *Rundfunkstaatsvertrag – Kommentar*, Huethig Jehle Rehm, 2010, part B4 paras. 62 et seq.
- 5) Cf. in this sense concerning the TwFD ECJ, Case C-6/98, *ARD v. Pro7*, [1999] ECR, p. I-7599, paras 39-41; Case C-89/04, *Mediakabel*, [2005] ECR, p. I-4895, para 23; Case C-52/10, judgment of 9 June 2011, *Eleftheri Tileorasi and Giannikos*, (not yet published in the ECR), paras. 25, 35.
- 6) English translations of all national transposition measures have been prepared in the framework of the research project on the AVMSD commissioned at the Faculty of Law, Economics and Finance of the University of Luxembourg and may be retrieved from www.medialaw.lu. See also the articles by Marcel Betzel and Roberto Viola in this publication.
- 7) ECJ, Case 2/74, *Reyners v. Belgium State*, [1974] ECR 631; Case C-55/94, *Gebhard*, [1995] ECR, p. I-4165; Case C-215/01, *Schnitzer*, [2003] ECR, p. I-4847.

remit which is not focused on profit-making. It does, however, exclude activities which are primarily non-economic and the recital astonishingly also refers to activities that are not in competition with television broadcasting such as private websites or content created by private users in social networks. The latter may seem to be arbitrarily chosen “non-television-competing” examples, but the goal is clearly visible: to exclude services which by their nature seem to prohibit applying regulatory standards that have previously been used for professionally created mass media content. The audiovisual nature of the service, explained by Recital 23 AVMSD, speaks of “moving images with or without sound”. As a result, silent films fall under the scope of application of the AVMSD while radio does not for its lack of images being transmitted which – although not in the operational part – also expresses the clear purpose of the provisions in comparison to the original Television without Frontiers Directive (TwFD).⁸ Purely text-based formats constitute an audiovisual media service only if they accompany the programme. In other words, these are not stand-alone but linked with the main service. The goal of the Directive, as confirmed by Recital 21 AVMSD, is to encompass audiovisual media services which are services of mass media, directed towards and having a clear impact on an undefined mass of the general public.⁹ Thus, they need to be comprised of a specific content (programmes to “inform, entertain or educate the general public”) which is defined below in connection with the criterion “programmes” as a constitutive element of an audiovisual media service. Consequently, as expressed in Recital 22 AVMSD, all private correspondences, games of chance and online games (provided that they are not broadcasts) as well as search engines (in the strict sense of the word “engine”¹⁰) are not regulated by the AVMSD.

As to its general graduated¹¹ scheme, the AVMSD distinguishes two types of audiovisual media services: namely linear services, meaning television broadcasting as defined in Article 1(1)(e) AVMSD; and non-linear services, meaning on-demand services as stipulated in Article 1(1)(g) AVMSD.¹² The definition of television broadcasting reiterates traditional television viewing by emphasizing the point-to-multipoint dissemination aimed at simultaneous viewing, whereas non-linear services are defined by criteria already used in the ECD which underline that it is the user who chooses the specific moment when he wants to see the specific content – although this has been selected for inclusion in a catalogue of programmes by the service provider in advance. As the service is provided for at individual request, it is “pulled” by the user. Nevertheless, as Recital 24 AVMSD clarifies, on-demand services in the sense of the Directive are “television-like” in as much as they compete for the same audience. This definition, relying on the user as a starting point, is taken even further in the recital that states the comparability with television would lead the user to reasonably expect the same level of protection by regulation as that viewer was used to, or would expect, for television.

Although this indication is only contained in the recitals and is therefore not a serious impediment, it certainly does not help to identify the “near-TV” services. Relying on categorizations of services by users in a world where the technological development is at a pace that makes it difficult even for experts to predict whether or not a service is comparable to traditionally established forms of media does not seem to be a promising approach. In order to address this concern, Recital 24 AVMSD indicates that the term “programme”, which for television broadcasts means a specific element in the schedule offered by the service provider and is explained in more detail below, is to be interpreted in a dynamic way. As a result, the traditional “push” content, for which the definition of programmes offers examples, is open to a broad understanding. This, in turn, could lead to more on-demand services being in the scope of the AVMSD.

8) 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 of 17 October 1989, L 298, p. 23; later amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997, OJ L 202 of 30 July 1997, p. 70.

9) In Case C-89/04, *Mediakabel BV v. Commissariaat voor de Media*, op.cit. (fn. 5), para. 30, the Court further specified the notion of the “general public”, according to which it does not necessarily have to be a “free” offer, as long as the service is “intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously”.

10) In a similar direction *Chavannes/Castendyk*, op.cit. (fn. 4), para. 33.

11) See on the key concept of “graduated regulation” *Valcke/Stevens*, “Graduated regulation of ‘regulatable’ content and the European Audiovisual Media Services Directive, One small step for the industry and one giant leap for the legislator?” *Telematics and Informatics*, 2007, 24, p. 285.

12) *Chavannes/Castendyk*, op.cit. (fn. 4), paras. 85-94 on “television broadcasting” and paras. 100-123 on “on-demand audiovisual media service”.

It is striking that Recital 27 AVMSD gives a list of examples of television broadcasts which refer to the technology used like “analogue and digital television, live streaming, webcasting and near-video-on-demand”. According to that same recital, if an audiovisual media service includes both, linear and non-linear elements which can be – and this is decisive – clearly separated, the AVMSD will apply to each respective service in accordance with the graduated regulation. If, however, there is no clear separation the television rules trump the less strict rules applying to non-linear services. Finally, Recital 28 AVMSD excludes electronic versions of newspapers and magazines from the scope of the concept of an audiovisual media service. This concession was a crucial element in the preparation of the Directive to meet concerns of newspaper editors and associations that did not “suddenly” want to be included in a regulation from which the traditional printed press was excluded. However, this recital does little to clarify things, because it is completely unclear how many examples of “electronic press” today are at all affected by this exclusion.¹³

The second element of the definition of Article 1(1)(a)(i) AVMSD refers to editorial responsibility.¹⁴ This notion is further defined in Article 1(1)(c) AVMSD and stems from the term “editor” who in the context of the AVMSD is the audiovisual media service provider. According to Recital 26 AVMSD, natural or legal persons merely *transmitting* programmes are not considered audiovisual media service providers as the editorial responsibility lies with third parties. Hence, Article 1(1)(c) AVMSD implies that effective control has to be exercised over both the selection of the programmes and the organization of these elements either in a chronological schedule or in a catalogue, which then constitutes the service. The Court of Justice of the European Union (ECJ) in the case of *Google France and Google*¹⁵ clarified that a provider of an information society service cannot be held liable until he becomes aware of the unlawful nature of the content.¹⁶ Although this was in the context of the scope of liability under the ECD, by analogy, the concept of “control” encompasses at least knowledge of how a programme is structured and organized and the possibility to influence these two elements.¹⁷ It is also suggested to look to the service providers’ “possession of the broadcasting rights” as the essential criterion of effective control because only then is the provider able to offer more than mere technical transmission of the programmes.¹⁸ In general, national liability schemes or those set up by the ECD are not affected (cf. Rec. 25 AVMSD). This is why the criterion of liability alone does not help to give a final answer about responsibility in the sense of the AVMSD. Moreover, according to this recital, the Directive explicitly leaves a margin of discretion to the member states when implementing this notion (which at the same time is characterized as “essential”) in their national legal systems.¹⁹ Yet, this leeway afforded to member states should not result in large-scale national differences which would jeopardize the uniform application of Union law.²⁰

The third criterion of an audiovisual media service with regard to Article 1(1)(a)(i) is that the principal (therefore not necessarily the only) purpose of the service is the provision of programmes. The general purpose of a programme in this meaning is to “inform, entertain or educate” the audience. This criterion is further specified in Article 1(1)(b) AVMSD which considers it an “individual item within a schedule or a catalogue”. Succinctly, its form and content are comparable to television broadcasting where the programme is a specific element of the day’s schedule such as e.g. a film or news programme

13) Evidently, real “e-papers” which are online versions of the printed paper, e.g. in a pdf format, are entailed, but the reality of newspaper websites today is different in view of audiovisual elements. It certainly cannot depend on who the provider is, whether a traditional publisher or not, when deciding whether the service is within the scope of the Directive or not. A problem in this context is also the meaning of “primary purpose” of the audiovisual elements within the service, see below and Schulz, Die Richtlinie über Audiovisuelle Mediendienste als Kern europäischer Medienpolitik in: Klumpp/Kubicek/Roßnagel/Schulz *Netzwelt – Wege, Werte, Wandel*, Springer, 2010, pp. 269, 275 et seq.

14) See also Schulz/Heilmann, “Definition of the Term “Editorial Responsibility””, in: European Audiovisual Observatory (ed.), *Editorial Responsibility*, IRIS Special, 2008, p. 11.

15) ECJ, Case C-236-238/08, *Google France and Google*, judgment of 23 March 2010 (not yet published in ECR).

16) ECJ, Case C-236-238/08, *Google France*, op.cit., (fn. 15), para. 109; see Fitzner, „Fortbestehende Rechtsunsicherheit bei der Haftung von Host-Providern Anwendbarkeit der Haftungsbeschränkung nach TMG und der aktuellen Rechtsprechung“, MMR, 2011, p. 85 et seq.

17) See Schulz/Heilmann on a more detailed explanation of the terms “selection” and “organization”, op.cit., (fn. 14), pp. 17-23.

18) Chavannes/Castendyk, op.cit. (fn. 4), para. 68; Schulz/Heilmann, op.cit. (fn. 14), p. 16.

19) The fact that member states are better placed to fill out this definition is also reflected in ECJ, Case C-236-238/08, *Google France*, para 119. See also Schulz/Heilmann, op.cit. (fn. 14), p. 14.

20) Schulz/Heilmann therefore suggest that the notion of “editorial responsibility” is fully harmonized by Union law, op.cit. (fn. 14), p. 15.

at a particular time. While an illustration of several definitions outlined above is transferred to the recitals, in this case the list of examples of what constitutes a “programme” is included in the provision itself, highlighting the need for clarity in this respect. Looking at the substance of the list, however, it becomes obvious that the examples limit the potential extension of the scope of the AVMSD because they are all traditional television formats. Moreover, the “feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama”, although enumerated in Article 1(1)(b) AVMSD, remain unclear in their explicit meaning today, because the wide use of amateur video clips e.g. on sites such as YouTube and the integration of such clips in television formats might shift the conventional understanding of some of the examples. Also, the understanding of the “principal purpose” being the provision of programmes as can also be derived from Recital 22, is to exclude services that only incidentally contain audiovisual elements. This limitation, however, only seems to refer to marginal use of such elements and mainly if they are contained in animated advertisements or comparable parts of the service. In view of services that use mainly text-based content but in addition a meaningful amount of moving images (even without sound), this understanding leaves open the application of the AVMSD which is especially relevant for websites of printed press products.

The fourth and last criterion of an audiovisual media service under subparagraph (1) alludes to its technical transmission using “electronic communications networks”. In this respect, the AVMSD does not provide a distinct definition in its first article and therefore this element is easiest to analyze. It refers to Article 2(a) of the Framework Directive²¹ which in turn is composed of the three following aspects: first, “transmission system”, second, “conveyance of signals”, and third, “irrespective of the type of information conveyed”. Above all, the inclusion of this phrase in the definition is an expression of a technology-neutral concept, which underpins the regulatory approach in this sector.²² In view of the necessity for the services concerned to have a “mass media”-like impact, Recital 39 mentions that accessibility by the general public means that the use of “standard consumer equipment” must be sufficient, although the exact definition of what is to be understood as such equipment is left to the national authorities.

1.2. Article 1(1)(a)(ii) Audiovisual Media Services Directive

Besides linear and non-linear services, Article 1(1)(a) AVMSD contains a “third category of ‘other media services’”²³ in its second subparagraph according to which audiovisual commercial communication is in fact an audiovisual media service. Irrespective of the term “audiovisual” which is present in both expressions and essentially means “images with or without sound”, the former is defined in more detail in Article 1(1)(h) AVMSD as being “designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity”. Such images are further accompanied or included in a programme “in return for payment or for similar consideration or for self-promotional purposes”.²⁴ Like the definition of programmes in Article 1(1)(b) AVMSD, the definition of audiovisual commercial communication also infers a list of examples including “inter alia television advertising, sponsorship, teleshopping and product placement” of which only the last is a new element. The word “inter alia” implies a non-exhaustive enumeration and takes a future-oriented stance by accounting for new advertising techniques. Recital 22 AVMSD postulates additionally that “short advertising spots” or similar spots on websites the principal purpose²⁵ of which is not the provision of programmes, do not constitute audiovisual commercial communication as mentioned above.

21) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ of 24 April 2002, L 108, p. 33 (as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ of 18 December 2009, L 337, p. 37).

22) Valcke/Kuczerawy/Lefever/Lievens/Stevens/Werkers, “The EU Regulatory Framework Applicable to Broadcasting”, op.cit. (fn. 4), para. 2-036.

23) Van Eijk, “Scope of application of the modernized Directive” in: *Ein neuer Rechtsrahmen für die audiovisuellen Medien*, EMR Schriftenreihe, 36, 2007, p. 22.

24) Although the remuneration is only a typical feature, not a constitutive, as can be derived from ECJ, Case C-52/10, judgment of 9 June 2011, Eleftheri Tileorasi and Giannikos (not yet published in the ECR).

25) For more details on the notion of principal purpose see Valcke/Kuczerawy/Lefever/Lievens/Stevens/Werkers, op.cit. (fn. 4), para. 2-032.

In brief, Article 1(1)(a) AVMSD pronounces a broad definition that seems to encompass a variety of media services. A more detailed glance at this notion reveals that this term sets strict criteria for its fulfillment, most of which remain rather vague despite the attempts to clarify their meaning in the recitals or further definitions stipulated in Article 1(1) AVMSD. As a result, the application to many “new” services as is shown below fails, because not all criteria, which are to be understood in a cumulative manner, are fulfilled.

2. E-Commerce Directive

The second reference point for the classification of on-demand services is the ECD which, in its Article 2(a), relies on the term “information society service” as defined by Article 1(2) of Directive 98/34/EC.²⁶ Five cumulative criteria can be identified, all of which are also presented in Recital 17 ECD. The first concerns a service provided for remuneration. As this aspect is not further specified in the Directive, the same reasoning applies as explained above under point 1.1. and as derives from Articles 56 and 57 TFEU. In this context, Recital 18 of the ECD is worth mentioning, as it outlines examples intending to span the range of economic activities covered. Thus, included in its scope of application are not only online contracting activities, but also activities without direct remuneration such as information portals. However, television broadcasting is explicitly excluded in view of the (then) existing TwFD while video-on-demand and commercial communication are included in the concept.²⁷ This hints at the ambiguity of the overall framework for on-demand services and the possible parallel application of two formerly distinct legal regimes.

Secondly, the service is provided “at a distance”, which means in accordance with the first indent of Article 1(2) of Directive 98/34/EC that the two parties are not present at the same time in order to receive, or respectively provide, the service. Thirdly, the service is transmitted by “electronic means” using “electronic equipment for the processing ... and storage of data”. Fourthly, and similarly to an on-demand audiovisual media service, the information society service is retrieved “at individual request”. In addition, the fifth criterion is whether the service is explicitly excluded from the scope of application. Annex V of the Directive mentions as an example for an excluded service television broadcasting within the meaning of the predecessor of the AVMSD. Furthermore, when reading Article 1(5)(d) ECD in conjunction with its Recital 16, online gambling activities (except for promotional competitions and games with a comparable aim) do not constitute information society services. Finally, there is a definition of a service provider contained in Article 2(b) ECD and of commercial communication in Article 2(f) ECD. Both are similar to the definitions under the AVMSD.

As a general observation, it may be emphasized that the numerous references to the previous TwFD in the recitals, as well as in the ECD itself, signify an attempt of the EU legislator to clearly separate the scope of application of the ECD and the TwFD in the form of a negative list. This worked well at the time of creation of the ECD. Today, it has become more difficult to draw a bright line between the two sets of directives especially since many newly developed services easily fulfill the ECD criteria but, even if they contain audiovisual elements, not necessarily the AVMSD criteria. The regulation of new services can touch upon both regimes and there is a *lex specialis*-approach applicable to most services according to which they are either within the narrower scope of the AVMSD (with the consequence of more detailed substantive provisions to be considered) or at least under the general rules of ECD. To create legal certainty for all actors involved, it is therefore desirable to be able to identify clearly if the AVMSD applies.

3. Other relevant legislation

In order to ensure a broad overview, several other secondary European Union law instruments are subsequently considered in search for further indications to categorize on-demand services. Frequent

26) 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 of 21 July 1998, L 204, p. 37 (amended later by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ of 5 August 1998, L 217, p. 18 and Council Directive 2006/96/EC of 20 November 2006, OJ of 20 December 2006, L 363, p. 81).

27) The other examples mentioned in the recital are clearly inspired by what was on the market in the late 1990s, but this does not limit the openness of the definition by being applicable to newly developed services since then.

reference to on-demand services is made in several recitals of the Electronic Communications Networks and Services Package of 2002.²⁸ These links are to delimit the scope of application of these directives vis-à-vis the previous TwFD. In addition, Recital 45 of the Universal Service Directive²⁹ excludes services offering packages of sound or television broadcasting content. In accordance, these directives reflect the awareness of the EU legislator of the general tendency of “convergence of the telecommunications, media and information technology sectors”,³⁰ while at the same time adhering to a distinct regulation of network and content, which did not change with the revision of the TwFD 2007 or the Electronic Communications Networks and Services Package 2009. Also, the provisions in the package do not result in a delineation of which content-based on-demand services fall under which legal regime.

In a similar vein, the Commission’s Communication on Public Service Broadcasting³¹ also emphasizes the phenomenon of convergence in its 5th paragraph in which the term “audiovisual services” is used. The Commission motivates its revision of the 2001 Communication with the profound technological changes which have led to an increase of distribution platforms and technologies and the “emergence of new media services”.³² As a consequence, from the perspective of a user, it becomes more difficult to distinguish between on-demand services and those disseminated via distribution platforms.³³ There has also been a gradual shift in the role of the consumer, who has become more active in producing and controlling content.³⁴ This has an impact on the remit of public service broadcasters which is acceptable from the perspective of competition law, according to the Communication, and the difference in terminology has to do with the fact that this applies also to radio and other services besides television. However, the Communication does not provide additional criteria for the differentiation.

A slightly different context, even if less visible, are the references included in the Sixth Council Directive on a common system of value added tax (VATD).³⁵ The terms mentioned in this respect serve fiscal purposes by defining the services subjected to tax and the place where a service is supplied.³⁶ The definition of the term “telecommunications” in Article 9(2)(e), 10th indent VATD is reminiscent of the notion of “electronic communications networks” provided by Article 2(a) of the Framework Directive³⁷ but uses a different terminology, mentioning “access to global information networks”. Article 9(2)(e), 11th indent VATD refers to “radio and television broadcasting services” without any further elaboration as to their meaning. Thus, the VATD is based on the conventional separation of telecommunications (transmission of signals) and television broadcasting (provision of content).

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- 28) Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ of 24 April 2002, L 108, p. 7; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), OJ of 24 April 2002, L 108, p. 21; Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ of 24 April 2002, L 108, p. 33; 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 Service Directive), OJ of 24 April 2002, L 108, p. 51; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ of 31 July 2002, L 201, p. 37. The directives 2002/21/EC, 2002/19/EC and 2002/20/EC were amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ of 18 December 2009, L 337, p. 37, the directives 2002/22/EC and 2002/58/EC by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, OJ of 18 December 2009, L 337, p. 1. The amendments brought no changes for the aspects relevant here (see also Recitals 2, 10 of Directive 2002/19/EC, Recital 20 of Directive 2002/20/EC, Recitals 5, 9, 10, 31 of Directive 2002/21/EC, Recitals 43-45 of Directive 2002/22/EC, Recital 16 of Directive 2002/58).
- 29) Directive 2002/22/EC, see Roßnagel/Kleist/Scheuer, *Die Reform der Regulierung elektronischer Medien in Europa*, Schriftenreihe Medienforschung der Landesanstalt für Medien Nordrhein-Westfalen, 2007, p. 72.
- 30) Framework Directive 2002/21/EC, Recital 5.
- 31) Communication from the Commission on the application of State aid rules to public service broadcasting (Text with EEA relevance), OJ of 27 October 2009, C 257, p. 1.
- 32) Communication on Public Service Broadcasting, para. 5.
- 33) Roßnagel/Kleist/Scheuer, op.cit. (fn. 29), p. 71.
- 34) On the changing role of the viewer see Helberger, “The Changing Role of the User in the “Television without Frontiers” Directive” in: EAO (ed.), *Legal Aspects of Video on Demand*, IRIS Special, 2007, p. 77; Helberger, “From eyeball to creator – toying with audience empowerment in the Audiovisual Media Services Directive”, 19 [2008] Ent. L. R., vol. 6, p. 128.
- 35) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the member states relating to turnover taxes - Common system of value added tax: uniform basis of assessment, OJ of 13 June 1977, L 145, p. 1; as a consolidated version from 1 January 2006 retrievable under http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1977_L0388:20060101:EN:PDF; see also Roßnagel/Kleist/Scheuer, op.cit. (fn. 29), pp. 59-61.
- 36) *Ibid.*, p. 61.
- 37) Directive 2002/21, op. cit. (fn. 28).

The two recommendations on the protection of minors and human dignity in relation to the competitiveness of the European audiovisual and on-line information services industry provide another point of reference.³⁸ To this end, these recommendations complement the AVMSD as they apply to “audiovisual and on-line information services”.³⁹ The second recommendation of 2006 that adds to, but does not replace, the recommendation of 1998, has the same scope of application although it is now explicitly extended to also cover services in mobile networks (Recital 19). Although this shows a tendency to pick up recent developments in view of the later adopted AVMSD, neither of the two recommendations gives supplementary criteria.

In brief, the scope of application of the different acts of secondary European Union law is difficult to determine with exactitude and precision. A common motive is a technology-neutral, now better referred to as platform-neutral approach which means that the regulation of a particular service is indifferent to the technological ways of its transmission from the provider to the end recipient. Due to the convergence of the media, new services may be situated at the crossroads of different legal regimes and this might not be avoidable. Therefore, Article 4(8) of the AVMSD provides for a conflict rule in which the AVMSD is to prevail. Beyond that, it is evident that the EU legislator did not want to fix exactly the scope of application of the different acts in order to remain open for development. Instead it will be up to the Court of Justice to provide interpretations of the scope when confronted with concrete services.

4. Case law or (rather) the lack of relevant case law

Against the above mentioned background one would expect a magnitude of relevant cases by the European courts dealing with issues of scope. However, there is only one case concerning on-demand services that is fully on target so far. On the other hand, similar to the interpretation of the rules on advertising, one can expect more to follow in the coming years. The case *Mediakabel*⁴⁰ may serve as a first indication even though it was decided prior to the adoption of the AVMSD. The case involved a Dutch pay-per-view service called “Filmtime” which displayed characteristics of a television broadcast in parallel to elements of an information society service. The ECJ, applying the TwFD, differentiated between near video-on-demand and video-on-demand.⁴¹ This distinction resulted in the classification of near video-on-demand as a television broadcast and the consequential application of the TwFD to the “Filmtime” service as the list of films on offer was determined by the service provider and made accessible according to a pre-determined schedule which could not be influenced or modified by the user. The individual key a user of “Filmtime” received constituted, in the opinion of the ECJ, merely a “means of unencoding” images which were transmitted to the viewers simultaneously and could not be qualified as being viewed “at individual request”.⁴² Thus, the nature of the service is decided from the “perspective of the provider”.⁴³

Under the AVMSD framework, no case which could provide the ECJ with an opportunity of delineating the scope of application of the AVMSD has arisen yet. A recent referral for preliminary ruling on the question of interpretation of the term “editorial responsibility” was – due to the circumstances of the case unsurprisingly – held to be inadmissible.⁴⁴ The case concerned the Broadcasting Authority of the French-speaking Community of Belgium and a dispute about which company had editorial responsibility for a broadcast as this influenced the question of jurisdiction. The ECJ rightly declined the admissibility as it considers the referring media authority not to be a court or tribunal for the purposes of Article 267 TFEU so that the notion of “editorial responsibility” was not further clarified.

38) Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness 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 of 7 October 1998, L 270, p.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 of 27 December 2006, L 378, p. 72. See in particular Recommendation 98/560/EC, Recital 5 and 6; Recommendation 2006/952/EC, Recital 19, I.2.

39) Recommendation 2006/952/EC, Recital 19.

40) ECJ, Case C-89/04, *Mediakabel BV v. Commissariaat voor de Media*, op.cit. (fn. 5).

41) *Ibid.*, paras. 18-19, 30; see also Gersdorf, “Medienrechtliche Einordnung des NVOD”, K&R, 2010, p. 375.

42) ECJ, Case C-89/04, *Mediakabel*, op.cit. (fn. 5), para. 38.

43) Van Eijk, “Scope of application of the modernized Directive”, op.cit. (fn. 23), p. 21.

44) ECJ, Case C-517/09, *RTL Belgium SA*, judgment of 22 December 2010, esp. paras. 18, 26, 42-44.

Although the pending case *Scarlet Extended*⁴⁵ essentially deals with intellectual property rights, it may contribute indirectly to the discussion at hand. The question before the Court concerns the obligation imposed on a service provider for a filtering system of all electronic communications of its customers in order to identify inter alia “audio-visual work”.⁴⁶ In his recent opinion the General Advocate proposed that such an all-encompassing filtering system could not be installed, as it violates the fundamental right to freedom of expression.⁴⁷ The inclusion of the term “audio-visual”, though used to identify a kind of “work” may allow the ECJ to give further hints on this terminology and the question of liability or obligations of providers which may to some extent be transferable to the AVMSD.

II. In concreto: examples of on-demand services

New media services such as Apple TV, Google TV or Yahoo Connected TV⁴⁸ in spite of being on the rise have not yet fully (definitely not in Europe) matured and are certainly far from replacing traditional broadcasting.⁴⁹ Should today’s technical, and above all, legal problems (such as intellectual property rights issues) be solved, HbbTV (Hybrid Broadcast Broadband TV) or generally spoken connected TV could well conquer the audiovisual markets and the living rooms of the consumers. What these new media services have in common is their combination of the television and the Internet element. This arrangement leads to a hybrid service that can be seen as being more than the sum of its elements by creating “intelligent connections” in an indefinite net of threads and links.⁵⁰ The viewer may enjoy television services across channels worldwide in addition to browsing the web by using a search engine as a means of navigation. Moreover, the user’s mobile phone could develop to being their remote control. The planned or launched services are also supported by several pre-defined applications that enhance the usability and many of the services encourage users to generate their own content and make it available for others on the platform.⁵¹ As a result, a user’s home screen is customized according to his needs and interests and there will be a development away from the “same screen” in every living room even if the same TV channel is switched on.

These connected hybrid services constitute a new generation of media services which is difficult to grasp in legal terms. Whereas websites of television broadcasters that include simulcasting or catch-up of the programmes without doubt fulfill the AVMSD criteria being an audiovisual service under editorial responsibility with the aim of providing programmes with a specific content and using networks, the situation is different for these new services.⁵² The external hardware used in form of the set-top box, is an external device which manufacturers increasingly integrate in the television set itself or within additional hardware such as the Blu-ray players (like Sony for instance). The hardware guarantees that content drawn from the Internet is formatted to fit to the television screen.⁵³ Content-wise the idea is to merge television with the Internet. In practice, viewers will be able to follow their favourite TV show while simultaneously accessing additional background information, e.g. on the actors via the webpage

45) ECJ, Pending Case C-70/10 *Scarlet Extended SA v. SABAM*, OJ of 1 May 2010, C 113, p. 20; see also Opinion of General Advocate Pedro Cruz Villalón of 14 April 2011 in Case C-70/10 *Scarlet Extended SA v. SABAM*.

46) *Ibid.*

47) *Ibid.*, paras 111-115.

48) See the company presentations under <http://www.apple.com/appletv/> and <http://www.google.com/tv/> or <http://www.youtube.com/watch?v=diTpeYoqAhc> (Google TV) and http://www.youtube.com/watch?feature=mfu_in_order&playnext=1&v=szE3lB30k3Y&list=TLVzjlDM5EBhI (Yahoo Connected TV); see also generally the overview in the article by Sebastian Artymiak in this publication.

49) For other examples such as webcasting or user-generated content and their classification see Chavannes/Castendyk, *op.cit.* (fn. 4), paras. 117-123.

50) See also Wagner, „Hybrides Fernsehen und das Europäische Medienrecht“ in: Kleist/Roßnagel/Scheuer, *Europäisches und nationales Medienrecht im Dialog*, Festschrift aus Anlass des 20-jährigen Bestehens des Instituts für Europäisches Medienrecht e.V. (EMR), 40, 2010, p. 325.

51) See Google TV presentation under www.google.com/tv/ or Apple TV presentation under www.apple.com/appletv/

52) In case of services that offer streaming of television programmes simultaneously (“live”, irrespective of minor delays necessary for technical reasons) by accumulating the streams of different television channels no new editorial responsibility is created. Although there is a selection of channels, there is no organization because the content is devised by the original TV broadcasters which does not change by including a user discussion forum or inserting advertising before the stream begins. Such a service (with a misleading name) is www.tvcatchup.com, but also here intellectual property issues have proven a difficulty when putting together the accumulated offer (see e.g. *ITV v. TV Catch Up* [2010] EWHC 3063 J Kitchin).

53) See also Wagner, *op.cit.* (fn. 50), p. 325.

of the show or the broadcaster.⁵⁴ The display of two simultaneous services is reminiscent of pop-up windows on the Internet⁵⁵ or add-ons whereby the television screen becomes an interactive platform where the user chooses the content from different sources.

Hence, the problem that Google, Apple, Yahoo and others are facing is twofold: the technical challenge is that content needs to be adjusted to the standards used by the aforementioned companies; the legal problem is that these providers need to clear with rights holders that they can make their content available via their services. The reality is that therefore currently the services are restricted to access to *certain* content and not, as advocated or intended, access to the entire web.⁵⁶ As far as on-demand services are concerned, it is questionable whether connected TV services can be considered as a single service that comes under the scope of application of the AVMSD. The services at hand constitute an economic activity and thus a service for the purposes of Articles 56 and 57 TFEU. The most problematic aspects of the definition of an on-demand audiovisual media service are who, in the case of hybrid services, has editorial responsibility and whether the service is equivalent to the provision of programmes as defined by the AVMSD. Concretely, the question is whether the hybrid service provider by assembling the different services (namely television and Internet and additional services) creates a *catalogue of programmes* within the meaning of Article 1(1)(b) and (g) AVMSD. Also, the different types of services (linear or non-linear, television or Internet) might have to be viewed separately – as Recital 27 foresees, if it is possible – and then it is questionable whether and how the AVMSD is applied to the different elements of the combined service. The answer to these questions is relevant because, on the one hand, the application of different standards to different services or elements of a service seems to endanger legal certainty and may lead to confusion as to what service falls under which regime. This could have a negative impact upon stakeholders and customers.⁵⁷ On the other hand, the application of the AVMSD to hybrid services as a whole just because there is a television element appears on first glance too rigid. This approach would fail to uphold the different levels of regulation that are expressed in the graduated scheme of the AVMSD and, when regarding the global picture, the ECD.

With connected services not all elements of the definition of an audiovisual media service are precisely fulfilled for the overall service.⁵⁸ With regard to content contained in regular TV channels, the notion of television broadcast (and this being a linear service) may unquestionably be applied. Content is audiovisual, disseminated as moving images predominantly with (rarely without) sound and is provided in the form of a service within the meaning of Articles 56, 57 TFEU. In accordance, the content displayed typically aims at informing, educating or entertaining the general public as it draws from such TV channels. Yet, the criterion of editorial responsibility for a particular service is problematic in this context. It is questionable whether the hybrid service provider bears responsibility just because he determines which TV channel and consequently what television broadcast is to be included in his overall offer. As for rights reasons there will typically not be the possibility to change the carried signal, it is more adequate to assume that the provider of the television broadcast retains editorial responsibility because the hybrid service provider does not exercise effective control for the purposes of Article 1(1)(a) and (c) AVMSD. For these services relying only on the ECD and its definition of an information society service would be completely insufficient. Concerning the TV channel content disseminated live the criteria of “at individual request” is lacking as the television broadcasts are only available in the order they are integrated in the schedule by the service provider. This changes if the connected TV provider offers additional services such as the catch-up of the TV channel programmes missed and in that way offers the user to put together his own programme. With such an element the non-linear rules of the AVMSD apply to that provider.

Concerning the web access service or the combination with added features via “apps” or comparable software solutions, these alone fulfill, without doubt, the criterion of an information society service as stipulated by the ECD: they constitute services, provided for remuneration and by electronic means. Additionally, an “app” is offered at a distance as the user and provider are not simultaneously present when it is used at individual request. It is difficult to argue that this feature alone is broadcast-like

54) See also *ibid.*; Ariño, “A Content Regulation and New Media: A Case Study of Online Video Portals”, *Communications & Strategies*, 66, 2007, p. 115.

55) See also Wagner, *op.cit.* (fn. 50), p. 331.

56) See also Wagner, *op.cit.* (fn. 50), p. 325.

57) Cf. the articles by Erik Valgaeren and Vincent Porter in this publication.

58) Similar in Chavannes/Castendyk, *op.cit.* (fn. 4), para. 118 with regards to “Simulcasting”.

with a similar impact on the public and, therefore, even with audiovisual elements in the additional services these will not be sufficient to characterize such services as a non-linear service in the sense of the AVMSD. This would only be different if one considered the additional software features as so closely linked to the television broadcast that the AVMSD may be applied to the combination, because then the strictest rule for the linear part of the service would have to prevail. Recital 27 does not imply this conclusion, but instead limits the “stricter rules prevail”-logic to on-demand content that is offered in addition to the same television content by the same provider. In effect, the decisive question is whether the elements that together constitute the connected TV service can be regarded separately.⁵⁹ It will continue to be a case-to-case decision and the difficulty is to distinguish between whether the platform/connected TV provider just adds an own service to the broadcast of another provider or whether the combination of both, television broadcast, Internet access service and additional applications makes it a distinctly new service. Indications for the latter perception are if the broadcast is not transmitted 1-to-1 but with changes undertaken to the schedule or whether that potential (including the clearing of rights) is given. Also, the more editorial organization undertaken by the platform provider, the more likely he “grows” into being editorially responsible in the sense of the AVMSD.

Although Recital 21 at the end clearly intends to exclude services such as YouTube from the scope, because they rely on user generated content, this could change in reality.⁶⁰ If the editorial influence is increased by creating specific channels, sorting and labeling the content and taking editorial decisions in advance of making content accessible this could mean an “upgrade” of regulatory impact from ECD to AVMSD. Unsatisfactory as it may be, even though the perception by the user was supposed to be the decisive approach, the role the provider assumes contributes significantly to whether the AVMSD criteria are fulfilled.

III. Conclusion

This contribution analyzed the different secondary European Union acts applicable to on-demand services, focusing on the AVMSD and the ECD. Since case law of the European courts is scarce and the technological development brings forth ever new forms of media services, it is difficult to make definite and lasting statements. What can be said about the current legal structure is that there exists an interdependence and interconnectivity between different legal instruments at European Union level that may not have been intended (at least not to the degree it exists today) by the EU legislator at the time of legislation making, but that is a result of a graduated regulation scheme. It is therefore debatable whether – taking into consideration the above explained difficulties to clearly identify the application of one or the other framework – a true level playing field for platforms such as connected TV has been achieved as planned.⁶¹ The development seems to prove that trying to establish a common framework for different kinds of services is hardly possible as the legislation process will always fall behind the innovative force creating ever new services. The struggle to grasp these new services is also evident at the level of the Council of Europe which is currently attempting at finding a new definition for relevant “media” in today’s world.⁶² Irrespective of such difficulties, the application of a given legal framework cannot be neglected in cases covered by the scope simply by pointing out differences to other similar services. For borderline cases it will be helpful to have clarifications by the Court of Justice notwithstanding that these might take a while to surface.

59) Cf. also Chavannes/Castendyk, *op.cit.* (fn. 4), paras. 109 et seq.

60) On the lack of editorial responsibility in the case of YouTube, see Schulz/Heilmann, *op.cit.* (fn. 14), p. 26; generally Valgaeren/Roland, “YouTube and User Generated Content Platform – New Kids on the Block?” in: European Audiovisual Observatory (ed.), *Legal Aspects of Video on Demand*, IRIS Special, 2007, p. 29.

61) Critically therefore Ariño/Llorens, *op.cit.* (fn. 1), pp. 125, 136 et seq.

62) Cf. 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, Resolution “Towards a new notion of media”, MCM (2009) 011, p. 4 ([www.coe.int/t/dghl/standardsetting/media/MCM\(2009\)011_en_final_web.pdf](http://www.coe.int/t/dghl/standardsetting/media/MCM(2009)011_en_final_web.pdf)), also accompanying document www.coe.int/t/dghl/standardsetting/media/Doc/New_Notion_Media_en.pdf; on the current status of the planned Recommendation cf. Report of the 4th meeting of the Committee of Experts on New Media, MC-NM(2011)013_en under point 4 (the draft Recommendation is MC-NM(2011)010).

Regulating On-demand Services in Italy

*Roberto Viola and Maja Cappello**
Autorità per le garanzie nelle comunicazioni (AGCOM)

Following the continuous changes in the media landscape, where providers and consumers are facing new business models and technological challenges, regulators have to adapt and ask themselves why, what and how to regulate. Most of the answers have been given by the European legislator, namely by the Audiovisual Media Services Directive (AVMSD), but there is still much to do nationally in order to ensure a level playing field and legal certainty.

The Italian approach to regulation of on-demand services has paid particular attention to the issues of scope and the boundaries between the so-called traditional services and new media aiming to compete with them, and starts by defining the exceptions. Nonetheless, there are still many open questions, which require that reality always be kept in mind in order to avoid regulatory traps.

I. Changing media landscape

1. The provider

Digitalization of audiovisual content and convergence of services and devices are the main ingredients feeding the variety of platforms – terrestrial, satellite, Internet, mobile ... – where today's users can access a constantly widening choice of content. Available services multiply their features and new business models arise according to the opportunities offered by technological improvements.

Providers carry out different roles according to the way they make content available, be it via a more traditional scheduling, or through a system that allows users to catch up with the content they have missed, or, finally, by making available a whole catalogue with content on which they have acquired "transmission" rights.

This implies competition not only between similar services (linear or non-linear, respectively) on different platforms, but also between linear and non-linear services on the same or on different platforms.

* Roberto Viola is Secretary General of Agcom; Maja Cappello is Head of Unit at the Audiovisual Content Directorate.

2. The user

Users not only influence providers' strategies but are also influenced by these strategies. They are today in a position where they can choose the attitude which they want to show towards content that is made available to them. Purely passive viewing belongs to the past. Consumers may engage more actively, including the possibility of exercising control not only over what to see, but also when and how. And they may share self-generated content with other users.

This new attitude creates different scenarios that providers have to take into account. They often act as aggregators of content produced or made available by users themselves, which leads to a change of roles to the extent that users become content providers and providers become content users.

3. The regulator

In this new media landscape regulators are facing issues that necessarily require a deep knowledge of the functioning of the system as such. When taking regulatory decisions, especially when transposing EU directives, it is thus particularly important to aim at balancing the different interests at stake, so as to make the impact of the rules as proportionate as possible. To allow an open review of their decisions, according to Rec (2000)23 of the Committee of Ministers of the Council of Europe, regulators should base their reasoning on an analysis of the logic of the new European Union rules that the addressees of the regulation should be easily able to follow.

For this reason, the moving boundaries of new services often make it advisable to opt for co-regulatory solutions where stakeholders themselves can contribute to the shaping of the rules rather than for statutory regulation.

II. Who is in and who is out in the Italian approach

1. The fulfillment of five cumulative criteria

In Italy EU directives are implemented via a delegation process from the parliament to the government, through a special law called *Legge comunitaria*, which fixes the criteria that have to be followed in the drafting of the final legislative decree by the government (*decreto legislativo*). Before the government can formally approve the decree, the competent parliamentary commissions have to express their opinion, of which the government must take account. During the transposition of the AVMSD the first draft of the decree was very much oriented towards traditional broadcasting, where any actor would have needed an explicit licence. It was due both to the opinion of the parliamentary commissions and to the hearing of the *Autorità per le garanzie nelle comunicazioni* (the Italian Communications Authority – Agcom) that the government introduced into the decree an explicit reference to the recitals of the AVMSD. The recitals contain a set of exclusions (determining services that don't fall within the scope of the AVMSD) that allowed Agcom to put the new media regulation into the right perspective.

As a consequence five cumulative criteria have to be satisfied in order to consider a certain service as an audiovisual media service according to the AVMSD.

1.1. An economic service ...

Firstly, the provided audiovisual media service has to be an economic service according to the Treaty on the Functioning of the European Union (TFEU). This means that simple private websites fall outside the scope of the Directive as they do not generate revenues. The same applies to user-generated content that is not created for profitable purposes, but only for sharing with other users.

The main problems arise when one has to evaluate the role of, for example, advertising banners used on what appear at first glance as private websites, which inevitably lead to revenues. In these cases, it has to be checked whether or not the use of a banner amounts to an (economic) activity, which is in competition with traditional broadcasting. Only in this case, the service in question would fall under the scope of the Directive.

1.2. ... of a mass media character ...

Secondly, this economic service must be of a mass media character. This leads to the exclusion of blogs, mailing lists, newsletters etc., as they are meant for a restricted audience and will not satisfy the condition of being meant for an indeterminate group of potential viewers. In order to establish whether this condition is satisfied it is important that the service concerned is intended for reception by, and could have a clear impact on, a significant proportion of the general public.

This criterion, which seems simple to identify, again raises problems with regard to, for example, cable broadcasting activities in in-store/in-door areas, such as railway stations or commercial areas where the clients are apparently identifiable – as travelers or shoppers – but can also be intermingled with other people coming for other purposes and thus become an indeterminate group. In order to ensure legal certainty, a prevalence test should be applied, aimed at excluding this type of narrowcasting from the scope of the AVMSD because it is not intended for the wider public.

1.3. ... the principal purpose of which is the provision of programmes ...

Thirdly, this economic service of a mass-media character must have as its principal purpose the provision of programmes. This leads to the exclusion of services where the audiovisual aspect is of ancillary relevance. The Directive mentions in its preamble (Recitals 22 and 28) as explicit cases that should be excluded the electronic versions of newspapers and magazines and online games.

Considering that according to the Italian constitution press cannot be subject to authorizations, particular attention has been paid to this aspect. Given the current state of web services offered by undertakings stemming from the press sector, according to the Italian implementation of the AVMSD, it has not been considered possible to include online newspapers or magazines into the scope of the transposition regulations.

A similar exclusion has been established for all items that cannot be considered as moving images with or without sound constituting individual items in a schedule or catalogue, as the AVMSD states, such as radio, text, pictures. It should be noted, however, that services merely designed to circumvent the provisions laid down for moving images would clearly fall under the scope of the rules implementing the AVMSD. For example a sequence of non-moving images with adult content, which are in fact the instant images of a film, would be evaluated under the AVMSD provisions concerning protection of minors.

1.4. ... in order to inform, entertain or educate the general public ...

Fourthly, this economic service of a mass-media character must have as its principal purpose the provision of programmes which are aimed at informing, entertaining or educating the general public. It is thus not sufficient that a selected public is the addressee of the programmes, nor that the content has a different aim than the ones mentioned. What appears to be important is the impact that audiovisual media services may have on the way people form their opinions.

1.5. ... via electronic communications networks.

Fifthly, this economic service of a mass-media character, which has as its principal purpose the provision of programmes and aims at informing, entertaining or educating the general public, must be provided via electronic communications networks. These include, according to the electronic communications package, satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.

Accordingly, cinema and off-line supports such as DVDs are excluded from the scope of the AVMSD. Easy to interpret at first glance, the boundaries of this criterion potentially create difficulties, as many off-line supports, such as games, now allow access to content made available through the Internet.

2. The Italian roadmap

2.1. Transposition into primary law

The implementation of the AVMSD into Italian law was finalised in 2010 with the adoption of the legislative decree no. 44/2010. During the legislative process, Agcom had been invited to parliamentary hearings and thus had had the opportunity to actively participate with its proposals and suggestions including proposals concerning future regulatory activities on issues falling under Agcom's direct competence.

When exploring different ways in which the criteria established by the Directive could be met, the legislator decided to incorporate the major part of the Directive's Preamble into the legislative text. By this token the decree gave a binding effect to certain Recitals (relating to the scope of the Directive) which otherwise would have merely been an interpretative tool.

2.2. Secondary regulation for the licensing requirements

During spring 2010, after having identified the main issues at stake, Agcom held two public consultations aimed at the adoption of two regulations, one for the licensing of linear audiovisual and radio services provided on the Internet (i.e. web-TV, IPTV and mobile TV) and one for the licensing of non-linear audiovisual media services provided on any electronic communications network. The draft regulations were made available for comments during the summer months and Agcom had asked for input from stakeholders. In December 2010 the two regulations were adopted by deliberations no. 606/10/CONS (on linear services) and 607/10/CONS (on non-linear services), respectively.

The adoption of the regulations led to a strong reaction from potential audiovisual media service providers calling for the safeguard of freedom on the Internet which, in their view, could be impaired by the need to apply for an authorisation even though the Internet does not suffer from scarcity of resources. In reply to these concerns, Agcom published a list of FAQs on its website, clarifying that no freedom is impaired by the need for a general authorisation, which is in practice very similar to a notification procedure, and is only aimed to ease the monitoring of compliance with the AVMSD.

More precisely, linear media service providers, even though they must apply for an authorization of their envisaged services, may start their activity after the elapse of 30 days from their application. In other words, they must not wait for a written authorisation, notwithstanding that Agcom can deny the authorisation in case of formal irregularities of the application form or its annexes. In contrast, non-linear media service providers are automatically authorised on the same day of the notification to Agcom of the start of their activity and Agcom has 30 days to verify if the provider fulfils the requirements; if not, the activity must be interrupted until those requirements have been satisfied.

For linear as for non-linear audiovisual media services, the authorisation is only subject to a formal verification process related to the fulfillment of a minimum set of requirements concerning the applicant: the company's statute must refer to the provision of audiovisual media services, the subject cannot be a public administration, public company or a bank, the holder of the authorisation must not have been condemned to more than 6 months imprisonment and the company must declare its VAT number.

In order to take into due account the fact that, at least potentially, the new service providers who are active on the Internet are still in a start-up phase, the regulations have provided for a very low administrative fee of EUR 500 for audiovisual media services and EUR 250 for radio services to be paid only once for a 12-year period at the moment of the application or notification. No annual fees are requested. At the same time, once authorized, these subjects will have to contribute with an annual 1,8‰ contribution to be calculated on their average revenues.

2.3. Agcom's regulations

In order to comply with the critical aspects highlighted by stakeholders during the consultation process, Agcom has clearly explicated the cases of excluded services following the application of the already mentioned cumulative set of requirements directly deriving from the provisions and the recitals of the AVMSD as transposed by the mentioned decree:

- any form of private correspondence, such as e-mails sent to a limited number of recipients;
- all services whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose;
- all activities which are primarily non-economic and which are not in competition with television broadcasting;
- services based on the upload of audiovisual content generated by private users, as long as there is no editorial responsibility of the media service provider on the selection of the content, but only aggregation activity of content uploaded by private users for the purposes of sharing and exchange within communities of interest;
- services offered by providers with yearly revenues less than EUR 100 000;
- linear services with a schedule of less than 24 weekly hours and services not intended for the wider public, such as company TV services, and cable TV services in restricted areas, such as railway stations, airports etc.;
- on-demand catalogues composed only of programmes already offered on a linear basis, such as catch-up TV or archive services, and catalogues that are not autonomously accessible by the general public, such as those inserted inside a catalogue accessible only from a bouquet offered by a particular provider;
- online and electronic versions of newspapers and magazines, websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or a non-audiovisual service, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as online games and search engines, but not broadcasts devoted to gambling or games of chance.

The most innovative cases of exclusion are, however, the two alternative thresholds based on revenues and on scheduling. Those two thresholds limit the scope of the regulations only to professional activities that are “television-like”, i.e. that compete for the same audience as television broadcasts.

The revenue-based condition of “television-like” is considered to be satisfied for providers who collect yearly revenues above EUR 100 000, after tax, provided that they derive income from typical television activities such as advertising, sponsorship, contracts and conventions with public and private subjects, public funding and pay-TV offers. Consequently, revenues from services other than television-like services, such as hosting services, should not be taken into account. In order to ensure legal certainty to potentially affected companies, the first balance sheet to be considered for the exemption clause is the first to be approved after the entry into force of the regulations referring to revenues of 2010. And, in any case, the threshold has to be measured one year after start-up in case of new companies.

As to the scheduling condition, linear services with less than 24 weekly programming hours identified by the same logo, excluding the time devoted to the repetition of programmes or fixed images such as written messages, are also excluded from the scope of the regulations and their providers do not need to apply for an authorisation. Also in this case, the non-fulfillment of the condition “to be able to compete for the same audience as television services” is expressed by the non-professional character of an irregular programme scheduling.

III. When regulation meets reality

What has appeared very clearly during the implementation process of the AVMSD into Italian law is that the identification criteria that were easy to apply in the traditional media world are now facing a moment of crisis.

On the one hand, web-TVs available over the free Internet or provided by aggregator sites or distributed on a managed network respond to highly different business models, but could be subject to the same rules. On the other hand, some criteria risk to be difficult to apply, as it is not always intuitive to, first, recognize and, then, establish which audiovisual services are stand-alone services and to distinguish them from those which are only ancillary to other services, such as newspapers’ websites. In this regard, it can for example be hard to establish the exact boundaries between online versions of newspapers or magazines and broadcasters’ websites, as both make videos available.

At the same time, user-generated content made available on Internet platforms has to be analyzed very carefully in order to determine who has editorial responsibility. In line with European legislation, media service providers fall under the remit of Agcom's regulations only when the following two cumulative conditions are met: editorial responsibility and economic exploitation. Whereas the second condition is easily recognisable, in order to determine editorial responsibility two elements are required: the exercise of effective control over the selection of the programmes and over their organisation (either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services). This means that websites that do not provide an *ex ante* selection of user-generated content, but only provide an indexing activity of the content uploaded by users, do not fall under the scope of the regulations. But this exclusion is valid only as long as the aggregator acts *ex post*.

In conclusion, the variety of services made possible by the evolution of technology and of business models makes it evident that certain obligations suit traditional broadcasting much better than on-demand services. For example, reporting obligations into a monthly register where all programmes made available have to be tracked and quotas of European works are more easily met for the former services than for the latter. In other words, there is a clear need to adapt regulation to reality, and for this purpose co-regulatory tools should be encouraged as they allow regulators to be forward-looking and close to the needs of both market players and consumers.

Finetuning Classification Criteria for On-demand Audiovisual Media Services: the Dutch Approach

Marcel Betzel*

Commissariaat voor de Media (CvDM)

This article describes how the AVMS Directive¹ has been transposed into the Dutch media legislation; it has a special focus on how the *Commissariaat voor de Media* (Dutch regulatory authority for the media – CvdM) intends to define and clarify in its policy guidelines certain definitions and criteria regarding audiovisual media services. The first section describes the general legal framework and the specific regulations of the public media services. The second and third sections focus on the regulation of commercial media services and especially on how the criteria regarding the definition of a commercial on-demand media service will be interpreted by the CvdM.

In the Netherlands, the AVMS Directive was implemented at the end of 2009 by the Implementation Act amending the Dutch Media Act 2008.² By this amendment, which entered into force on 19 December 2009, the formal transposition process was completed. At the moment of writing this article, the CvdM is in the process of finalising its policy guidelines which further elaborate legal definitions and criteria and address practical issues like the registration process of on-demand audiovisual media services.³ Since these are draft guidelines, which still need to be adopted formally by the board of the CvdM, it should be noted that the following describes only the current stage of the policy preparation process and not necessarily the final opinions and decisions of the CvdM in that respect.

Regarding most aspects of the AVMS Directive, the Netherlands' legislature has opted for a minimum harmonization, especially as far as commercial media services are concerned. Only in the specific case of advertising for alcoholic beverages, the Netherlands authorities have chosen to use the opportunity of adopting stricter or more detailed regulation for media service providers falling under their jurisdiction, provided by Article 4, paragraph 1 of the AVMS Directive. The Media Act prohibits advertising and teleshopping messages for alcoholic beverages broadcast on linear channels between 6.00 a.m. and 9.00 p.m.⁴ This can be seen as a more detailed implementation of the Directive's requirement that advertising and teleshopping for alcoholic beverages should not be aimed specifically at minors.

* Policy Adviser, CvdM.

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 (Official Journal L 332, 18 December 2007), as codified by Directive 2010/13/EU.

2) *Wet van 10 december 2009 tot wijziging van de Mediawet 2008 en de Tabakswet ter implementatie van de richtlijn Audiovisuele mediadiensten* (Act of 10 December 2009 amending the Media Act 2008 and the Tobacco Act to implement the Audiovisual Media Services Directive), *Staatsblad* (State Journal) 2009, 552.

3) Note of the Editor: Meanwhile the *Regeling van het Commissariaat voor de Media van 22 september 2011 houdende beleidsregels omtrent de classificatie van commerciële mediadiensten op aanvraag zoals bedoeld in artikel 1.1, eerste lid, van de Mediawet 2008 (Beleidsregels classificatie commerciële mediadiensten op aanvraag 2011)* was passed. (Interpretative Regulation of the Media Authority of 22 September 2011 containing policies regarding the classification of commercial media on-demand services, as referred to in Article 1.1, first paragraph, of the Media Act 2008 (classification of commercial on-demand media services 2011)). See Edith van Lent, *Mandatory Registration for Video On-Demand Services Initiated*, in IRIS 2011-10.

4) Section 2.94 (regarding public media services) and 3.7 (regarding commercial media services).

Following the system of the AVMS Directive, on-demand audiovisual media services of commercial media service providers are only subject to a set of basic rules, while more detailed rules are applicable to linear audiovisual media services only.

I. General framework: Media Act 2008 and policy guidelines of the CvdM

1. "Multimedia Act"

It must be stressed that the Dutch Media Act 2008 was already phrased in technology-neutral and platform-independent terms since 1 January 2009, so almost a year before the Implementation Act came into force. On 1 January 2009 most elements of the so-called Multimedia Act⁵ entered into force, which led to important changes for both public and commercial media services. Many long-existing legal definitions were revoked or adapted in a substantial way. Since then, the Media Act 2008 no longer refers to the term "broadcaster" but uses the term "media service provider". Also the long-standing distinction between a programme offer for general purposes and a programme offer for particular purposes (subscription programme) was abolished.⁶

One of the major changes for public media services was the abolishment of the principal distinction between, on the one hand, TV and radio programmes and, on the other hand, audiovisual content offered via platforms like digital thematic channels and websites. This was achieved by wording the definition of the public media task in technically neutral and platform neutral terms, as laid down in section 2.1 Media Act. This section underpins the principle that public media service providers can serve their public remit through different media services and outlets, independently of platform or technique. Nevertheless, the media offer has to meet certain qualitative and quantitative requirements, which should guarantee the public nature of these services. Especially, it must be ensured that the public media services serve the democratic, social and cultural needs of society.

Another important change for public media services was achieved by revoking the programme-content obligations. Before, national public media service providers had to broadcast certain minimum percentages of information, education and culture. Also a maximum percentage (25%) for entertainment was laid down in the Media Act. These thresholds were replaced by more concrete goals regarding programme categories, audience reach and special target groups, which are laid down in performance agreements between the *Nederlandse Publieke Omroep* (national public media service – NPO) and the Minister of Education, Culture and Science. The NPO is responsible for the coordination of all individual national public media service providers. The CvdM will report yearly to the minister about NPO's performance. Every five years the NPO will have to submit a new plan for its programme policy regarding TV, radio, digital thematic channels and services offered via Internet-based platforms. The CvdM will send its comments regarding these NPO plans to the minister.

Especially for private media service providers, many rules regarding advertising and sponsorship were liberalised. This was done with the aim to create a level-playing field between commercial media services under Dutch jurisdiction and those operating from abroad (like Luxembourg) but targeting the same audience in the Netherlands. In line with the AVMS Directive, the general requirement of a minimum 20 minutes break between two advertising blocks was repealed. Regarding films, news and children's programmes, the regime for advertising interruption was liberalised in Dutch media legislation as well. Section 3.11 of the Media Act now refers to "programmed time". This means that for the calculation of the 30 minute period – which may be interrupted once by advertising – the duration of the advertising itself may be added to the programme duration (according to the so-called gross principle). As a consequence these films and programmes can be interrupted sooner than is allowed under the net principle which does not include the time spent on advertising in the calculation of programme duration.

5) *Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet (Mediawet 2008)* (Act of 29 December 2008 to establish a new Media Act), *Staatsblad* (State Journal) 2008, 583.

6) Elementary for a "programme for particular purposes" was that the consumer had made a direct agreement with the programme service provider, but this did not reflect the situation in practice anymore.

Split-screen advertising is allowed under certain conditions. In sponsor references/credits, slogans are allowed as long as they are not too promotional for sponsor products, i.e. by a direct encouragement or special recommendations of products. As said, a stricter rule compared to the AVMS Directive for both private and public media services was the introduction of a ban on advertising for alcoholic beverages between 6.00 a.m. and 9.00 p.m.

A basic principle of the Media Act 2008 is that public media services are regulated in a stricter and more detailed way than private media services in two respects. In the first place, the requirements as such – especially in the area of advertising and sponsorship – are more detailed and stricter. For instance, product placement is a “no-go zone” for public media services in the Netherlands as even products of the sponsor may not be shown in a programme when there is a financial contribution by the sponsor.⁷ In the second place, as a general principle, the rules regarding advertising and sponsorship apply to all public media services, regardless of whether they are of a linear or non-linear nature. Section 2.98 of the Media Act 2008 states that the rules regarding advertising offered on TV and radio are applicable to the greatest possible extent to the other public media services, i.e. Internet websites and video on-demand services. For commercial media services a principally different approach is taken as a consequence of the framework of the AVMS Directive. Only their services which can be regarded as audiovisual media services, either linear (TV) or non-linear (on-demand) are subject to the rules in the Media Act 2008 and are in need of a licence (linear services) or registration (on-demand media services) by the CvdM.

2. Policy guidelines of the CvdM regarding advertising in public media services

One can easily imagine that especially the rules regarding the maximum amount of advertising are difficult to apply to Internet pages containing advertising by means of banners and buttons. As a consequence, there was a need to develop guidelines in order to facilitate the practical application of these rules. In its recently adopted guidelines regarding advertising in public service media,⁸ the CvdM expressed as a general principle that advertising in public media services should be restricted in duration and amount and should not be dominating.

This general principle has been elaborated into more detailed requirements. For instance, on websites offered by public media services advertising (like banners) may never exceed 10% of the space of a browser page. Also there should be a clear (written) reference to inform the audience of the commercial nature of the banner. It should also be clearly separated from the editorial content, for instance by a clear frame. Written advertorials – advertising disguised as an editorial article – are not allowed. The same goes for advertising techniques like “pop ups”, “pop unders”⁹ or “hover ads”¹⁰ which infringe upon the principle of a clear separation between editorial and commercial content. As far as VOD services – usually catch-up-TV services¹¹ – are concerned, it is allowed to show pre-roll advertisements. These are video commercials shown usually before the programme (item) starts. The CvdM policy guidelines prescribe a maximum duration of 15 seconds, which is also in line with the current practical situation on most websites of public media services.

II. Scope of regulation of commercial on-demand media services

1. Legal definitions in the Media Act 2008

Section 1.1, paragraph 1, of the Media Act 2008 defines an on-demand media service as a “media service consisting of media offer which is delivered upon individual request and can be watched at a moment freely chosen by the user”. The section defines also the other components of the definition of an on-demand media service like “editorial responsibility”, “media service” and “media offer”.

7) Section 2.108, paragraph 1, of the Media Act 2008.

8) *Beleidsregels reclame publieke media-instellingen 2011* (Policy guidelines advertising public media service providers 2011).

9) A type of (usually advertising) windows that appear behind the browser window of a website that a user has visited.

10) A special type of pop-up ads created using Dynamic HTML, JavaScript and similar web browser technologies. Because they do not scroll with the web page, they appear to “hover” over the page, usually obscuring the content.

11) *Uitzending Gemist* is the main catch-up-TV service provided by the NPO.

From these legal definitions it can be concluded that a media service qualifies as an on-demand media service if the following criteria are met:

- it is distributed via a public electronic communication network;
- it is based on a catalogue;
- it consists of videos and has the principal purpose of offering videos;
- it falls under the editorial responsibility of the provider (with regard to selection and organisation of the video content);
- it has a mass media character;
- it can be seen as an economic service.

Of course, the Media Act 2008 only applies to commercial (on-demand) media services when they are provided by a natural or legal person falling under the territorial jurisdiction of the Netherlands, which usually means the service provider is deemed to be established in the Netherlands according to the criteria of the AVMS Directive.¹²

2. Policy guidelines of the CvdM regarding classification of commercial on-demand media services

Since the legislation has left room for further interpretation and clarification, the CvdM will elaborate in policy guidelines how it interprets the criteria for commercial on-demand media services. The policy guidelines will have to make clear which commercial on-demand media services will be caught by the scope of the Media Act 2008 and hence need registration with the CvdM.¹³ For public on-demand media services this was not necessary since in general all audiovisual public media services will fall under the present regulation. This elaboration and clarification is in line with articles and recitals of the AVMS Directive and the explanatory notes to the Media Act 2008 but is also based on practical experiences and observations by the CvdM.

What has happened so far? From the beginning of 2008, the CvdM participated in a working group of the competent Ministry through which it was able to provide input for the draft bill and its explanatory note. Already before the bill was adopted and the amendment of the Media Act 2008 entered into force on 19 December 2009, the CvdM started to locate potential (on-demand) media services and to test the AVMS Directive criteria. For this purpose, the CvdM also used a specifically customized web crawler,¹⁴ which traced down potential audiovisual media services by filtering web-based services on features like video content and catalogue. The CvdM used this web crawler in order to obtain an unbiased selection of services and also to get an idea of the potential number of media services falling under the CvdM's supervision. The services were collected in a database for further examination. In 2010 the CvdM organized several meetings with (legal) experts as well as service providers which could be affected by the implementation of the AVMS Directive. Also, the CvdM discussed AVMS related issues with other NRAs on several occasions. At the end of 2010 both traditional broadcasters and new media service providers were invited to comment on the draft policy guidelines "Classification of commercial on-demand media services". The first months of 2011 were used for taking these comments into consideration. The CvdM has the intention to adopt the policy guidelines before September 2011.

In accordance with the stipulations and recitals of the AVMS Directive as well as the Explanatory Note to the Implementation Act¹⁵ further criteria for the classification of on-demand commercial media services should meet some basic requirements. This means that above all they should be:

12) Section 1.2, paragraph 1, of the Media Act 2008 refers to Article 2 of the AVMS Directive for assessing jurisdiction.

13) Section 3.29b, paragraph 1, of the Media Act 2008.

14) A computer programme that browses the World Wide Web in a methodical, automated manner or in an orderly fashion. Other terms for web crawlers are "ants", "automatic indexers", "bots", "web spiders" and "web robots".

15) *Memorie van Toelichting bij de wijziging van de Mediawet 2008 en de Tabakswet ter implementatie van de richtlijn Audiovisuele mediadiensten* (Explanatory Note to the amendment of the Media Act 2008 and the Tobacco Act to implement the Audiovisual Media Services Directive) Tweede Kamer, 2008–2009, 31 876, nr. 3.

- technology and platform neutral: not based on traditional concepts since video services on the Internet are often different from conventional TV;
- fair and non discriminating: similar services deserve the same treatment;
- clear and predictable: industry and consumers, respectively, must know in advance whether they fall under the regulation and whether they enjoy protection, respectively.

III. Criteria for classification of commercial on-demand media services

This section focuses on how the CvdM is applying the different criteria for the classification of commercial on-demand media services.

1. Video and catalogue

Recital 24 of the AVMS Directive refers to the “television-like” characteristics of on-demand media services. This means they should compete for the same audience as regular TV and, due to the nature and way of access, viewers should reasonably expect regulatory protection. In this light, another relevant provision is Article 1, under b, of the AVMS Directive, which defines the concept of programme as being an individual item within a schedule or catalogue established by a media service provider that is comparable to TV as far as content and form are concerned. The article mentions some examples of programmes like feature-length films, sports events, situation comedies, documentaries, children programmes and original drama.

This raises at least the impression that the European legislature had in mind a rather traditional concept of TV when defining on-demand audiovisual media services. One could conclude from this that a web-based audiovisual media service consisting of short news clips would not qualify as an on-demand audiovisual media service. An argument for this approach would be that on regular TV these single news items would not be broadcast individually but would be included in one programme of longer duration. Having said this, on the other hand, Recital 24 states that the concept of “programme” should be interpreted in a dynamic way and taking into account new developments in TV broadcasting. It is obvious that the nature of TV (programming) is changing permanently and is also adapting to new formats that would be considered as typical for Internet because of their short duration or lack of other features like title, leader, introduction and credits.

Taking into account the blurring boundaries between “classical” TV and Internet formats, the CvdM decided not to focus too much on the “TV-like” aspect. This also because it is hard to take into account the expectations of the viewer, this being a rather subjective criterion. The average viewer does not exist and therefore it is hard to interpret his or her expectations. A person of younger age used to watching YouTube on a TV which can receive “Connected TV” services¹⁶ will probably consider YouTube more TV-like than an older person who has not grown up with the latest techniques and devices.

In the draft policy guidelines a definition of “video” is given. The reason for using the term “video” and not “programme” is motivated purely by legislative-technical considerations since the term “programme” in the Media Act 2008 has been reserved for TV broadcasting services. In practice, a video is usually similar to a programme. The main distinction is that the former is offered as part of a catalogue, while the latter is included in a schedule. Also, unlike video, a programme can consist of exclusively audio content (i.e. radio programme). A video is described as an electronic product including moving images which forms a single item, carries a unique title and is part of a catalogue. “Catalogue” is defined in the draft policy guidelines as the organisation of videos in a database which makes them accessible to the user, usually by some kind of search option.

16) Integration of the Internet and Web 2.0 features into modern television sets and set-top boxes, as well as the technological convergence between computers and these television sets/set-top boxes. Also referred to as “over the top TV” or HbbTV (Hybrid Broadcast Broadband TV).

2. Principal purpose

According to Recital 22 of the AVMS Directive a service containing audiovisual content which is merely incidental to the service is not an audiovisual media service because its principal purpose is not considered to be the provision of programmes. The recital mentions as examples of such “supplementary” audiovisual services websites which contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. Therefore games of chance, including lotteries, betting and other forms of gambling services, as well as online games and search engines should also be excluded from the scope of this Directive.

In practice websites consist of both text and video parts which – due to their different nature – are difficult to quantify and compare. When assessing the principal purpose it is crucial that the videos offered are not supplementary to another service. The audience must be able to use the on-demand audiovisual media service in an autonomous way, independently from any other (text-based) services. Therefore, and in line with the Explanatory Note to the Implementation Act, the CvdM will take into account the functionality and presentation of a service and its ratio compared to the rest of the website or other services. The main question to address here is: how will the service be used and perceived by the audience?

If an on-demand audiovisual media service is included in a wider range of services provided by one website, the video service will be treated as a stand-alone service if it can be clearly distinguished from the rest. In order to be able to distinguish between the different services, here again the CvdM will pay attention to function and presentation. Hence the principal purpose of the stand-alone video service and not of the whole website or further activities will be relevant and decisive. This is especially important in case the audiovisual media service provider offers many other services which are very different from audiovisual media services. For instance: if an insurance company were to offer a sports channel on the Internet, its audiovisual services would always be outweighed by its core business activities. Nevertheless, it is likely that the principal purpose of its video channel would be providing programmes and not (solely) selling insurances.

3. Editorial responsibility

The concept of editorial responsibility, as defined in Article 1, paragraph 1, under c, of the AVMS Directive, consists of two important components: effective control over both the selection of programmes and its organisation in either a schedule (in case of TV broadcasting) or in a catalogue (in case of on-demand audiovisual media services).

The assumption that both activities are exercised by one and the same entity does not always apply. The situation in practice often differs a lot and the person or organisation responsible for the selection of programmes is not always in charge as well of the organisation of these programmes. When it comes to organisation of video content in a catalogue, platform operators like cable companies, IP TV operators and EPG providers often have a role to play as well. And due to the arrival and further development of connected TV services this situation is expected to occur more often in future. In case different service providers are responsible for selection and organisation of programmes, respectively, the CvdM intends to consider decisive the control over the choice of the videos. In most cases, this media service provider will also be in the position to put an end to situations which are not in line with most AVMS Directive provisions. Therefore, it makes more sense to address such a media service provider with regulation and supervision.

4. Mass medium

The AVMS Directive contains several references¹⁷ to the mass media character of an audiovisual media service. An audiovisual media service should be intended for reception by, and have a clear impact on, a significant part of the general public and its function should be informing, entertaining and educating.

17) Article 1, paragraph 1, under a (i); Recitals 21 and 22 AVMS Directive.

It is clearly stated in Recital 22 that any form of private correspondence like email should be left out of the definition of audiovisual media services. The example of email seems rather unnecessary since email will normally lack an audiovisual character and therefore will not qualify as an audiovisual media service anyway. Video chat communication will usually fall outside this regulation as well.

Apart from excluding private communication from the scope of audiovisual media services, the reference to mass media is not really a distinguishing criterion. This is especially the case when it comes to audiovisual media services on the Internet which usually can be received by a large audience. The intention of the media service provider to serve a large audience, being a rather subjective criterion, is hard to assess. Furthermore, the impact on the audience is almost impossible to measure because – due to their on-demand character – services are not consumed at the same time by all viewers and therefore reach and impact cumulate (only) over time. The CvdM intends not to consider as a mass medium an audiovisual media service whose viewers can be identified as a unique group, for instance because they are localized in a specific area, which is usually the case for narrow casting.¹⁸ Also a media service of specific interest for a certain local community like a video feed provided by a local church or non-professional sports association will probably not qualify as an (on-demand or linear) audiovisual media service due to its clearly local nature.

5. Economic service

In the definition of an audiovisual media service laid down in Article 1, paragraph 1, under a (1) of the AVMS Directive, reference is made to Articles 56 and 57 of the Treaty on the Functioning of the European Union. According to Article 57 of the Treaty, services are only governed by EU regulation as long as they are normally provided for remuneration.

Since more and more web-based services, even those offered by private persons, contain advertisements, sponsorship or similar commercial references through for instance easily accessible applications as AdSense,¹⁹ it seems the criterion “economic service” provides only little opportunities to limit the scope of the regulation. A possible solution could be the introduction of a threshold in terms of revenue or turnover like Italy has opted for. There is, however, a risk that such an approach would be considered as a (potentially) discriminatory measure since large service providers would be faced with regulation and supervision while smaller service providers of a similar service would fall outside the scope completely. Also, it might be very difficult to isolate the revenues of a video service on a website as an autonomous source of income.

In its draft policy guidelines, the CvdM suggests that audiovisual services offered by private persons will not be considered as an economic service unless they are offered for payment or are of a clear commercial nature.

6. Possible consequences for services in practice

In the period prior to establishing the policy guidelines the CvdM has identified the following main categories of (potential) on-demand audiovisual media services, some of which also drew special attention during the (pre) consultations:

- Catch-up-TV services;
- Online video stores;
- Newspaper and magazine video sites;
- Aggregator sites;
- Video hosting sites.

It is interesting to see if and to what extent they will qualify as on-demand audiovisual media services and be subject to media regulation.

18) For instance, broadcasts on screens located in shopping malls, public transport stations and vehicles.

19) AdSense is an ad serving application run by Google Inc.: website owners can participate in this programme to enable text, image, and video advertisements on their websites.

6.1. Catch-up-TV services

The least questions and doubts are raised in the field of so-called “catch-up-TV” services. Usually, all classification criteria are met by these services. Some conclude from this that traditional broadcasters will fall sooner within the scope of regulation than new service providers. The key goal is anyway to treat similar services in an equal manner – regardless of the background of the service provider – in order to achieve a level-playing field.

6.2. Online video stores

Online video (rental) stores will usually also qualify as an on-demand audiovisual media service. Some might find this strange since regular video stores are usually not governed by TV regulation, but in the case of their online equivalents it is not unreasonable that they should be covered by the regulation of audiovisual media services. They will usually meet all classification criteria and one cannot deny they will usually compete for the same audience as regular VOD services offered by traditional broadcasters or cable operators.

6.3. Newspaper and magazine video sites

More interpretation difficulties could occur in the area of newspaper and magazine video sites. Not surprisingly, representatives of the publishing sector tend to be in favour of excluding from the scope of regulation all online offers of newspapers. According to them this follows from Recital 28 of the AVMS Directive which excludes electronic versions of newspapers and magazines from the scope of the Directive. Also because traditionally newspapers and magazines have been less heavily regulated than TV broadcasting some member states might opt for excluding all audiovisual services of newspapers from the scope of regulation.

The CvdM, however, intends to classify a stand-alone video service of a newspaper or a magazine as an on-demand audiovisual media service if it meets all criteria of the definition. In order to be able to assess the autonomous character of a video service, features like functionality and presentation of the service will be taken into account. The main question to address here is whether the service can be used and perceived by the user as a stand-alone video service. Hence the videos should not be only supplementary to written articles. This means the consumer should be able to watch and understand these videos without having to read the written articles on the newspaper’s or magazine’s website.

6.4. Aggregator sites

Another category identified by the CvdM consists of the so-called “aggregator websites”. Usually these sites consist of a collection of catch-up-TV services provided by other media service providers, usually broadcasters. Often the videos are classified and searchable in different categories and usually they are offered by embedded techniques.²⁰ As a consequence the videos will no longer be available on the aggregator site as soon as the original website stops publishing them. So although the presentation component of “editorial responsibility” lies with the aggregator site, this is not the case for the selection of content. Hence the aggregator does not take full editorial responsibility and cannot be regarded as a media service provider.

6.5. Video hosting sites

According to Recital 21 AVMS Directive, 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 are excluded from the definition of audiovisual media services.

Because in most cases the individual user and not the platform provider has effective influence over the selection of video content, YouTube, Vimeo, MyVideo, Live Leak, Daily Motion, Metacafe and many other video hosting and exchange websites cannot be regarded as media service providers in the sense of

20) Technique which enables a user to integrate on his website videos or other content from third parties, usually by adding customized code to the html code of his/her website.

the AVMS Directive. Although they can remove content for different reasons,²¹ it is the user who decides what content to publish online and share with others. This raises the question whether these individual users can be regarded as media service providers. Usually the answer to that question will be negative since there is no catalogue present or because the service cannot be regarded as an economic service.

Channels of professional parties on YouTube and other platforms, consisting of large video catalogues and accompanied by commercials and ads, however could qualify as on-demand audiovisual media services. In some cases YouTube itself could even be considered as an audiovisual media service provider. There is a clear trend towards more influence on selection of video content by YouTube, since the company seeks more and more partnerships with professional content providers like audiovisual producers and film distributors.²² A huge challenge for regulatory authorities occurs here: where will video hosting and exchange sites or channels operating within these platforms cross the line and turn into an audiovisual media service provider?

IV. Summary

As usual, the Netherlands have opted for a stricter and more detailed regime for public media services as far as online and other audiovisual media activities are concerned. Generally speaking, all audiovisual media content which fits into the public media task will be regulated as much as possible in the same way as traditional TV services. As a consequence also advertising on websites of public media services which cannot be regarded as on-demand audiovisual media services will be subject to regulation and supervision. In order to clarify how and to what extent the regular advertising rules of the Media Act 2008 will be applied the CvdM has established policy guidelines.

For commercial media services a principally different regime applies. Online and other new media activities will only be regulated by the Media Act 2008 as long as they qualify as on-demand or even linear audiovisual media services. Hence websites and other services that cannot be regarded as (on-demand) media services are excluded from regulation and are not caught by the legal requirement to register with the CvdM. The Media Act 2008 by which the AVMS Directive has been implemented since the end of 2009 closely follows the wording of the Directive's articles and recitals.

After consultation of stakeholders the CvdM is currently in the stage of finalising policy guidelines for the classification of on-demand commercial media services. In these policy guidelines the CvdM further clarifies and elaborates when a service of a commercial media service provider can be qualified as an on-demand audiovisual media service. Due to their broad meaning, the criteria of "mass medium" and "economic service" do not grant many opportunities to exclude services from regulation. This is different, however, for the interpretation of terms like "video", "catalogue", "principal purpose" and "editorial responsibility", which are defined in more detail in the draft policy guidelines.

One of the big issues will be how to deal with situations where different service providers are responsible for different aspects of the selection and organisation of content. Video hosting and exchange platforms and services like YouTube and many others constitute a special challenge. There is a clear trend towards video content offered within such platforms becoming increasingly professional and in certain cases potentially falling under the editorial responsibility of channel owners or YouTube or similar platform providers. Taking into account that the potential number of services that might need to be supervised can be immense, regulatory authorities have a legitimate interest in clear and certainly not too wide definitions.

Last but not least: the main challenge for national legislators and regulatory authorities is to keep pace with the rapid technical developments. Definitions and classifications can easily be out of date already before being adopted due to new trends and techniques occurring. In that respect the implementation process of the AVMS Directive can turn out to be a permanent lesson in aiming at a moving target.

21) YouTube generally removes videos for one of the following three reasons: (i) terms-of-service violation (for instance because of nudity or gratuitous violence in the video), (ii) content ID match and (iii) DMCA takedown notice.

22) On 10 May 2011 Google announced that its video service YouTube is adding 3 000 new movie titles available to rent and view on-demand to users in the United States. YouTube has partnered with Universal, Sony Pictures and Warner Bros. This brings the total number of movies available to stream on the video platform to around 6 000.

Germany: Selected Aspects of Commercial Communications Regulation as regards On-demand Audiovisual Services

Alexander Scheuer*
Institute of European Media Law (EMR)

This article presents the regulatory approaches followed in Germany in respect of commercial communications in on-demand audiovisual services. The first chapter is dedicated to an overview of the applicable legislation and regulation (including codes of conduct), the relevant authorities and co- and/or self-regulatory institutions, as well as the procedures applied by these. This general overview is followed, in the second chapter, by a presentation of examples that illustrate in particular (i) what on-demand services are caught by what legislation/regulation; and (ii) the authority and/or co-/self-regulatory body that are responsible for implementing the relevant provisions. An analysis of the different approaches (traditional versus self-/co-regulation) as well as some concluding remarks form chapter three.

It is essentially argued, that the choices made by the German legislator do not necessarily result in a fully consistent scheme. It rather seems that traditional state regulation is used to implement a certain public policy objective for one specific kind of service, while co-regulation pursues the same objective in relation to another kind of service. Most likely the underlying motivation lies outside of the logic of the respective regulatory objectives and finds its explanation in regulatory culture and tradition.

I. Applicable legislation and regulation, competent authorities and co-/self-regulatory bodies, and related procedures

1. The split competence for legislating on-demand audiovisual services

In Germany, on the one hand, the *Länder* (the 16 individual states) are vested with the competence to legislate on media services (and goods like printed press). This includes some power to legislate on commercial communications. Concerning broadcast media (TV and radio) and so-called “*Telemedien*” (telemedia services, see below 1.1), the *Länder* adopted relevant rules in the *Rundfunkstaatsvertrag* (Interstate Treaty on Broadcasting – RStV)¹ and, as far as aspects of advertising, sponsorship and teleshopping might have an impact on the protection of minors, in the *Jugendmedienschutz-Staatsvertrag* (Interstate Treaty on the Protection of Minors – JMStV).²

On the other hand, it is up to the *Bund* (the Federal level) to adopt legislation on economic activities, which also include commercial communications. As far as commercial communications in

* Alexander Scheuer, Attorney-at-law, General Manager and Member of the Executive Board of the Institute of European Media Law (EMR), Saarbrücken/Brussels.

1) An unofficial translation into English is available at:
http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/13._RStV-englisch.pdf

2) An unofficial translation into English is available at:
http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/_JMStV_Stand_13_RStV_mit_Titel_english.pdf

Telemedien are concerned, the *Telemediengesetz* (Act on Telemedia Services – TMG),³ the Preliminary Act on Tobacco, the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG) and other acts (such as on – advertising for – medicines, medical treatment and food) contain relevant provisions.

The TMG, the RStV and the JMStV transpose the 2000 eCommerce Directive as well as the Audiovisual Media Services Directive (AVMSD). Parts of the latter are also transposed by the Preliminary Act on Tobacco.

1.1. Legal concepts of different telemedia services

More specifically, the *Rundfunkstaatsvertrag* (concluded by the German States) regulates different kinds of telemedia services. Telemedia services are information and communication services that are aimed at reception by the general public. Among these we find the equivalent to what the AVMSD defines as non-linear audiovisual media services (sec. 58 para. 3 s. 1 RStV), but also those which have (at least some) journalistic-editorial “appeal” (sec. 55 para. 2 RStV) and, finally, the “simple” telemedia (sec. 55 para. 1 RStV). Regarding the latter two categories, the notion of telemedia goes thus beyond the definition of non-linear audiovisual media services, which reflects the fact that the two governing acts, the RStV as well as the TMG, transpose not only the AVMSD but also the eCommerce Directive.

Following the well-established approach of “*abgestufte Regulierungsdichte*” (graduated intensity of regulation), a stricter set of rules applies to television-like *Telemedien* services, particularly if accessible on a pay-per-view basis (sec. 58 para. 3 s. 2 RStV), whereas “simple” telemedia services – at the other end of the spectrum – are only subjected to a minimum of rules.⁴

The (Federal) Act on Telemedia Services applies to all kinds of information and communication services, except for telecommunications (based) services and broadcasting. It stipulates some basic rules regarding commercial communications in *Telemedien* (sec. 6 TMG).

1.2. Implementation of rules by the competent authorities at state level

In principle, implementation of the law is a matter for the administration (and judiciary) of the *Länder*. Therefore the individual states generally decide which authority is competent for monitoring and enforcement. It is important to note that in Germany the responsibility for supervising the services offered by broadcasters is divided. Supervision is done “internally” by the competent bodies for public service broadcasters, on the one hand,⁵ whereas the *Landesmedienanstalten* (the regional media supervisory authorities) control commercial providers (at least) in respect of broadcasting, on the other hand.

The *Kommission für Zulassung und Aufsicht* (Commission for licensing and monitoring – ZAK) is the joint body of the *Landesmedienanstalten* that generally supervises the commercial communication practices of commercial *broadcasters* (sec. 35 para. 2 no. 1 RStV). In case of alleged infringements of provisions on commercial communications, the *Beauftragte für Programm und Werbung* (Commissioner for Programme Affairs and Advertising), acting on behalf of the ZAK, prepares decisions. The proceedings may be launched either following complaints brought to the attention of the *Landesmedienanstalten* or be based on their own monitoring activities. Decisions of the ZAK are taken by a majority vote of its statutory members (14); these decisions have to provide factual and legal grounds and must be

3) A former version of the TMG has been translated into English for information purposes by the Center for German Legal Information, Berlin, and is available at:

http://www.cgerli.org/fileadmin/user_upload/interne_Dokumente/Legislation/Telemedia_Act_TMA_.pdf

4) It should be noted that the RStV introduces regulation also for so-called *Plattformen* (platforms). A provider of a platform is defined as a person who – using digital(ised) capacities – either bundles (also third-party) broadcasting as well as telemedia services similar to broadcasting or who takes the decision of what kind of services are made available in a package (sec. 2 para. 2 no. 13). Exceptions to some of the applicable rules are foreseen *inter alia* (i) for platforms in open networks (Internet, UMTS and alike) where the provider lacks a dominant position in the relevant market, and (ii) for platforms which limit themselves to mere conduit (sec. 52 para. 1 s. 2 nos. 1 and 2). Interestingly, the prohibition to alter the content or technical aspects of broadcasts or the content of telemedia services comparable to broadcasting, the ban on including single programmes or other content in packages as well as the prohibition to otherwise market the programmes (with or without payment), without the consent of the broadcaster, are applicable to any platform.

5) In the following, regulation of on-demand audiovisual media services offered by public service broadcasters shall not be elaborated upon; see for some of the relevant aspects in this regard: Christian M. Bron, Financing and supervision of public service broadcasting, in: EAO (ed.), *Public Service Media: Money for Content*, IRIS plus 2010-4, at IV.1. (p. 19).

implemented by the competent *Landesmedienanstalt* (sec. 35 para. 9 RStV). The RStV lacks specific provisions as to which body is to supervise compliance with rules on commercial communications in *telemedia services*. Nevertheless, in the majority of German States, this task is entrusted to the state media authority of the individual *Land*.⁶

Where a media authority is competent to monitor and enforce compliance, the competent body/ies as well as the relevant procedure are governed by individual sector-specific and/or general legislation of the respective *Land/Länder*⁷ and by the (Federal) Act on Administrative Offences. Sanctions available comprise such measures as reprimands (combined with an order to terminate existing and abstain from future infringement), publication of the decision by the provider, and financial penalties (possibly including a recovery of gains obtained through the misdemeanour).⁸ Enforcement has to be left to the competent prosecutor's office if the infringement constitutes at the same time a criminal act.

1.3. General, i.e. not media-specific, legislation on commercial communications

In addition to media-specific legislation, in particular the UWG will be applicable (*cf.* sec. 6 para. 3 TMG). It regulates unfair and misleading business practices (transposing *inter alia* the 2005 UCP Directive⁹). It contains a definition of "codes of conduct" and declares as misleading the practice whereby someone asserts compliance with a certain code when this is actually not the case (sec. 5 para. 1 no. 6 UWG). One of the examples given for an unfair commercial practice is to disguise the advertising character of a commercial practice (sec. 4 no. 3 UWG). Furthermore, as in the UCP Directive, the UWG lists in an annex activities which are in any event regarded as unfair. Among these practices are: (i) falsely claiming to have signed a code of conduct (no. 1); (ii) an undertaking's sponsoring of the use of editorial contents for marketing purposes, if this connection does not become perfectly clear from the content itself or the way it is visually or acoustically presented ("advertising disguised as information", no. 11); (iii) directly exhorting minors to purchase the advertised good or service or to make their parents or other adults do this (no. 28).

A court would adjudicate alleged infringements either with a view to these prohibitions or according to the general clauses of the UWG because a market behaviour is unfair, misleading or unacceptably intrusive (sec. 3, 5 or 7). The court will order the undertaking to cease the infringing practice. Should there be a risk of repetition, the court would issue an injunction (a cease-and-desist order, which one may also obtain *ex ante*). In addition, the court may award damages as well as repayment of potential gains. In principle, the parties entitled to a claim against the infringer (e. g. competitors, associations whose aim is to secure fair competition, other associations with a privileged status such as consumer protection institutions) should first seek to obtain an affirmation of abstention from the alleged infringer before initiating court proceedings.

In the first place, the stipulations of the UWG on codes of conduct are important, because such codes are central instruments for co- and/or self-regulation. In the second place, the UWG matters because it contains prohibitions of certain commercial practices which have a general bearing for a number of on-demand services. It is particularly relevant, where German law does not classify an on-demand service as a non-linear audiovisual media service in the meaning of its rules transposing the AVMSD, and thus the service would not have to observe the related stricter set of rules. In practice, however, the equivalent UWG provisions apply. For instance, one may argue that the general prohibition to disguise the advertising character of a commercial practice (sec. 4 no. 3 UWG), and even more the specific prohibition on advertising disguised as information (no. 11 of the Annex to the UWG) may have the same effect as the prohibitions on surreptitious advertising and the requirement to identify sponsorship as well as product placement in German media law.

6) According to the *Telemendezuständigkeitsgesetz Nordrhein-Westfalen* (Act of the State Northrhine-Westphalia on the competence as regards telemedia services) it is exceptionally not the media regulatory authority, but another state authority. The Act is available in German at:

https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=2&gld_nr=2&ugl_nr=2251&bes_id=10245&aufgehoben=N&menu=1&sg=

7) In two cases, two states (Berlin and Brandenburg; Hamburg and Schleswig-Holstein) have respectively set up a joint media authority (mabb and MA-HSH, respectively).

8) *Cf.* <http://merlin.obs.coe.int/iris/1997/7/article17.de.html>

9) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), OJ L 149, 11 June 2005, p.22-39.

Relevant rules			
General	"Product"-specific	Sector-specific (Electronic Media)	
<u>all means of (commercial) communication</u> (in the case of product-specific rules partly depending on the interpretation of the scope of the term "advertising" ("Werbung"))		<u>general telemedia</u>	<u>specific telemedia</u> (potential impact on formation of opinion of the individual or the general public)
<i>UWG</i> (Unfair Competition Act) – General Code of Conduct of <i>ZAW/Werberat</i>	Preliminary Tobacco Act – Code of Conduct of the Cigarettes Industry Act on Advertising for Health Care Products – Code of Conduct Statute Book on Food and Feed – Code of Conduct for Food Advertising of <i>ZAW/Werberat</i>	<i>TMG</i> (Telemedia Services Act)	<i>RStV</i> (Interstate Treaty on Broadcasting) – Code of Conduct for Food Advertising of <i>ZAW/Werberat</i> Joint Guidelines of Media Authorities on Commercial Communications on TV – Code of Conduct for Alcoholic Beverages Advertising of <i>ZAW/Werberat</i> – Code of Conduct on Product Placement (still to be adopted)
	Interstate Treaty on Games of Chance		Joint Statute of Media Authorities on Prize Games and Related Programmes
	<i>JuSchG</i> (Federal Act on the Protection of Minors)	<i>JMStV</i> (Interstate Treaty on the Protection of Minors) – General Code of Conduct of FSM [– Code of Conduct on advertising with and for children on radio and TV of <i>ZAW/Werberat</i>]	

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Services		Control of compliance
On-demand Services		Body
<u>outside of "media" regulation</u>	<u>inside of "media" regulation</u> (because of the potential impact on formation of opinion of the individual or the general public)	(as the case may be: at the same time or consecutively)
<u>telemedia service</u>	<p>simple <i>telemedia</i> service</p> <p>telemedia service with journalistic-editorial "appeal" (i.e. particularly "electronic press")</p>	<p>courts (civil/criminal)</p> <p>media authorities</p> <p>other State authorities</p> <p>self-regulatory bodies, e.g. <i>FSM ZAW</i></p> <p><i>Wettbewerbszentrale</i></p> <p><i>Verein für lautere Heilmittelwerbung</i> (Association for loyal marketing of medicinal products)</p> <p>Self-control of cigarettes industry</p>
	<p>general on-demand media service aimed at general public</p> <p>TV-like VOD service</p> <p>TV-like (NVOD) service on pay-per-item basis for access to individual programme</p>	

services" (word of caution: table does not necessarily show correlations or hierarchy!)

2. Co- and/or self-regulation in the area of commercial communications

German media law provides for different links to self-regulation. Depending on the concrete legislative arrangement by which this link is construed, it might even be a form of co-regulation.

In particular, this is the case for commercial communications on TV concerning alcoholic beverages, where the Joint Guidelines of the German Media Authorities on Advertising, Product Placement, Sponsorship and Teleshopping on Television of February 2010 (no. 2 para. 4) refer to the relevant guideline of the *Zentralverband der Deutschen Werbewirtschaft* (the Lead Association of the German Advertising Industry – ZAW) and the *Deutscher Werberat* (*Werberat*, German Advertising Council). The Joint Guidelines also refer to the code of conduct on product placement (still to be) adopted jointly by the broadcasters, the associations of the advertising industries and the producers (no. 4 para. 11). Implementation of the JMStV has become a matter for co-regulation insofar as the competent body of the *Landesmedienanstalten*, the KJM, has certified a self-regulatory institution for the protection of minors, subject to the fulfilment of several conditions (see below 2.2). This institution assumes the primary responsibility for (monitoring and) enforcement.

As for food advertising, the explanatory memorandum ("*Begründung*") to the 13th Interstate Treaty amending the Interstate Treaty on Broadcasting, which came into effect in April 2010, contains a reference to the guideline on commercial communications for food issued by the ZAW and last amended in 2009. As laid out in a press release of March 2011, the ZAK welcomes the increasingly positive appraisal, by respective providers, of self-regulatory means in the electronic distance-selling sector. It encouraged the *Landesmedienanstalten*, who have issued licences to teleshopping programme operators, to suggest to the licensees (TV broadcasters) to affiliate with the Electronic Retailing Association Europe (ERA).

2.1. Commercial communications and the protection of consumers in general

There is a long-standing tradition of self-regulation for matters of commercial communication in Germany. The main institution for adopting and implementing respective standards is the *Werberat* which in its turn is a body of the ZAW. The ZAW is composed of associations from the following four sectors: (i) industries which commission advertising; (ii) undertakings which carry out commercial communication campaigns (print and electronic media, outdoor marketing) and produce relevant material (flyers, posters, trailers); (iii) media agencies; and (iv) advertising professionals and research institutions. The Board of Directors of the ZAW (*Präsidium*) elects ten persons from among the representatives of its member associations; they form the *Werberat*, which may decide to assign further experts to the institution. The *Werberat* drafts self-regulatory standards which are finally adopted by the *Präsidialrat* of the ZAW (the member organisations' general assembly); it has issued several codes of conduct, *inter alia* on advertising for alcoholic beverages, and guidelines on commercial communications for food.

According to its rules of procedure, the *Werberat* initiates proceedings *ex officio* or on the basis of complaints received (free-of-charge); it may forward a complaint – provided that the complaint is not manifestly ill-founded – to other specialised bodies, such as the *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (Centre against unfair competition), or to the State Prosecutor's Office if it finds that a clear infringement on legal norms is at hand. It will forward a complaint to the *Verein für lautere Heilmittelwerbung* (Association for loyal marketing of medicinal products) in the case of related commercial communications, or to the *Selbstkontrolle der Zigarettenindustrie* (self-control of the cigarettes industry) if the complaint deals with a matter relevant to that body.

A complaint procedure encompasses the following steps:

- Upon receipt of a complaint the undertaking on whose behalf the commercial communication was effectuated and/or the media agency responsible for it will be given the opportunity to comment.
- Should the advertiser concerned declare that he will either modify the campaign accordingly or terminate it altogether, the procedure will be closed; in specific cases the *Werberat* may still adopt a decision on the merits of the case.
- Should the advertiser not (fully) accommodate the complaint or not react at all, the *Werberat* will take its decision following a written procedure. If the case is of significant importance, it will decide after discussing the complaint in a full plenary; decisions require the simple majority of the members voting on the matter.

- If the *Werberat* upholds the complaint and issues a reprimand, the undertaking will be asked to declare whether it will adapt the campaign or if alternatively the campaign will be stopped.
- Should the undertaking not be willing to implement the decision of the *Werberat* or should it not react at all, the *Werberat* may make the finding public.
- Where deemed appropriate, the *Werberat* will in parallel inform the media that launched the campaign about the (state of the) procedure as well as its outcome.

The *Werberat* does not provide for copy-advice assistance procedures, *i.e.* ex-ante assessment of planned marketing measures.¹⁰

2.2. Commercial communications and the protection of minors

The JMStV regulates advertising, teleshopping and sponsorship in (broadcasting as well as) telemedia services in respect of the protection of minors. These commercial communications must not be detrimental to the physical and moral development of minors as further specified by the JMStV (sec. 6 para. 2). The *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter* (Voluntary Self-Monitoring of Multimedia Providers – FSM) has been accredited in 2005; its membership is composed of associations and enterprises from the online (media and ISP) sector. The FSM's general code of conduct *inter alia* obliges its affiliated members (providers) to respect the stipulations of sec. 6 JMStV.

In order for a provider to become a member of the FSM the provider's services must comply with the relevant statute and codes. A special committee of the FSM will normally check beforehand whether or not this is the case. Hence, the system aims to reduce the potential for non-compliance in the first place.

A telemedia service provider, who is a member of the FSM, may not be prosecuted for infringement of the provisions of the JMStV if two conditions are met: (i) the self-regulatory body conducts ex-post-factum an assessment of the measure in question and finds no violation of the rules, and (ii) this decision does not disrespect the legal discretion of which the institution disposes for its findings (sec. 20 para. 5 JMStV). Either the KJM thus "activates" the FSM and thereby initiates a case, or the FSM acts upon complaints, which is more common.

The FSM Complaint Office handles complaints according to its own rules of procedure:

- It will investigate all aspects of the case at hand and will give the respondent the chance to present its point of view within a certain period of time;
- the respondent will also be given the opportunity to take corrective actions.
- If the provider does not alter the contents of its disputed offer, a case-handler furthers the complaint to the independent Board of Complaints for arbitration.
- The board shall aim to reach, at every stage of the proceeding, an amicable settlement between the complainant and the respondent. If this proves impossible, the board may implement specific measures.
- Depending on the gravity of the violation, sanctions range from issuing advice and requesting corrective actions, to reprimands and, finally, an association internal penalty (financial penalty or exclusion from membership).
- The decision is published (naming the company) for reprimands, financial penalties or exclusions from the association. A reprimand must also be published for one month on the website of the provider concerned.
- Should the decision relate to a content service and should the provider of that service ignore the decision, the FSM may notify the host provider and request it to take-down the offer or deny access to it. If the content service provider in question does not take corrective action or disregards sanctions continuously, it can be excluded from membership in the FSM.¹¹

10) For more information on the above see in particular: <http://www.werberat.de/content/Keyfacts.php>

11) This description is based on, and more information is available at: <http://www.fsm.de/en/>

II. Examples of commercial communications' regulation in respect of different on-demand audiovisual services

The examples of commercial communications regulation, as presented hereinafter, were selected according to the following considerations:

Firstly, they shall illustrate the kind of rules addressing telemedia services that qualify as on-demand audiovisual media services under the AVMSD, on the one hand, and the kind of rules applying to telemedia services which are audiovisual, but still not fulfilling (all of) the requirements of the AVMSD, on the other hand.

Secondly, when choosing from the different areas of commercial communications regulation, the examples had to reflect topical scenarios that explain the implementation of the "graduated approach". The selected cases deal with the protection of minors, alcoholic beverages, and food.

Thirdly, the examples shall serve to explain why a particular regulatory tool was chosen. They therefore illustrate where Germany opted for a combination of traditional state regulation and self-regulation (i.e. co-regulation), where self-regulation (merely) complements traditional regulation, and finally where commercial communications are subjected either to state regulation or alternatively self-regulation.

1. The protection of minors in commercial communications

1.1. Rules applicable to all kinds of on-demand audiovisual services

The German law transposed Article 9(1)(g) AVMSD in a way that its stipulations apply to all kinds of telemedia services (see sec. 6 para. 2 JMStV). In addition, the JMStV requires to keep separate commercial communications containing content that might impair the physical, mental or moral development of minors, from other contents directed at them (sec. 6 para. 3 JMStV).

In the first place, the implementation of this set of rules is a task for the co-regulatory system which comprises as actors the self-regulatory body FSM and the body acting for the *Landesmedienanstalten*, KJM. There might be some role for self-regulatory approaches (in the future): the *Werberat* might become a responsible body if the scope of application of the existing guidelines on the protection of minors will be extended to also cover online media.¹²

1.2. Rules applicable to on-demand audiovisual media services

For telemedia services which fulfil the definition of a non-linear service in the AVMSD, aside from the above mentioned rules a number of additional provisions have to be respected. For instance, concerning children's programmes neither (real) product placement nor production props of a significant value are allowed (sec. 7, 15, 44 RStV), and showing a sponsor logo is prohibited (sec. 8, 58 para. 3 s. 1 and 2 RStV). Furthermore, if the on-demand audiovisual media service is made accessible against remuneration for the individual programme (pay-per-view), children's programmes may not be interrupted by advertising or teleshopping spots (sec. 7a, 58 para. 3 s. 2 RStV).

Depending on the legal situation in the state which has jurisdiction over the service provider, the media authority or another designated authority can enforce these additional rules. Again, it might be questioned whether – on a complementary footing – the *Werberat* might in the future also assume responsibility for implementing its code which to date (only) covers radio and television services. It should be noted, however, that such a future development towards a complementary self-regulatory control is, if at all, only likely with regard to the provisions applicable to all telemedia services as described *supra* (1.1) (and not for telemedia services equalling audiovisual *media* services).

12) Cf. "Codes of Conduct", The German Advertising Standards Council and the Complaint Procedure Relating to Online Advertising (as of 1997), documented (in German) in: *Deutscher Werberat* (ed.), *Jahrbuch* 2011, page 65.

2. Commercial communications for alcoholic beverages

2.1. Rules applicable to all kinds of on-demand audiovisual services

In general terms, commercial communication for alcoholic beverages must neither be specifically directed at minors nor have a special appeal for them through the way in which it is presented nor portray minors consuming alcohol (sec. 6 para. 5 JMStV). The related Code of Conduct of ZAW/*Werberat* contains much more detailed provisions which deal with abusive consumption, minors, the portrayal of professional sportsmen, safety, disease-related statements, the level of alcoholic content, fear, disinhibition and conflictual situations, physical performance and social or sexual success, and the age of portrayed persons.

Again, implementation of the first set of rules would be the task of the co-regulators, which are the self-regulatory body FSM and the body acting on behalf of the *Landesmedienanstalten*, the KJM. It appears that in practice, however, the higher degree of detail of the self-agreed rules by the ZAW/*Werberat* points to a greater likelihood that enforcement will be assured by this latter body.

2.2. Rules applicable to on-demand audiovisual media services

In the case of TV-like on-demand services, the additional statutory prohibition to promote excessive consumption of alcoholic beverages in advertising, teleshopping and sponsorship (sec. 58 para. 3 s. 1 and 2, sec. 7 para. 10 RStV) must be respected; however, whether this applies to product placement too, is doubtful.

Whereas in the case of television broadcasting the rules mentioned above would be implemented by a system of co-regulation (*cf. supra* at I. 2.), in the case of on-demand services the enforcement of the statutory prohibition mentioned in the preceding paragraph is primarily a task for the media or other state authority of the *Land* holding jurisdiction over the service provider. As for all other kinds of telemedia services, the application of the ZAW's/*Werberat*'s Code of Conduct is ensured by this self-regulatory body.

3. Commercial communications for food, particularly HFSS

The German law lacks (media-) specific statutory provisions on commercial communications for food. Also the rules contained in the related Code of Conduct of ZAW/*Werberat*, do not distinguish as to the kind of media used, particularly not regarding different on-demand services (i. e. audiovisual services and audiovisual media services). The relevant general provisions prohibit *inter alia* the encouragement of excessive/one-sided consumption and a negative presentation of alimentation that aims at avoidance of high in fat, salt and sugar (HFSS) products. Specifically for commercial communications addressed at children, it is forbidden to single-out any food/beverage as an indispensable part in a full meal. Furthermore, communications shall not be a prejudice to a healthy, active lifestyle and to the adoption of balanced, healthy dietary habits.

Application and enforcement of this code again lies within the competence of the ZAW/*Werberat*; it takes place, thus, in the form of self-regulation.

III. Analysis and conclusion

Firstly, it follows from the examples presented in the previous chapter – (mostly) irrespective of the public policy objective pursued – that a level-playing field between on-demand audiovisual media services (in the meaning of the AVMSD) and other on-demand audiovisual services “only” exists when it comes to the more general stipulations.¹³ In essence, this reflects the “graduated approach”, that is the legal regime that becomes stricter the more closely a certain service relates to television, specifically in terms of the potential impact on the individual and public formation of opinion.

¹³ As seen, in the area of commercial communications for food, particularly HFSS, no distinction is being made in relation to the services offered. Furthermore, this public policy objective is entirely left to self-regulation.

Secondly, where the protection of minors and commercial communications for alcoholic beverages are concerned, the enforcement of the basic rules is open to co- as well as self-regulation. At a closer look, it transpires, on the one hand, that ensuring the protection of minors in commercial communications rather requires co-regulation (through stipulation in the JMStV and application by the accredited self-regulatory institution FSM under the supervision of the KJM). On the other hand, implementation of the general rules on commercial communications for alcoholic beverages, i.e. those which are not dealing with the protection of minors as contained in the JMStV, is mainly a matter for the self-regulatory institution *Werberat*.

In the case of services which would be caught by the AVMSD as non-linear audiovisual media services, the media authorities (or another state authority designated to this effect) are called upon to monitor and apply the stricter rules (and possibly sanctions) that exist for such services. There is limited room for bringing self-regulatory institutions into the enforcement scheme, either because the relevant codes do not apply to telemedia services (yet) or because the legislator/regulator did not opt for a co-regulatory model in this field.

Thirdly, when looking at the example of commercial communications and the protection of minors as one overall public policy objective, we saw that enforcement of part of the applicable provisions (either equivalent to Articles 11(3); 10(4) s. 2; or stricter than Article 20(2) s. 2 AVMSD) vis-à-vis providers of on-demand audiovisual media services in the meaning of the Directive, is the responsibility of the media (or other state) authorities. Another subset of the relevant rules (comparable to Article 9(1)(g) AVMSD) in this area is implemented via a system of co-regulation, irrespective of the kind of service concerned. To date, there is no complementary role assumed by self-regulation in this field, since the existing code of conduct applies exclusively to television (and radio), but not (yet) to on-demand services.

It appears to be somewhat premature to identify the wisdom behind the current distribution of competences, given that the role of self-regulation might still evolve. One logic that seems to apply is, however, that (existence and) enforcement of stricter rules applicable to on-demand services which are TV-like is meant to rest upon a scheme that is well-learned from the “regulatory world” for television services. Still, it does not seem imperative to conclude that there exists an inherent gradation between the provisions on the integration of commercial communications in children’s programmes and those rules aimed at ensuring the protection of minors from the content and manner of presentation of commercial communications. To recall these provisions, in the first case, the legislator opted for a traditional “state” regulation, while in the second case, a system of co-regulation seems to satisfy the implementation needs. It remains obscure whether one can identify a motivation for the choice of different regulatory tools, even though – given the approach of Article 9(2) AVMSD – it may not come as a surprise that protection of minors in the area of commercial communications for “unhealthy food” is regarded to be properly vested in the hands of a purely self-regulatory regime.

Finally, a provider of a non-linear audiovisual media service (a telemedia service which is TV-like, particularly if based on a pay-per-view access to the individual programme) will not only be confronted by a multitude of applicable norms which are spread throughout diverse legislative acts and codes of conduct. If only looking at the issue of protection of minors in commercial communications, it is clear that it will also be faced with a number of different regulators, either state or non-state within a co-regulatory regime. Luckily, perhaps, it seems that – judging from the content of the norms, which will be enforced by either of the institutions – in this case there is no need for high levels of cooperation. Therefore the risk of divergent approaches to interpretation and implementation by the regulatory bodies does not appear very high.

Co- and Self-regulation in the Area of Protection of Minors in the United Kingdom

*Chris Dawes**

Department for Culture, Media and Sport

This article addresses the reach of content regulation of video-on-demand (VOD) services in the United Kingdom (UK), some of the principles legislators and regulators have adopted and some of the challenges faced in particular in relation to those video-on-demand services within the scope of the Audiovisual Media Services (AVMS) Directive and, more broadly, now on the horizon.

The protection of minors is of course central to all media regulation in the UK, but assumes different forms in different media.

Already some other participants of the workshop have reported on some of the ways in which member states have determined which services would fall under which regulatory regime: linear television, video-on-demand and the rest of the World Wide Web.¹

In the UK, the government has very much followed the basic definitions used in the AVMS Directive in the transposition into national law, as described by Mark Cole,² which was achieved by the due date of December 2009.

I. The UK's approach to the regulation of on-demand audiovisual media services

In describing the solutions to regulation the UK has adopted, it is necessary to step back a little. Prior to 2003, it was considered that video or television on-demand services would have fallen within the scope of broadcasting and they were regulated by the then regulator, the Independent Television Commission (ITC); there were some – but few – such services.

Since the legal definition of “broadcasting” in the UK was from 1990, it pre-dated the general availability of the Internet and the UK Government believed that some Internet services also therefore fell accidentally within the definition of broadcasting, though thankfully the ITC did not seek to exercise its responsibilities on the World Wide Web. Given the growth of the Internet, this legal uncertainty could not last, so, in the Communications Act 2003, which also saw the establishment of Ofcom as the regulatory authority for spectrum, telecommunications and the electronic media, ministers sought to draw a clear distinction between traditional broadcast services, which would continue under statutory regulation, and the Internet. The policy aim was to adopt a technologically

* Chris Dawes is the Head of Broadcasting Regulation and Content Policy at the Department for Culture, Media and Sport.

1) See in particular the articles by Marcel Betzel and Roberto Viola in this publication.

2) For detailed information see the article by Mark D. Cole in this publication.

neutral approach, so that services which used Internet Protocols to convey linear broadcast services would remain within statutory regulation, whereas on-demand services, where the viewer is able to choose the time of viewing, should fall outside such regulation, irrespective of whether they were on-demand television (i.e. broadcasters' catch-up services) or other Internet services. The view was that the important criterion was that of viewer choice – if you selected a programme from a catalogue, or indeed any website, you were able to take responsibility for what you watched. Whereas you could flick to broadcast material without knowing what was on. So, for broadcasting, viewers should be able to retain confidence that it would conform to certain broad and generally understood expectations as regards content.

But, naturally, there was some concern that moving the video-on-demand services out of regulation might provide incentives for operators to reduce the levels of protection available. In the UK there is the so-called "headline test": what would the headlines look like if ministers removed VOD regulation and pornographers rushed in with services easily accessible to children? And so, ministers set out their expectation of industry: that statutory regulation would be removed *only* if providers put in place a system of *self*-regulation to provide consumer reassurance, especially in relation to protecting children.

Briefly, the distinction drawn by the UK legislator between self- and co-regulation is that a self-regulatory scheme is one in which participation is voluntary and which is devised by its participants rather than the state (even if there is a threat of legislation). A co-regulatory scheme involves some degree of legal underpinning by the state. There are many variations of both types of scheme and the boundary between the two is sometimes unclear.

The VOD industry responded to government's challenge, but it soon became clear that businesses were not naturals when it came to designing regulatory systems; nor would they naturally co-operate with competitors to do so. The government therefore sketched out some basics which ministers would expect to see: the tasks of the regulator in terms of setting agreed minimum standards – for example for individual PIN protections; the level of independence to aim for; provision of customer information about standards and complaints processes; and some system of appeal. But it did really need one company to be willing to take the lead and this, eventually, led to the original incarnation of ATVOD: the Association for Television On-Demand.

Most of the UK's main providers, for example the then VideoNetworks, British Telecommunications (BT) and Virgin Media, were members. Sky was not.

The UK has a policy bias against statutory regulation if self-regulation can meet the desired objectives. A self-regulatory scheme can do this in particular if there is a reasonable alignment of interests between businesses and their customers. In this case, self-regulation was seen as having the advantage of allowing the industry to establish common standards, at a time when Corporate Social Responsibility was an increasingly important part of the business environment and of the contract between business and customer, and between business and society. Also, self-regulation enables industry to respond flexibly to a rapidly changing technological environment and developing consumer expectations – there is no need to wait for regulatory action or even legislation to meet new challenges, whether technological or changes in cultural, social or political contexts. Industry can act quickly.

Since it was assumed that most on-demand material would already have been shown on television, the likely grounds for complaint seemed few and that would allow the system to operate at a low cost. And indeed the experience of ATVOD was that there were very few complaints.

Of course, the UK already had models of self-regulation, notably the Advertising Standards Authority (ASA) and the Press Complaints Commission (PCC); the British Board of Film Classification (BBFC) is also in part a self-regulatory body, providing a coherent classification system for the benefit both of local authorities who license cinema premises and the film industry, as well as having a statutory function of classifying hard-copy video material (in particular DVDs).

II. The UK's role in the development of the Audiovisual Media Services Directive

That brings me to the Audiovisual Media Services Directive. The UK had been extremely concerned about the Commission's first proposals in 2005. In particular, the then government feared that the Commission plans would extend regulation into a broad range of services, including sites ranging from YouTube to private blogs, that might carry – or benefit in part from – advertising, sponsorship or micropayments, and therefore would fall within the definition of a “service” in the Treaty sense. The government was concerned that the basic tier of protections proposed by the Commission, for example specific rules for the protection of minors or the ban on incitement to hatred on a number of grounds, would effectively have added to the UK's constraints on freedom of expression across a wide range of such sites for no evident good, or proportionate reason of necessity in the UK context. There is a central core in these areas which all member states will have in common, but there will inevitably at the margins be a degree of subsidiarity which properly reflects individual states' history and experience, even though that might on occasion lead to one member state allowing material which another might not. The UK Government does not, for example, find it necessary to ban incitement to hatred on grounds of gender, although of course we do have anti-discrimination laws. We would therefore either have had greatly to extend specific regulation of on-demand services to meet that obligation, or change the general law – but we saw no reason why all these on-demand services should operate to different standards from the rest of society. Neither option was attractive. In particular, we saw a risk of sites moving out of Europe, with no improvement in public protection but the loss of economic and creative opportunities.

The UK's preference was to maintain the already existing self-regulatory system. However, the clear legal advice, confirmed in Working Group discussion and by the Commission Legal Services, was that self-regulation was not a sufficient means for implementation of Directive requirements. A Directive places obligations on member states and member states must therefore be able to ensure compliance and this can be done securely only through implementation of EU law in domestic legislation. The UK Government had hopes of maintaining something close to self-regulation and encouraged the inclusion of a reference to self- and co-regulation (now in Recital 44) and we noted that the advertising self-regulatory body of the UK, the ASA, had been able to retain its role as the “established means” for achieving compliance with the provisions of, in particular, the Unfair Commercial Practices Directive, with the Office of Fair Trading effectively providing the statutory underpinning.

Alas, domestic legal advice was that the nature of the rights and obligations created by the Directive were such that this “established means” approach did not offer a sufficiently robust means of implementation.

III. The establishment of the respective co-/self-regulatory schemes in the UK

1. General

The structure of the system adopted by the UK drew on some other British models. The Regulations implementing the Directive ensure that there is a public body ultimately responsible by placing the obligation to secure compliance with the Regulations on Ofcom. Ofcom is then permitted to designate any body corporate to be the “appropriate regulatory authority” responsible, in whole or part, for doing that job. Ofcom has a role in ensuring that the body or bodies designated are fit and proper, have the necessary resources, are sufficiently independent and meet the principles of good regulation (transparent, accountable, proportionate, consistent and targeted where needed). Other provisions require providers to notify the regulator of the provision of a relevant service and pay a fee to cover the costs of regulation and there are provisions about how that fee is to be arrived at.

2. The Advertising Standards Authority (ASA)

In the UK, Ofcom has designated the ASA to regulate advertising in on-demand services and ATVOD, now converted thereby into a co-regulatory body (and an “Authority” rather than “Association”), to

regulate other content. The ASA is therefore a comprehensive regulatory body for advertising. It is a mature regulator, established in 1962, regulating a mature industry, which sees a business benefit in self-regulation. It combines effectively – and fairly seamlessly from the outside – self- and co-regulatory models. It is responsible for broadcast advertising (contracted out by Ofcom) and non-broadcast advertising and has recently even extended its remit to include promotional activity by companies on their own websites (i.e. not paid-for advertising). The advertising regulatory system is designed to ensure that children, young people and vulnerable groups especially are protected from harmful, misleading or inappropriate advertising and marketing.

3. The Authority for Television On-Demand (ATVOD) and further initiatives

As far as ATVOD is concerned, in the early days there were some teething problems.

First, it should be emphasised that there have been few complaints from the public. However, there have been problems over scope – that is, the question of which services are covered. Some services, especially small ones which had been operating without problems, saw no benefit in being regulated or paying for the privilege – they are services unlikely to benefit from the ability to operate across borders.

And some of those services felt excluded from decisions about the establishment of ATVOD – Ofcom and government simply had not known at the time that they existed.

Similar concerns arose in respect of newspapers. Clearly, there is a point at which a newspaper-branded site could tip over from an electronic version of a newspaper (benefitting from the exception in Recital 28) into a video-on-demand service.³

Secondly, what is a “service”? A TV channel can have different advertisement opt-outs and remain a single service for licensing. When does a video-on-demand service become a separate service?

Then there was debate on the costs. It is a UK Treasury doctrine that regulators must recover their costs from the regulated industries. But there are no common metrics for assessing a fair charge; unlike, say, television audience measures. Even a major provider might operate a service with no profits – even losses – which is perhaps a “loss leader” bundled with other services, or a new service which might grow.

ATVOD has sought to develop low-cost options for smaller operators or charities, starting last year at GBP 150 (approximately EUR 170). But most services were liable for a flat rate of GBP 2 900 (approximately EUR 3 300) per service and that level of fee might risk being a disincentive to developing new services which could increase the diversity and economic benefits of the sector.

For the year 2011-2012, a more granular approach has been achieved. As well as concessionary rates for charities (at GBP 100, or EUR 119), ATVOD has adopted a range of options for fees based on turnover. Besides this, it might be expected that, after the initial tasks of establishing the new system, costs will fall.

However, some have questioned whether this model of co-regulation is optimal or if it has unhelpfully combined the cultures of a statutory regulator – OFCOM – and a self-regulator – ATVOD – leading to the worst of both worlds: duplication, second-guessing, risk aversion.

That is not in any way government’s view, but it adds another variable to the range of issues which naturally arise with a new system and which seem particularly problematical with AVMS where a new boundary of regulated services was being defined in the midst of an explosion of new service propositions.

Turning to the content provisions overseen by ATVOD, these are very much as in the Directive, directly transposed. However, a particular issue has arisen around hard-core pornography – that is,

3) For a practical example on this see the contribution by Erik Valgaeren at 2.1.1

pornography showing real depictions of a range of sex acts. DVDs of such material must be classified by the British Board of Film Classification (BBFC) as R18 and are able to be sold in the UK only in licensed sex shops. Such material is not allowed to be broadcast on linear television. One website was successfully prosecuted in the UK under the Obscene Publications Act for showing as a “teaser”, without the protection of a credit card wall and therefore accessible to children, material at or beyond the stronger end of R18.⁴ Yet there are differing views on whether the provisions of Article 12 of the Directive require such material to be barred for children. Article 12 requires member states to “take all appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see such ... services”.

In respect of other services – for the generality of the Internet, not covered by statutory regulation – the UK Government has established the UK Council for Child Internet Safety. The Executive Board is chaired by ministers and contains representatives of industry, civil society child protection groups, an academic researcher, the Internet Watch Foundation (which maintains the black-list of child abuse sites which Internet Service Providers have agreed to block) and the Child Exploitation and Online Protection Centre (CEOP), the branch of the police which pursues paedophiles. The Council has developed self-regulatory guidance on matters such as moderation, social networking, chat and Instant Messaging and is examining barriers to take-up of parental controls. It is developing an independent monitoring system and working closely with European initiatives.

There are also self-regulatory online classification systems developed by the BBFC for straight-to-Internet films.

IV. Conclusion

This situation will not remain static and gives rise to several questions. Now that there is a system for regulating video-on-demand in place, will there be a case for adding to the rules, whether because they are not deemed sufficiently comprehensive to protect children or because viewers see the distinction between regulation of linear and on-demand television as anomalous, particularly with the development of connected TVs? Many such services are likely to have policies about content and the protection of children for good business reasons – but not necessarily all. It is commonly known that on the Internet many protections are currently dependent on businesses’ policies – what they choose for business reasons to include in Acceptable Use policies, for example, and the extent to which they actively and speedily ensure compliance with such policies.

So is the route chosen in future likely then to be to extend the scope of statutory regulation or to seek to reduce protections to a common minimum and, perhaps, rely more heavily on technical filtering or on new forms of self-regulation, perhaps at an international level and perhaps relying on obligations placed on or assumed by businesses rather than states?

And if there is to be more such self-regulation, will we depend more on initiatives such as the UK’s Good Practice Principles on Audiovisual Content Information?⁵ Or will we want to be more automated, needing a drive to more standardisation of metadata?

For video-on-demand, given the definitional challenges in the Directive and resulting differences in transposition and implementation between member states, will we need to re-visit the AVMS Directive’s scope and, if so, extend it or develop new models with perhaps wider scope and some role for self-regulation, whether at the EU or Council of Europe level?

Finally, in the UK, ministers have announced a new Communications Act to be in place by 2015, so it is certain that all these issues will need to be debated when developing policies for that legislation.

4) R v. Perrin, [2002] EWCA Crim 747 (22nd March, 2002). The decision is available at: <http://www.bailii.org/ew/cases/EWCA/Crim/2002/747.html>

5) <http://www.audiovisualcontent.org/>

The New Audiovisual Media Services Directive and its Addressees: How will the Industry Tackle its New Challenges?

*Lore Leitner and Erik Valgaeren**
Stibbe

With the current evolution of the so-called “Web 2.0”, the delivery of audiovisual content through online video portals is making its conquest. Services like Sky Anytime, BBC iPlayer or Hulu are at the heart of the evolution and are still growing. In view of this, the European Commission decided to adapt its approach and modernised the European framework for content regulation: since 10 March 2010, the European audiovisual media services sector is governed by the new Audiovisual Media Services Directive (or AVMS Directive).¹ However, this regulatory step does not imply that the industry has reached its final milestone. To the contrary, it is just the beginning of the industry weighing the pros and cons and deciding whether to adhere to the new framework.²

In this article, the following will be discussed: (I) the possible hurdles and burdens that the new Directive might impose on the audiovisual media industry; (II) how these can or will be overcome; and (III) which possibilities and opportunities the industry may find for co- and self-regulation.

I. Practical difficulties in applying the current media laws

Even though an online video platform can be launched in no time, this does not mean that devising innovative audiovisual media services is that easy. When launching its service, any audiovisual media service provider will sooner or later confront the legal side of the project which may be very complex. The first part of this section will set out the minefield of practical legal barriers facing providers. Secondly, some specific legal rules and the difficulties that may be encountered when trying to apply them in practice, will be presented.

1. Minefield of practical legal barriers

When launching an audiovisual media service, it is important to be fully informed of all the practical hurdles that will need to be cleared. In this section, a general overview of points of particular interest is provided. These should be borne in mind, and it will be demonstrated that the full picture implies more than what is perceived at first sight.

* Erik Valgaeren is a TMT partner in the Brussels office of Stibbe and is a member of both the Brussels and New York Bar. He presented the topic during a legal workshop at the European Audiovisual Observatory. The article was written in collaboration with Lore Leitner, a TMT associate in the Brussels office and member of the Brussels Bar, and provides a more elaborate overview.

1) Directive 2010/13 EU of the European Parliament and the Council of 10 March 2010 on the coordination of Certain Provisions laid down by Law, Regulation or Administrative Action on Member States concerning the Provision of Audiovisual Media Services.

2) M. Ariño, “Content Regulation and New Media: A Case Study of Online Video Portals”, *Communications & Strategies*, n° 66, 2007, 115.

1.1. Cross-jurisdictional issues and discrepancies

The industry of audiovisual media providers mainly consists of global or multi-country players, especially for business concepts related to online or Internet-accessible media platforms. Often, online video platforms and business models are introduced in many countries which all have specific regulation relating to audiovisual media, even within Europe. This phenomenon has two reasons:

- The European legal audiovisual services framework heavily relies on directives. However, these directives do not imply full harmonisation, but rather provide a large margin for member states to implement them in line with the structure and tradition of the existing national legal framework. This may create substantial discrepancies that must be taken into account when seeking to operate in different jurisdictions.
- In addition, there are some regulations governing audiovisual services that are not harmonised and remain a national concern due to the fact that: (a) the area of expertise has not yet been regulated on a European level, or (b) the subject matter concerns mandatory law. Examples of the latter can mainly be found in national consumer protection regulation relating, for instance, to advertisements for tobacco products, alcohol consumption, etc. Regulations on online gambling services and related advertisements also differ largely between member states.

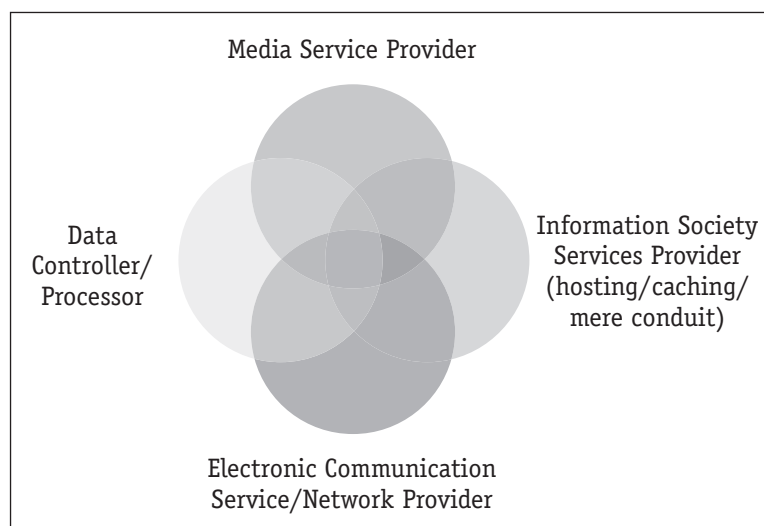
1.2. Large variety of relevant legal subject matters

Moreover, audiovisual media services are not solely governed by media regulation laws. Other subject matters will also come into play, e.g.:

- Content will be protected by intellectual property rights, in particular, copyright.
- The ultimate addressee of the service will be the individual consumer. This, of course, entails the involvement of (national) consumer protection laws.
- Given that the service provider will want to collect the personal data of its users and install cookies on their hard disks for advertisement purposes, privacy laws will apply.
- E-commerce laws have to be taken into account.
- Language legislation may apply to the language used to communicate with the consumer.

1.3. Complex stratification of labels

Various types of legislation apply specific labels to identify corresponding sets of rights and obligations. These different labels may or may not converge, partially overlap, or at least complicate the assessment as to where the legal “center of gravity of the business model” is. For instance, the European Privacy Directive (95/46/EC) identifies the natural or legal person who determines the purposes and means of the processing of personal data as the “data controller”. Any entity which processes personal data on behalf of this data controller is then identified as “processor”. The data controller will be subject to many obligations, including filing a notification, informing the data subjects, concluding agreements with its processors, etc. However, the fact that an entity is identified as the main player under privacy law, does not mean that this will be similar for the other sets of regulation involved (AVMS, e-commerce, e-communications etc.). The data controller could, for the purposes of media regulation, happen to be an entity that has no editorial responsibility, but is a mere platform provider. Consequently, another entity may be identified as the media service provider under applicable audiovisual media services laws. In addition, the entities will or will not have to be identified as information society service provider, electronic communication service or network provider, etc.



Therefore, one should always be very careful when assessing a business concept and ensure that all obligations are complied with by the right entity. Sometimes it may be advisable to adjust the business model to make the labels converge and increase the level of legal certainty.

1.4. Regulations not adapted to the “digital paradigm shift”

In addition, most regulation is drafted without reference to the digital world. This can be the case because legislators decide to issue technology-neutral legislation which will not be affected by time and evolution, or worse, if legislation was drafted to fit a non-digital paper-only world. In addition, legislation is often based on theoretical reasoning and settles academic discussions or reflects political compromise, rather than providing practical solutions for real-life problems. In both cases, audiovisual media service providers will be challenged to comply with applicable legislation without having clear guidance on the practical application of the laws.

1.5. General consequences

Given the above, it is often very difficult for audiovisual service providers to identify the rules and regulations to which they are subject. Therefore, most providers will benefit from an early involvement of legal advisors. In many cases legal research is required to make a comprehensive assessment on the regulatory framework of every country involved in the business model. In many instances, there will be no “one size fits all” business model possible. In other words, it may prove to be impossible to comply with all relevant legal obligations of all countries involved. Therefore, an audiovisual service provider will need to make a prior risk assessment of its concept and prioritise on certain compliance issues.

2. Substantive issues

In this second part, some potential substantive issues that may arise for an audiovisual service provider will be considered. Even though there are many issues regarding clearing copyright and applying local consumer protection laws, the analysis will focus on the material issues regarding the AVMS Directive (in point 2.1) and the Privacy Directive (in point 2.2).

2.1. Application of the new AVMS Directive

As mentioned above, the new AVMS Directive is designed to modernise the previous set of regulation for audiovisual services. To achieve this goal, the Directive attempts to introduce a horizontal, comprehensive regulatory framework for all services in order to create a level playing field between traditional broadcasters, the so-called linear services, and the new media players which offer the same kind of content but in an on-demand or non-linear form. Thus, from 2010 onwards the new AVMS Directive covers audiovisual services irrespective of how the content is offered. However, this does not mean that all issues under the old regulatory framework have been resolved. Furthermore, the emergence of the new digital age has created a number of additional challenges, which also have only been partly addressed. Hereunder, some specific issues and challenges are discussed.

2.1.1. Lack of clarity in the scope of the Directive

Even though the Commission clearly expressed its aim to regulate all audiovisual services irrespective of their nature, it must be said that the scope of the AVMS Directive still does not cover all services:³

- Recital 21 of the AVMS Directive indicates that the scope should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest. This recital clearly refers to social networks like Facebook and social platforms such as YouTube.
- In addition, Recital 28 states that the scope of the AVMS Directive should not cover electronic versions of newspapers and magazines.

3) D. M. Sithigh, “Co-regulation, Video-on-demand and the Legal Status of Audiovisual Media”, *UEA Law School Working Paper Series*, 2010-DMS-3, available at: ssrn.com/abstract=1728664

These statements are relatively clear, but many platforms offering audiovisual content these days are electronic versions of newspapers or are devised in such a way that they entail a social network aspect. Does this mean that they are definitely not subject to the AVMS Directive?

As was shown in the recent case *ATVOD v. Sunday Times Video Library*, the answer is not so obvious. In this case, a part of the website of the Sunday Times was dedicated to audiovisual content related to recent news items and could be found under the link "Video Library". In the opinion of the Sunday Times, it did not have to comply with the provisions of the English transposition of the AVMS Directive, nor did it have to file a notification with the Authority for Television On Demand⁴ (hereafter "ATVOD") because of the carve-out described above. ATVOD, however, had a different view on this topic. In its decision, it stated that "a single website or domain may contain more than one service, and the Sunday Times 'Video Library' does appear to ATVOD to constitute a service in its own right, albeit a service which sits alongside an electronic version of a newspaper. The video content is aggregated on a discrete section of the website providing a catalogue of viewing options. Whilst the videos may in some cases have a specific connection to content in the newspaper, the viewer is not invited to consider the content as subsidiary or ancillary to the online version of the print newspaper. The Video Library is presented as a consumer destination in its own right, and the programmes provided within The Video Library service can be viewed, enjoyed and made sense of without reference to the newspaper offering."⁵ In addition, it referred to the fact that the programmes are comparable to the form and content of TV programmes, and that the main purpose of the "Sunday Times Video Library" is to provide these TV-like programmes. Consequently, it decided that the Sunday Times had to file a notification and pay a subscription fee of GBP 2 900 and, furthermore, that it had to comply with all the provisions regarding audiovisual content as defined in the national transposition of the AVMS Directive.⁶

2.1.2. Limits of the "country-of-origin" principle⁷

The regulation on territorial applicability of the Directive is construed in such a way that, in principle, only one member state should have jurisdiction over an audiovisual media service provider. This is accomplished through the "country-of-origin" principle. This principle entails the obligation for the home country to exercise control over its broadcasters/service providers and the prohibition for receiving countries to establish secondary control over incoming content services. The AVMS Directive determines which member state qualifies as the home country by applying the following main criteria:⁸

- the member state where the service provider has its head office and the editorial decisions are taken in the same member state; or
- if the editorial decisions on the audiovisual media service are taken in another member state than that of its head office's establishment, and a significant part of the workforce involved in the pursuit of the audiovisual media service operates from that other member state, then that member state will qualify as the home country.

Even though this principle sets forth a clear distinction, in reality it often proves difficult to determine the national applicable law. This is mainly because of the global set-up of many players in the audiovisual sector. Often, we are faced with multi-jurisdictional structures with corporate headquarters in one member state, regional operational structures in other member states, and local subsidiaries in charge of a part of the editorial decisions and virtual organisations spread all over Europe (or over the world). This makes it very unclear which law primarily applies or in fact leads to multiple applicable national laws. In addition, many business concepts involve the use of delocalised technologies like peer-to-peer networks or cloud computing, which makes the picture even more complex.

4) www.atvod.co.uk

5) www.atvod.co.uk/regulated-services/scope-determinations/sunday-times-video-library

6) The Sunday Times has appealed against this decision. No decision in appeal has been reached in this case yet.

7) See also P. Valcke, D. Stevens, et al, "Audiovisual Media Services in the EU – Next Generation Approach or Old Wine in New Barrels?", *Communications & Strategies*, n° 71, 2008, 103.

8) Article 2 of the AVMS Directive. In addition, the Directive lists exceptions to this rule in case of stricter rules of general public interest for a service which is wholly or mostly directed towards the territory of another member state.

2.1.3. Respecting age restrictions in a digital world

The AVMS Directive contains the obligation to protect minors against immoral or harmful material.⁹ For linear services, this requirement can be complied with by not broadcasting adult or violent content at all or, in other cases, by respecting certain time slots; age rating symbols can be added or information can be given before the start of a TV programme. For non-linear services, the exercise is more intricate: setting up time slots is hardly commercial and can be complex if the platform is accessible worldwide.

2.1.4. Devising advertisement requirements online

The AVMS Directive contains a number of obligations for audiovisual media service providers regarding commercial communications.¹⁰ Under national law, these requirements are often transposed in the form of volume restrictions for commercials, time slots for certain kinds of commercials, showing obligatory signs during certain commercials¹¹ or showing an obligatory pre-set text at the end of a commercial.¹²

In the online world, again, these obligations are hard to comply with because advertisement is approached from a different point of view. For example, advertisement space can remain visible at all times when the consumer is looking at the content. Also, setting up time slots for certain kinds of commercials has no use. As a result, it is not yet clear how these requirements can be complied with in an online world, which leaves audiovisual media service providers with a margin of uncertainty.

2.2. Privacy

A further substantive issue concerns the proper application of privacy and data protection rules. This issue can be of great importance for providers who offer their services for free, but realise their profit through behavioural advertising schemes which make use of cookies. Cookies allow the service provider to collect, analyse and share data of customers and to adjust their advertising schemes to their behaviour. Previously, using cookies was allowed provided that users were adequately informed of their use and had the possibility to opt out. However, under the new E-Privacy Directive,¹³ service providers need to obtain Internet users' prior consent to use cookies. This requirement for obtaining prior consent was confirmed by the Article 29 Working Party in Opinion 2/2010 on online behavioural advertising.¹⁴ In addition, the Working Party noted that browser settings may only deliver consent in very limited circumstances.

Consequently, most audiovisual service providers who wish to realise their profit through behavioural advertising schemes are faced with a challenge to create some form of opt-in possibility via the audiovisual service platform. However, in most cases, service providers opt for non-compliance because they do not want to overly burden their users and scare them away to less compliant providers.

II. Accommodating the regulatory framework by adjusting technologies

1. Why?

As indicated above, audiovisual service providers are often confronted with the need to modify their platforms to comply with applicable laws. Adjusting a business concept to comply with local laws,

9) Article 12 of the AVMS Directive.

10) Article 9 of the AVMS Directive.

11) E.g. for candy.

12) E.g. the phrase "*Zu Risiken und Nebenwirkungen lesen Sie die Packungsbeilage und fragen Sie Ihren Arzt oder Apotheker*" ("Please inform yourself on risks and collateral effects through studying the accompanying product leaflet or consulting your doctor or pharmacist!") for all medication commercials in Germany.

13) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, as amended by Directive 2009/136/EC.

14) Opinion 2/2010 (00909/10/EN, WP 171) was adopted on 22 June 2010 and is available at: ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf

however, often reduces its usability tremendously. So the question remains how far the industry is willing to comply with all the legal requirements?

The initiative to adjust technology for the sake of compliance is triggered by a mix of three factors:

- the (lack of) clarity of the regulation: as described above, in most cases regulation will be technology-neutral or even not adapted to the new digital world;
- the enforcement risk;
- the severity of the penalty.

Indeed, even if legislation is at hand, the regulator typically does not mention how to implement the rules into practical tools and applications. Also, in case there is a prohibition or regulatory decision, there are often no practical alternatives or solutions provided to the industry. In such case, and if these obligations are subject to severe penalties and have a high enforcement risk, compliance will have to be achieved through a self-invented concept. In addition, if the concept proves workable, it may be enforced by regulatory authorities and, as such, adjustments of technology might flow back to better technology regulations.

1. Examples of regulatory triggered technology adjustments

Some examples of general technology adjustments triggered by regulatory compliance are:

- The Content Verification Programme of YouTube: with this tool, copyright holders can identify infringing material available on the platform and have it removed.
- The Google Streetview reporting tool: users can report images from Google Streetview that infringe their privacy or contain inappropriate content.
- Amazon Instant Video and Hulu work with an access restriction based on IP address geolocation: users from countries in which copyright was not cleared will have no access to the content.
- German and Austrian public service television broadcasters, who also provide online platforms for their content, comply with age restriction obligations by implementing a time slot for certain content. For instance, *Tatort*, a crime series aired on the German television channel *Das Erste*, can only be accessed in the evening and at night.

III. What would self- or co-regulation bring to the industry?

1. The Directive on the concept of self- and co-regulation

The new AVMS Directive explicitly provides the possibility for member states to opt for co-regulation and/or self-regulatory regimes at a national level in the audiovisual services industry. The Directive adds that these regimes should be broadly accepted by the main stakeholders in the member states and provide for effective enforcement.¹⁵

In Recital 44 of the same Directive, the Commission states that both co-regulation and self-regulation instruments can play an important role in delivering a high level of consumer protection. Accordingly, measures aimed at achieving public interest objectives in the emerging audiovisual media services sector would be more effective if they were taken with the active support of the service providers themselves. In addition, the cost for member states to put regulation in place would be reasonably lower since it could be shared with the industry. The Commission, however, stresses that self-regulation should always remain a complementary method of implementing certain provisions of the Directive, and should not constitute a substitute for the obligations of the national legislator. Co-regulation then gives a suitable legal link between self-regulation and national legislation in accordance with the legal traditions of the member states, and allows for the member state to intervene in the event its objectives are not being met. A perfect example of an independent co-regulator is the

¹⁵) Article 4(7) of Directive 2010/13/EU.

ATVOD in the United Kingdom: this authority is responsible for all UK video-on-demand services and performs functions of the UK Office of Communications¹⁶ (Ofcom) relating to on-demand services. It was originally created as a self-regulatory body with the support of the UK Government, but was gradually restructured to ensure that it was sufficiently independent to protect the consumers against the industry's commercial interests.¹⁷

2. The industry's reaction

It is clear that such initiative for self- and/or co-regulation brings at least three distinctive advantages to the industry. First, the industry has a good view on the technology pipeline and is in a better position to foresee necessary regulatory adjustments. Second, as described above, legislation is often inefficient because of its lack of clarity or impracticality. Regulation which fully or partially emanated from the industry may be more concrete and tangible. Third, the public support for such regulation will be much broader. In conclusion, putting in place regulation via self- or co-regulation enhances the possibility for the industry to create a cross-border level playing field which proves to be advantageous for the industry's global players. This would remedy the lack of legislation uniformity, which currently cannot be achieved by member states nor by the European Commission.

In spite of self-regulation's many advantages and because of the early stage of the Directive's transposition, there are currently not many self-regulatory industry initiatives in place regulating the audiovisual online media sector yet.¹⁸ An example in the online advertisement sector is the "Online Behavioural Advertising Framework" of IAB Europe.¹⁹ This is a cross-European self-regulatory framework for online behavioural advertising, which provides that advertisements which target users based on their Internet activity are identified by a special icon. The initiative is subscribed by many companies, including Google and Microsoft.

IV. Conclusion

The new AVMS Directive does not appear to have made things easier. Certainly, the modernised Directive broadens its scope and is, in that respect, more in tune with the current digital world we live in. However, the European Commission, Parliament and Council did not succeed in creating one single basic framework which all audiovisual media service providers can rely on without further ado. Even though this was not one of their preliminary goals, a solution for this problem would have been helpful.

As described above, the industry is left with a number of issues which are not remedied. First, audiovisual service providers are faced with a number of legal barriers preventing them from readily entering the audiovisual market, e.g., a large variety of legal subject matters, international legal aspects, the complex question of interpreting applicable regulation and applying it to the right players, etc. Second, the current legislation (including the new AVMS Directive) leaves room for uncertainty about applicability and other issues. Solving these issues might be possible by adjusting technology. However, the industry will only adjust its business concept if there are sufficient incentives to do so (because of unclear regulation, grave penalties or high risk of enforcement). Self- or co-regulation could help and bring many advantages, but, so far, not many tangible results have been reached from that direction. The story of ATVOD, however, is promising.

We thus conclude that the industry is awaiting how the new rules will be filled in, and, at the same time, is willing to contribute to improving the current framework if there are sufficient incentives.

16) www.ofcom.org.uk

17) T. Schwithal, "European Media Governance – Regulation 2.0 and the Audiovisual Media Services Directive", *Governance*, BIS-Verlag, Oldenburg, 2009, 223.

18) Examples of television-specific organisations are *Freiwillige Selbstkontrolle Fernsehen* (Germany) and *Kijkwijzer* (The Netherlands).

19) IAB Europe is the trade association of the European digital and interactive marketing industry.

The Regulation of On-demand Audiovisual Services: The Expectations of Europe's Consumers

Vincent Porter*

European Alliance of Listeners' and Viewers' Associations (EURALVA)

The 105 recitals and 36 articles of the Audiovisual Media Services Directive (AVMSD) contain a series of ambiguous diplomatic compromises, which were designed to allow the expansion of audiovisual commercial communication, to relax state control, and to maintain national subsidiarity. Extensive lobbying by the advertising, broadcasting and telecommunication industries, notably over the regulations forbidding surreptitious audiovisual commercial communication and product placement, has substantially reduced the protection previously afforded to television viewers.

I. Two areas of ambiguity

The Directive fails to identify clearly what it means by an on-demand audiovisual media service, and what it means by co-regulation and self-regulation.

Recital 27 AVMSD clearly identifies two distinct types of on-demand service. These are (a) TV catch-up services which are offered as on-demand services by TV broadcasters, and can therefore be regulated in the same manner as TV programmes; and (b) different kinds of on-demand services which are offered in parallel, but are clearly separate services. However, Article 1(1)(g) ignores this distinction with a single all-embracing definition, which defines on-demand services as those which provide the individual viewer with a catalogue of programmes which he or she can watch at a moment of their own choosing.

This ambiguity has allowed individual member states to define an on-demand service in different ways. Whereas France draws a clear distinction between TV catch-up services (*télévision de rattrapage*) and video-on-demand services (*vidéo à la demande* – VàD),¹ the United Kingdom uses the catch-all term “on-demand programme service”. This is a service whose “principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services.”² Whereas France distinguishes clearly between two categories of on-demand service, the UK focuses – rather imprecisely – on the type of programmes included within an on-demand service.

The Directive is also ambiguous about the relations between a member state and its co-regulatory or self-regulatory regimes. Although Article 4(7) encourages the use of self-regulation and co-regulation, Recital 44 states that self-regulation “should not constitute a substitute for the obligations of the

* Media Adviser, EURALVA

1) Décret no 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande, Arts. 1(I) (1) and (2).

2) The Audiovisual Media Services Regulations 2009 (Statutory Instrument 2009/2979), Art. 2.

national legislator”, and that co-regulation provides “in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States.” Moreover, Recital 44 continues, “co-regulation should allow for the possibility of State intervention in the event of its objectives not being met.” Thus the detailed national arrangements which establish the powers of these “self-regulatory” or “co-regulatory” authorities will be more important than the formal category in which each body is placed.

II. The problem of access

In order to access an on-demand service, the consumer has to subscribe to a broadband network, because on-demand services are distributed in a completely different manner to television broadcasts. Whereas broadcasting is a one-way service, which can be transmitted over the air, an on-demand service is a two-way service which must be delivered individually. Moreover, in order to watch an on-demand programme, the consumer must subscribe to a broadband network of sufficient speed and bandwidth to deliver the programmes without interruption.

1. The regulatory division between carriage and content

The AVMSD ignores the issue of access, because it relies on the distinction which the EU authorities established in 2002 between the regulation of carriage and that of content. The former was dealt with in a package of electronic communications directives,³ but the latter was left to the e-Commerce Directive, and the AVMSD.

The interdependence between consumer access to on-demand services and the regulation of their contents calls into question the EU’s earlier regulatory division between carriage and content. An on-demand service may seek to regulate consumer access by specifying the electronic communications network to which the viewer has to subscribe. So may a TV broadcaster which is rolling out a catch-up service. The latter can do this, either via the technical specifications for its new generation of set-top boxes, or by restricting viewer access to the digital platform from which the catch-up TV service is delivered.

To date, France has adopted a *dirigiste* approach, while the UK has opted for a free market approach. The national policies in both Germany and Spain, where the regulatory responsibilities for telecommunications and television are divided between the state and the regions, are still unclear.

2. The regulatory approaches of France and the UK

A brief comparison between the two approaches developed by France and the UK is revealing. In November 2010, the *Conseil Supérieur de l’Audiovisuel* (the French Media Regulatory Authority – CSA) called for bids to run an on-demand service using the digital multiplex for the R3 network. This will offer French viewers both TV catch-up and video-on-demand services, and will provide the successful applicants with access to 95% of French viewers. The CSA has also identified a small section of the electromagnetic spectrum through which viewers can access the successful applicant’s catalogue of on-demand programmes. Each applicant will have to meet programming targets, which include the number of available cinema films and audiovisual works, and quotas of both European and original French-language programmes.⁴

The Office of Communications (Ofcom), the UK media and telecommunications regulator, has adopted a free-market approach, however. *YouView* is a seven-partner consortium consisting of four public service TV broadcasters (the BBC, ITV, Channel 4 and Five), and three telecommunications companies (British Telecom, Arqiva, and TalkTalk). They are currently developing a receiver, which will allow viewers to access both the Freeview digital terrestrial TV platform, and via a broadband network,

3) Directives 2002/19-22/EC of 7 March 2002, and Commission Directive 2002/77/EC of 16 September 2002, as amended in 2009.

4) Décision no. 2010-764 du 16 novembre 2010 portant appel aux candidatures pour l’édition d’un ou plusieurs services de médias audiovisuels à la demande diffusée par voie hertzienne terrestre en mode numérique.

on-demand content such as that available via the BBC i-Player. The Consortium aims to establish itself as a portal, which will develop a common interface for Internet Protocol Television (IPTV) in the UK, although the BBC Trust has insisted that the *YouView* platform must also allow viewers to access other providers of on-demand services.⁵ BSkyB, Virgin, IP Vision, and ten other companies opposed *YouView*'s plans on the grounds that its arrival would distort the IPTV market. Nevertheless, Ofcom rejected the complaints on the grounds that *YouView* would bring benefits to consumers and viewers, and that it was difficult to determine with any confidence how the market in content syndication would develop.⁶ *YouView* has recently postponed its launch until 2012, however, a delay which some experts argue, will mean that it will be too late to establish itself as a UK standard. Meanwhile, BSkyB and Virgin Media are each offering UK viewers an on-demand service, which can only be accessed via their already existing broadband or cable service. Both companies are using their on-demand service to leverage all their potential consumers into subscribing to their broadband service.

Meanwhile many UK viewers, who are living in rural areas, are unable to access any broadband services at all. Once the roll-out of digital terrestrial television has been completed in 2012, the UK Government will therefore top-slice some of the BBC's television licence revenues in order to ensure the roll-out of a universal broadband network. Precisely which viewers, and which networks, will benefit from this decision is still unclear. This is possibly because the European Commission's rules on the provision of state aid for broadband roll-out are different to those for public service broadcasting. The former are territorially based and depend on the competitive telecommunications environment in the area for which state aid is proposed,⁷ while the latter are based on the improvements to public service which will be delivered by the broadcaster.⁸

I now wish to examine a number of provisions in the AVMSD which are designed to inform consumers about the nature of an individual programme in an on-demand service.

III. Programmes which might be unsuitable for children

Most viewers will welcome Article 12 AVMSD, which requires member states to ensure that minors will not normally be able to see or hear on-demand services which might seriously impair their physical, mental or moral development.

Unfortunately, the article only refers to on-demand services as a whole. It is silent about the regulation of individual programmes within a service. However, Article 4(1) AVMSD allows a member state to take more detailed or restrictive measures, while Article 3(4) also permits a state to take further measures, provided that they are proportionate, which are designed to protect both minors or consumers against a given on-demand service. The manner in which a state combines its duty under Article 12, and its powers under Articles 3(4) and 4(1), will determine the balance between the "pre-transmission censorship" of on-demand programmes by the member state, and the programme-classification system which is offered by providers of on-demand services.

Before deciding whether to access a programme, those viewers who are parents will want to be able to restrict, normally by means of an electronic parental lock, the range of programmes which their own children can access in the home. Europe's consumers already live in a society where cinema films and DVDs have already been classified by a self-regulatory or co-regulatory body. On the other hand, the state frequently uses its licensing powers to regulate which programmes a TV station can broadcast, and at what time.

Although Article 10(1) of the European Convention on Human Rights (ECHR) allows signatory states to license TV services, it does not allow them to license on-demand services. To restrict the freedom of expression in these services, a state has to use its powers under Article 10(2) of the Convention,

5) <http://www.bbc.co.uk/news/technology-11332147>

6) <http://media.ofcom.org.uk/2010/10/19/no-investigation-into-project-canvas/>

7) Communication from the Commission, Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, (2009/C 235/04) *Official Journal C* 235/7, 30 September 2009.

8) Communication from the Commission on the application of State aid rules to public service broadcasting, (2009/C 257/01), *Official Journal C* 257/1, 27 October 2009.

which requires any restriction to be both specified in law and “necessary in a democratic society”. The ECHR therefore restricts how member states can interpret their powers under Article 3(4)(a)(i) and 4(1) AVMSD.

Most consumers will therefore expect European States to establish regulatory arrangements for on-demand services which balance the freedom of expression of on-demand services against the rights of viewers to restrict the access of their children to unsuitable programmes. For this, viewers will need a classification system accompanied by a parallel system of parental electronic locks. These could also be introduced by a co-regulatory or a self-regulatory body.

IV. The classification of on-demand programmes

Many member states have already developed systems for classifying their TV programmes, and some are already using the same systems to classify their catch-up TV services. In France, the CSA has already extended to on-demand services the co-regulatory system of programme classification which it agreed with the television companies in 1996.⁹ The signalling and labelling system has five levels, and involves the creation of a “trust zone” for programmes suitable for all audiences. On television, Category IV programmes (above 16) are sometimes related to transmission time, whereas Category V programmes (above 18) afford viewers a parental lock, as they have to be paid for separately. They are also subject to technical access restrictions such as PIN codes.¹⁰

In the Netherlands, the audiovisual industries have developed the self-regulatory *Kijkwijzer* system, which has two elements. One classifies the suitability of the programme for children of various ages, while the other advises parents about the presence of socially undesirable material, such as swearing, sexual activity, drug taking or racial discrimination. To date, *Kijkwijzer* has classified over 32 000 audiovisual productions, and 90% of Dutch parents use the system.¹¹ It is therefore highly likely that the Netherlands will extend the system to its on-demand services.

The UK Government has enacted a far more stringent criterion for on-demand services than that required by the AVMSD. Its on-demand services must ensure that persons under the age of 18 will not normally see or hear “any material which might seriously impair [their] physical, mental or moral development.”¹² This formulation prohibits any material which is contained in an on-demand service, not just the service as a whole. It could refer to an individual scene within an otherwise harmless programme.

The UK’s public service TV broadcasters have traditionally classified their broadcasts according to the time at which they are transmitted. They have therefore introduced some programme classification, and thus the availability of parental locks, into their catch-up services. The problem for UK viewers is their lack of consistency. The parental lock on the BBC i-Player currently protects children under 16, whereas that on the ITV-player is designed to protect children under 18. Moreover, 4OD, Channel 4’s publicly owned, but advertiser-funded, on-demand service, has two parental locks, which are designed to protect children under 16 and 18 respectively.

The Authority for Television on Demand (ATVOD), the UK’s recently established co-regulatory body for the UK’s one hundred or so non-TV on-demand services (many of which target other EU member states), simply requires its members to identify programmes which are only suitable for adults. They must ensure that if age verification does not take place each time the viewer returns to the service, any further access to such content must be controlled by the use of mandatory security controls such as passwords or PIN numbers.¹³ For the moment, ATVOD is taking a precautionary approach, since it has only partially adopted the 18R classification of the UK’s British Board of Film Classification, which

9) Délibération n° 2010-57 du 14 décembre 2010 relative à la protection du jeune public, à la déontologie et à l’accessibilité des programmes sur les services de médias audiovisuels à la demande. <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023312354&dateTexte=&categorieLien=id>

10) See the EPRA news of 5 January 2011 at: http://www.epra.org/comasystem/view/presse/view_presse.pl?datensatz=preNQY34mivgKfMv913U0QlvrijZBwc2yzTOXjDD2Jgvp2QaGbyV1t1294229416

11) <http://www.kijkwijzer.nl/index.php?>

12) The Audiovisual Media Services Regulations, op. cit., s. 368E (2).

13) http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed1.1_Mar_2011.pdf

is for those DVDs which are only for sale in sex shops. This may be because the UK Government has asked Ofcom, the national regulator, to consider with ATVOD's assistance "whether the new regulations provide sufficient protection for children and young people with regard to sexually explicit content, and to provide it with a report."¹⁴ The outcome could either be an additional classification band, to empower those parents who wish to protect their children from all sexually explicit content, or a more stringent classification threshold for all programmes in UK-licensed services. So far, there has been no public discussion about the possibility of providing viewers with an additional parental lock.

However, since Article 30 AVMSD requires the competent independent regulator in each member state to take appropriate measures to provide each other and the European Commission with the information necessary for the application of Articles 3 and 4 of the Directive, the opportunity exists for European regulators to develop a series of classification systems, accompanied by electronic parental locks, which would empower parents to protect their children and young people from sexually explicit, and other undesirable content.

V. European works

Recital 69 AVMSD justifies a quota of European works in on-demand services on two grounds. Firstly, they could partially replace television broadcasting, and secondly they would contribute actively to the promotion of cultural diversity. Among other things, the recital suggests that video-on-demand services might include a minimum share of European programmes in their catalogues, or present them attractively in their electronic programme guides. Article 13 AVMSD therefore requires member states to ensure that, among other things, on-demand audiovisual media services shall promote, where practicable and by appropriate means, access to European works. This could include the share and/or prominence of European works in a service's catalogue of programmes.

The advent of on-demand services will allow viewers an increased choice of audiovisual media, which will also encourage them to become more active in choosing which programmes to watch. There will no longer be an automatic correlation, as Recital 69 implies, between the production and distribution of European works and the development of cultural diversity. Nevertheless, Europe's viewers will undoubtedly welcome the recognition of the importance of Europe's providers of VOD services including in their catalogues information about the European origin of individual programmes. But it will also be important, for both member states and on-demand services, to promote the qualities, as well as the classification, of individual European works. Viewers will expect on-demand services, not just to label the European works in their catalogues, but also to provide them with a description of the quality of each work. The European Commission could link a development of this nature to the proposal for a European Heritage Label, which is currently being championed by the Directorate-General for Education and Culture.¹⁵

Moreover, given the highly flexible, and sometimes obscure, definitions of a European work allowed by Recital 32, and Articles 1(1)(n) and 1(4) AVMSD, those consumers who do wish to enjoy the cultural diversity which will be accessible from the inclusion of European works in on-demand services, would also welcome a degree of co-operation, between the national regulatory authorities who are responsible for the enforcement of consumer protection laws. They could use their powers under Regulation No. 2006/2004 of the EU¹⁶ to establish a more consistent and consumer-friendly definition of a European work in on-demand services.

VI. Product placement

Although Article 11(2) AVMSD sets out a general prohibition on product placement, by way of derogation from this general principle Article 11(3) allows product placement in all programme genres, except children's programmes, provided that among other things, viewers are clearly informed of its presence. In order to avoid any confusion, Article 11(3)(d) specifies that programmes containing

14) Ibid.

15) http://ec.europa.eu/culture/our-programmes-and-actions/doc2519_en.htm

16) Official Journal, 9 December 2004, L 364/1.

product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break. So far, among others, France, the French-speaking Community of Belgium and the UK have established their rules for a neutral logo to notify viewers about the presence of product placement. But whereas France requires the logo to be displayed for one minute, and francophone Belgium requires it to be displayed for ten seconds, the UK only requires its logo to be displayed for three seconds.¹⁷ The shorter the notification, the more it is likely that some viewers will be deceived.

Moreover, the notification regulations in Article 11(3)(d) AVMSD pay no regard to the point at which the consumer has to pay in order to watch a programme. Whereas the AVMSD requirements may possibly give adequate warning for programmes included in a catch-up TV service, they are insufficient for the viewer of a pay-per-view on-demand service. He will need to know, before he pays, whether or not the programme contains product placement. Furthermore, the final paragraph of Article 11(3)(d) also allows a member state to waive the notification requirements, if the programme has neither been produced nor commissioned by the on-demand service itself. This exception to the requirement to notify consumers about the presence of product placement in a programme virtually contradicts Article 9 AVMSD, which prohibits surreptitious audiovisual commercial communication.

Finally, a new concern for viewers is the development of the MirriAd system, which is backed by Oxford Capital Partners and the STV Group, and can embed life-like brand images directly into video content after production.¹⁸ Although the system claims not to interfere with the editorial independence of the media service provider, it can digitally embed brand images before the consumer can access the programme. Thus the version of a programme which is supplied by an on-demand service could be different from that seen on TV; or a version, which is made available to viewers without product placement in one member state, could also include product placement, when it is offered to consumers in another member state. Here again, Europe's consumers will expect their national consumer protection authorities to co-operate by using their powers under Regulation No. 2006/2004, to ensure that Europe's on-demand services use the same version of a programme across the whole of the single market.

VII. Children's programmes

The AVMSD includes several references to children's programmes. Article 9(2) encourages service providers to develop codes of conduct regarding the accompaniment of, or inclusion in children's programmes, of inappropriate audiovisual commercial communications for foods and beverages. Article 10(4) prohibits the showing of a sponsorship logo during children's programmes, and indent 2 of Article 11(3) prohibits product placement in them. Moreover, Article 20(2) regulates the legitimacy of advertising breaks in the television transmission of children's programmes. Regrettably, these provisions afford no real protection to viewers' children from the persuasive powers of commercial communicators. The Directive contains no definition whatsoever of a "children's programme". Nor do its provisions protect children, because the legislators failed to distinguish between a children's programme and the programmes which children watch. They still allow commercial communicators to target children by including advertisements and product placement in family programmes.

Moreover, although Article 33 AVMSD requires the European Commission to submit a report to Parliament and the European Economic and Social Committee on the implementation of the Directive by 19 December 2011, it is only required to assess the issue of television advertising accompanying or included in children's programmes. There is no requirement for it to consider advertisements, sponsorship or product placement in on-demand services.

Given the failure of the Directive to protect their children, Europe's viewers will have to hope that Europe's regulators and co-regulators will find a way to introduce a positive logo for children's programmes, which can provide them a guarantee that the programme contains (a) no inappropriate audiovisual commercial communications for foods and beverages, (b) no product placement, or unduly

17) Délibération n° 2010-4 du 16 février 2010 relative au placement de produit dans les programmes de télévision, art VII; <http://www.csa.be/documents/show/1143>; and <http://media.ofcom.org.uk/2010/12/20/rules-for-product-placement/>

18) <http://mirriad.com/gallery/showreel/>

prominent product placement, and (c) no advertising breaks. Co-regulatory authorities, which are normally closer to Europe's audiovisual commercial communicators than official regulators, may well be more likely to fulfil this ambition.

VIII. Conclusion

Europe's consumers consider that the AVMSD has largely failed to protect their interests. They will need member states to implement domestic regulation to guarantee all households a choice of broadband services by which to access on-demand services. They will also expect the services themselves to classify the suitability of their programmes for children, and to link them to a series of electronic parental locks. Finally, viewers need European works, programmes containing product placement, and children's programmes to be adequately and consistently labelled, before they have to pay to watch them.

Legislators' and Regulators' Expectations in the Field of On-demand Audiovisual Media Services

*Joan Barata Mir**

Blanquerna Communications School, Universitat Ramon Llull

I. On-demand services as audiovisual media services

The inclusion of non-linear services within the framework of the Audiovisual Media Services Directive (AVMSD)¹ has led to an important change in the field of mass media regulation. Until the approval of this norm, only linear services – that is to say, traditional broadcasting – had fallen under the scope of the audiovisual legal regime. This regime is different from those applicable to the written press and e-commerce, and it is characterized by the intense protection of a number of values considered to be paramount for democratic broadcasting regulation: protection of human dignity, protection of minors, prohibition of the incitement to hatred, protection of consumers from certain kinds of abusive commercial speech, etc.

Another article in this publication will examine the legal criteria under which non-linear services can be defined and identified vis-à-vis traditional linear services and – more importantly – mere e-commerce services. It must be kept in mind that, before the adoption of the AVMS Directive, audiovisual Internet services were considered and regulated as e-commerce services, both at the EU and the national level. It is worth noting here, however, that one of the most important reasons for this modification is that the European legislator has started to view on-demand audiovisual services as mass media communication services.² This new regulatory perspective determines the introduction of very relevant elements applicable to those services.

On the one hand, to the extent that on-demand audiovisual services fall under the scope of the AVMS Directive, values such as those mentioned in the first paragraph of this article will also matter for these services, even if the regulatory instruments that will be used to foster these values may differ from those existing in the field of traditional broadcasting. The text of the Directive stresses the need to protect such values and rights in the provision of any kind of audiovisual service, but at the same time it gives some leeway to member states in order to decide and to put in place the specific

* Vice Dean for International Affairs and Professor of Communications Law, Blanquerna Communications School (URL, Barcelona)

1) Directive 2010/13/EU of the European Parliament and of the Council on the provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services.

2) Recital 21 of the Directive says: "For the purposes of this Directive, the definition of an audiovisual media service should cover [...] audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public." On the other hand, Recital 22 insists on the fact that "[f]or the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public".

regulatory instruments to be applied.³ In this perspective, factors like the degree of presence of on-demand services in the audiovisual national market, the need to avoid any measure that would hinder the deployment of those services by the private sector, and the level and kind of regulatory culture existing in each country will probably have and, in fact, are having, a key influence when adopting a specific legal framework. For example, while in the case of the UK, a structured co-regulatory scheme for on-demand services has been established with a clear remit and a precise definition of the backstop powers remaining in the hands of the communications regulatory authority, in the case of Spain the legislator has just copied and incorporated into the new national law the generic and basic wording of the Directive in the field of on-demand services. It has neither concretized the definition of on-demand services nor developed any specific regulatory regime.⁴

On the other hand, editorial responsibility, understood as a basic element for the imposition of certain duties on service providers (and well-known in the field of traditional broadcasting), will be applied for the first time to on-demand audiovisual service providers as well. The application of such notion to this new territory will change the way in which authorities will be able to intervene in the provision of on-demand content, at least from the point of view of certain aspects of the legal liability of providers.⁵

One thing that should be kept in mind, in any case, is the idea of proportionality. Regulation of audiovisual services is linked to the promotion of culture, the formation of public opinion, pluralism, and many other legitimate public interests. But first of all, it has to do with the imposition of certain limits to the exercise of a fundamental right. And this particular element requires that any regulation of audiovisual media services must pass the proportionality test that applies to any restriction to the right to freedom of speech and information, according to a very solid and clear jurisprudence by the European Court of Human Rights (apart, of course, from the guarantees imposed by the constitutional system of each member state). It is not possible here to further explore this matter. It should be remembered, however, that according to the European Court of Human Rights (ECtHR), only restrictions that are prescribed by law and are necessary in a democratic society are acceptable. Furthermore, one must take into account that this idea of “necessity” is also connected with the requirement to establish only those measures that are least restrictive and pursue a legitimate aim, that is one of the aims covered by Article 10 of the European Convention on Human Rights (ECHR).⁶ Because of this human rights context, it seems clear that the idea of proportionality should play a role when defining specific regulatory measures to be implemented in the field of on-demand services. The European legislator itself seems to be aware of this requirement: for example, while member states should guarantee that programmes that might seriously impair the development of minors are not included in broadcasting services (Article 27 AVMSD), in the case of on-demand services member states should only ensure that this kind of content is made available in such a way that guarantees that minors will not normally see or hear those programmes (Article 12 AVMSD). As it can be seen, the availability of technical solutions to safeguard against access of minors to harmful content in on-demand audiovisual services would make the strict prohibition of pornographic content a disproportionate measure.

Another interesting example of this human rights debate has to do with the requirement of a licence for the provision of audiovisual media services. Article 10 of the ECHR states in paragraph 1 that the recognition of freedom of expression “shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises”. The Court of Strasbourg, in the famous decision

3) On the one hand, Recital 58 of the Directive stresses that: “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”. On the other hand, different articles of the Directive applicable to on-demand audiovisual services in fields like transparency, no incitement to hatred, accessibility, preservation of certain requirements in the field of audiovisual commercial communications, and protection of minors, among others, in general terms only establish a general duty of member states “to take measures in order to ensure” certain basic provisions, and in some cases adding that such measures should be taken “where practicable and by appropriate means”. See articles 5 to 13 of the Directive.

4) Spanish Law 7/2010, of 31 March.

5) See Recital 25 of the Directive. As Recital 45 reminds, the idea of editorial responsibility is directly linked to the role that audiovisual service providers play in the formation of public opinion: “Because of the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions, it is essential for users to know exactly who is responsible for the content of these services.”

6) See the first and one of the most important decisions of the ECtHR in this field, *Handyside v. United Kingdom*, of 7 December 1976.

*Groppera Radio v. Switzerland*⁷ has interpreted this last sentence of paragraph 1 so as to indicate that the reason why it was introduced in the text of the Convention “was clearly due to technical or practical considerations such as the limited number of available frequencies and the major capital investment required for building transmitters”. At the same time, however, it also declared that “the purpose of the third sentence of Article 10 § 1 (art. 10-1) of the Convention is to make it clear that states are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2 (art. 10-2), for that would lead to a result contrary to the object and purpose of Article 10 (art. 10) taken as a whole”. The conclusion that can be derived from the jurisprudence of the ECtHR would be that despite the fact that not only technical reasons may justify the imposition of a licensing regime in the field of on-demand audiovisual services, such a measure should only be applied when strictly needed to preserve other legitimate areas of public interest. In addition it must be taken into account that a licensing regime, which is based on an *ex-ante* intervention, will only be acceptable if it can be justified vis-à-vis alternative and less restrictive regulatory interventions, such as notification or authorization schemes.

In general terms, the provision of on-demand services is subjected to very important and relevant principles and rights. However, elements like the technology that will be used to grant access to these services, and the different position of the viewer when consuming them, will alter the judgment of what kind of measures may be justified to restrict freedom of speech. Certain access technologies may require the implementation of less restrictive regulatory measures that have to be better adjusted and suited to the specific characteristics of the technology used.

II. Regulatory and legislative reach over on-demand audiovisual media services

One of the most important legal problems of on-demand services concerns the capability of statutory regulation and territorial authorities to reach them. While access to broadcasting services is still very much conditioned by the territory of reception, access to on-demand audiovisual media services may only depend on having a broadband connection, no matter from where, at what time or from which device. Thus, on-demand content may potentially have an impact on the public opinion of a specific state or territory, even if its authorities have no role to play in terms of content regulation and also in terms of authorizing, licensing or monitoring the activities of those responsible for such content.

In this field it is important to make a clear distinction between two kinds of on-demand services: on the one hand, services operated by traditional broadcasters or cable and satellite distributors (that is, by service providers which also offer radio and television services through their infrastructure), and on the other hand, on-demand services carried and delivered over the Internet through a wide range of individuals and intermediaries.

In the first case, it seems clear that even if the legal situation of the owners of the cable or satellite infrastructure may change in the on-demand world, it remains relatively easy to identify the entity responsible for the provision of specific content and the territorial authority competent to regulate it. As it has just been noted, some distributors that assume for the first time the direct responsibility for the selection and elaboration of a video catalogue (while in the past they had just provided and transported the signal of a bunch of radio and television channels under the responsibility of a third party), will also assume editorial responsibility in terms of the AVMS Directive. However, one can guess that on-demand distributors, and also broadcasters which add on-demand services to their offer, could easily accept and export to their on-demand activities principles formerly applied only to linear services. A good reason for that would be the commercial incentive to guarantee to viewers or users (as the case may be) a relatively homogeneous level of regulatory protection, especially in fields like protection of minors, content labeling or transparency.

In the case of on-demand services provided over the Internet, some factors radically change compared to the linear world: the degree of delocalization of the creator of a certain piece of content

7) *Groppera Radio and Others v. Switzerland*, of 28 March 1990.

might be much higher;⁸ the presence of intermediaries is also more relevant, and the incentives to accept and to assume responsibility, and therefore to fall under audiovisual regulation, is very low. In this context, it should be taken into account that due to the abovementioned level of delocalization as well as the internationalization of on-demand services provided over the Internet, there is a risk for operators of being ruled by diverse specific regulatory frameworks, different regulatory authorities and changing interpretative jurisprudence. This risk apparently gives service operators a very low incentive to accept traditional regulatory schemes. This being said, it is also true that regulation could potentially reach these on-demand services through the imposition of some regulatory burdens on those intermediaries which provide the last mile of the service (ISPs, infrastructure owners, etc.), and which therefore may easily fall under the jurisdiction of easily identifiable local authorities. However, as it has been pointed out by some authors, the temptation of extending responsibility to the last mile-level could be disproportionate, as far as it would impose on ISPs and/or similar actors unrealistic and unbearable duties to monitor content *ex-ante*.⁹

III. Regulatory problems relating to on-demand audiovisual media services on the Internet

Focusing on on-demand audiovisual services, the first big challenge for law enforcement, and probably, in the mid-term, for the national and European legislators, is to clarify some ambiguous concepts that were introduced in the 2007 reform of the AVMS Directive. In particular, some of the (audiovisual medias services) excluding criteria established by the Directive in order to draw the line between traditional broadcasting, on-demand audiovisual media, and e-commerce services have become difficult to interpret and might even lend themselves to arbitrary applications of the legal text.

In this sense, we can mention the exclusion of on-demand services that are not “television-like” (sic), the “electronic version of newspapers” and those modalities of communication that are “primarily non economic, and which are not in competition with television broadcasting, such as private websites and services consisting of the provision of audiovisual content generated by private users for the purposes of sharing and exchange between communities of interest”¹⁰. Without wanting to go into the interpretation problems that these concepts may raise at the current stage of Internet communication formats, it can also be doubtful whether some of these exclusions are justified or not. That is to say, it is not clear that audiovisual content embedded in so-called electronic versions of newspapers lacks a clear impact in the audiovisual public sphere and that it can actually be clearly differentiated from other forms of on-demand media services. It is also doubtful whether audiovisual content offered by private users within big and powerful social networks can still be considered as mere private or non-commercial communication. At present, it can probably be said that the literal application of some of these exclusions might lead to situations of discriminatory treatment, in so far as actual audiovisual mass media services might be excluded from the application of the principles and mandates of the AVMS Directive.

A second group of problems is related, as it has already been shown, to the presence of a certain number of intermediaries and the way in which they should be regulated, taking into account the current regime of liability exemption derived from the e-commerce legislation.

First of all, the original creator of an on-demand content might be acting from a place very far from any regulatory authority or even just remain unknown. It is true that traditional broadcasting regulation did not reach content creators or producers, either. However, the link between broadcasters and regulatory authorities established by concessions/licences and the broadcasters’ undisputed powers in the selection or provision of content to the general public, did make it easy to make them the target of the bulk of the broadcasting legal regime and responsibility. In the non-linear field, original content is normally distributed through a series of platforms, portals and distribution systems.

8) Think, for example, of the case of an audiovisual content generated by an Egyptian young activist and then distributed through many different social networks, newspapers and user-generated video platforms.

9) See Arino, M., “Content Regulation and New Media: A Case Study of Online Video Portals”, *Communications & Strategies*, no. 66, 2nd quarter 2007, p. 115.

10) See Recitals 21 and 28.

Secondly, these intermediaries play a role in selecting, prioritising and/or granting access to content, a role which should not be neglected. Very relevant debates on net neutrality, on the power of search engines and on the application of questionable private content rules used by these intermediaries (think, for example, of the content criteria that apply to Youtube videos, which the company established and enforces itself¹¹), are closely related to the strength of these powers and the need to impose regulatory limits on those intermediaries. However, as it has already been pointed out, the characteristics of the decisions taken by these intermediaries, even if they imply some degree of responsibility and interference in the process of providing and accessing audiovisual content, would probably not meet all the requirements and criteria of editorial responsibility imposed by the AVMS Directive. Thus, apart from the very limited scope of the e-commerce Directive regime, it is not clear whether new regulatory principles for on-demand services can actually be applied to very relevant and reachable intermediaries (like ISP providers, big portals or search engines). Apart from the problem of applying the notion of editorial responsibility, a problem of proportionality may also arise in many of these cases.

A third important element in this field is the change in the regulatory perception of the viewer. By including non-linear services in its scope, the AVMS Directive has apparently moved from a protective approach towards the viewer, in which the viewers' degree of responsibility and ability to protect themselves from unlawful content was quite low, to a new framework, based on the perspective of a brand new media literate viewer, capable of discriminating content and of avoiding possible harms with much less external regulatory intervention. Different Recitals of the Directive seem to stress this idea of viewer empowerment. However, some authors have criticized this vision as somewhat naïve and doubt that the conception of a viewer who has become more informed (see the transparency requirements ex Article 5) and literate (see the promotion of media literacy policies in Recitals 12 and 47 and Article 33) alleviates the need for regulatory intervention and can even force audiovisual markets to provide content that respects the main principles of the audiovisual regime.¹²

IV. Regulatory challenges. What needs to be done?

1. Concept clarification

The AVMS Directive has introduced an important change by covering different modalities of audiovisual mass communication. However, it is necessary to move one step forward and to revisit the boundaries between on-demand audiovisual services and other Internet services. The current definitions and exclusions established by the European legislator in 2007 have been outdated by the extremely fast development of technology and the change in the social use of new technologies. It must be kept in mind that the new Directive was approved at a time when social networks or YouTube-based models of distribution of audiovisual content were just emerging or did not even exist yet.

2. Creation of incentives for on-demand service providers and intermediaries to assume audiovisual regulatory principles

Traditional broadcasters or platform distributors may have some incentives to export the application of broadcasting principles from traditional media to new services, in order to guarantee a certain level of protection for all audiovisual services that they offer. For most of the cases concerned, the relevant service providers can be considered editorially responsible for the content that they offer be it on traditional or on-demand media. However, in particular vis-à-vis intermediaries it could be a little bit harder to find or create similar incentives in the field of Internet on-demand audiovisual services given that these intermediaries, according to the AVMS Directive, generally lack complete editorial responsibility over content. Even if a distinction could be drawn between (more or less) closed (walled-garden) Internet-based audiovisual media services (for which one can normally identify

11) As noted, YouTube provides a good example of rules that regulate free speech, approved and applied by a private entity. See www.youtube.com/t/community_guidelines

12) Helberger, N., "From eyeball to creator – toying with audience empowerment in the Audiovisual Media Service Directive", available at: www.ivir.nl/publications/helberger/From%20eyeball%20to%20media%20literate%20viewer.pdf

one preeminent intermediary which has a central role in granting access to the service and might therefore be less reluctant to assume some traditional broadcasting regulatory principles. This might be the case, for example, for device manufacturers, content aggregators, telecom operators who directly manage closed systems, etc.) and services openly accessible on the worldwide web, it would still remain uncertain whether a high and diverse number of intermediaries would accept to fall under the jurisdiction and legislation of several different states (which would be the case because of the usual cross-border scope of Internet on-demand audiovisual services). Such an expectation does not seem very realistic in light of the current – limited – degree of responsibility of these actors and currently applicable liability exemptions provided by the regulation of non-audiovisual Internet services (i.e. the e-commerce Directive). At any rate, and as professor Eli Noam has pointed out, intermediaries will probably be seen and used by public powers as a kind of very useful *cordon sanitaire* for undesirable content.¹³

3. Explore the possibilities of the current legal regime, in areas such as competition law or consumer law

In some cases, the behavior of the intermediaries mentioned in this article can be described under categories very well established in the field of competition law (like abuse of dominant position) or consumer law (cases in which the role of the intermediary impedes the access of the consumer to information relevant to make his/her choices). Thus, the instruments furnished by these two general disciplines could provide a useful regulatory scheme, which may not yet have been fully explored.

4. Move from ordinary regulation to a “communications governance scheme”...

The communications governance scheme is obviously the field for self- and co-regulatory schemes, in particular in areas in which the enforcement of traditional regulation would be either difficult to guarantee or just against the literal wording of the applicable legislation.¹⁴ The creation of such schemes, however, should not mean a mere privatization of the system for monitoring content and guaranteeing certain relevant principles. A good co- or self-regulatory system has to be based and established on clear public policy objectives, and viewed as convenient and adequate by the private sector; it has to count on adequate and proportionate mechanisms to intervene in the market; it has to empower viewers according to a realistic conception of their capabilities; and it should provide adequate backstop powers when needed and, of course everyone should be aware of the existence of these self- and co-regulatory mechanisms.

13) Noam, E., “Regulation 3.0 for Telecom 3.0”, *Telecommunications Policy*, Volume 32, Issues 1-2, February_march 2010, p. 4.

14) See Recital 44 of the Directive.

Elements of the definition of an audiovisual media service	Further reading definitions	Corresponding recitals
<p>Art. 1 alinea 1 lit. a) i): For the purposes of this Directive, the following definitions shall apply: “audiovisual media service” [...]</p>	/	<p>Recital 29: All the characteristics of an audiovisual media service set out in its definition and explained in recitals 21 to 28 should be present at the same time.</p> <p>Recital 28: The scope of this Directive should not cover electronic versions of newspapers and magazines.</p>
<p>- [...]a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union [...]</p>	/	<p>Recital 21, 2nd sentence: [the definition of an audiovisual media service] Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non- economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.</p>
<p>- [...] which is under the editorial responsibility [...]</p>	<p>Art. 1 alinea 1 lit. c): “editorial responsibility” means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.</p>	<p>Recital 25: The concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the concept of “effective control”, when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).</p>
<p>- [...] of a media service provider [...]</p>	<p>Art. 1 alinea 1 lit. d): “media service provider” means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.</p>	<p>Recital 26: For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.</p>

<p>- [...] and the principal purpose of which [...]</p>	/	<p>Recital 22, 2nd sentence: That definition [of an audiovisual media service] should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.</p>
<p>is the provision of programmes</p>	<p>Art. 1 alinea 1 lit. b): “programme” means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama.</p>	<p>Recital 23: For the purposes of this Directive, the term “audiovisual” should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive, which should not affect the freedom of the Member States to regulate such services at national level in accordance with the Treaty on the Functioning of the European Union.</p> <p>Recital 24, 2nd sentence: In the light of this [that on-demand audiovisual media services compete for the same audience as television broadcasts] and in order to prevent disparities as regards free movement and competition, the concept of ‘programme’ should be interpreted in a dynamic way taking into account developments in television broadcasting.</p>

Elements of the definition of an audiovisual media service	Further reading definitions	Corresponding recitals
<p>- [...]in order to inform, entertain or educate, to the general public [...]</p>		<p>Recital 21, 1st sentence: For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on- demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public.</p> <p>Recital 22, 1st sentence: For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients.</p> <p>Recital 39: As this Directive concerns services offered to the general public in the Union, it should apply only to audiovisual media services that can be received directly or indirectly by the public in one or more Member States with standard consumer equipment. The definition of “standard consumer equipment” should be left to the competent national authorities.</p>
<p>- [...]by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC [...]</p>	<p>[Art. 2 lit. a) Directive 2002/21/EC: “electronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed].</p>	

<p>- [...]Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph [...]</p>	<p>Art. 1 alinea 1 lit. e): “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.</p>	<p>Recital 27: Television broadcasting currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example, is an on-demand audiovisual media service. In general, for television broadcasting or television programmes which are also offered as on- demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast, i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.</p> <p>Recital 30: In the context of television broadcasting, the concept of simultaneous viewing should also cover quasi-simultaneous viewing because of the variations in the short time lag which occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process.</p>
<p>- [...]or an on-demand audiovisual media service as defined in point (g) of this paragraph;</p>	<p>Art. 1 alinea 1 lit. g): “on-demand audiovisual media service” (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.</p>	<p>Recital 24, 1st sentence: It is characteristic of on-demand audiovisual media services that they are “television-like”, i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive.</p> <p>Recital 58: 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.</p>

The Regulation of On-demand Audiovisual Services: Chaos or Coherence?

At the end of 2011, the European Commission will report for the first time on the application of the Audiovisual Media Services Directive. The Commission's letters to member states asking for information in this connection were unusually long and detailed, thus indicating the difficulties experienced in incorporating the Directive into domestic law. These difficulties mainly arise with respect to regulating non-linear audiovisual media services.

For this reason, in April 2011 the European Audiovisual Observatory and the Institute for European Media Law invited 25 experts on audiovisual media law to a workshop at which an assessment was made of the situation with regard to the regulation of on-demand audiovisual services. The principal questions for discussion were how the new provisions on the scope of the Directive have been incorporated into domestic law and how member states have handled the possibility of promoting the self- or co-regulation of on-demand audiovisual services.

The papers on which the workshop was based and a detailed report on the discussions that followed the various contributions are summarised in this *IRIS Special* and form a comprehensive overview of the possible regulation. After reading this *IRIS Special*, the somewhat provocative question in the title, "Chaos or Coherence?", can probably be answered by establishing that the regulatory landscape in Europe is characterised by both chaos and coherence.

This *IRIS Special* focuses on:

- Definitions of on-demand audiovisual services in EU member states
- The demarcation lines between the various types of media service
- Limits to the application of the Audiovisual Media Services Directive
- The involvement or exclusion of intermediaries in the regulation
- The meaning of "editorial responsibility" and the "principal purpose" of audiovisual services
- The technical dimension of on-demand services via networked devices
- The transposition of the Audiovisual Media Services Directive in two selected EU member states, the Netherlands and Italy
- Experience of self- and co-regulation in the case of the protection of minors and commercial communication in the United Kingdom and Germany
- Media users' expectations with regard to regulation
- Assessment by the business world of the Directive and of other provisions relevant for on-demand services
- The position of the legislature and the regulatory authorities
- Summary of the views of 25 experts from all over Europe

The European Audiovisual Observatory has published other titles on matters covered by the Audiovisual Media Services Directive:

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

ISBN 978-92-871-6665-4, 131 Pages,
Edition 2009, EUR 89

IRIS Special:
Editorial Responsibility

ISBN 978-92-871-6476-6, 50 Pages,
Edition 2008, EUR 75

IRIS plus:
Product Placement

ISBN 978-92-871-6859-7, 47 Pages,
Edition 2010, EUR 24,50

The European Audiovisual Observatory has also published two titles on the Russian rules governing the area falling within the scope of the AVMS Directive:

IRIS Special: The Regulatory Framework for Audiovisual Media Services in Russia

ISBN 978-92-871-6789-7, 64 Pages, Edition 2010, EUR 70

IRIS plus: A Landmark for Mass Media in Russia

ISBN 978-92-871-7050-7, 56 Pages, Edition 2011, EUR 24,50

Permanent reporting on regulation issues and all other legal aspects at the European and national level is provided by the Observatory's monthly electronic newsletter:

IRIS, Legal Observations of the European Audiovisual Observatory

The newsletter is available free of charge at <http://merlin.obs.coe.int/newsletter.php>

