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New Forms of Commercial Communications in a Converged Audiovisual Sector

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New forms of commercial communications in a converged audiovisual sector

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Going convergent implies several challenges for companies, users, policy makers and regulators, especially when it comes to the multiple facets of commercial communication in the online environment. The steady growth of new on-demand services in a context where most users tend to claim that everything should be free of charge has obliged a rethink of the ways of funding audiovisual content. If direct payment and the 30-second spot were the monetary drivers in the linear world, many service providers are now using big data as main currency and behavioural advertising as their leading form of commercial communication.

The legal implications of these developments are multiple. Not only do we witness a progressive blurring of the difference between audiovisual content and advertisements, which in itself could undermine the traditional cornerstones of the separation principle and editorial independence that have accompanied European broadcasting regulation for 25 years; not only does technology allow a completely new form of exploitation of personal data, by tailoring both commercials and search results to fit the personal preferences of each user, who is often unaware about how intrusive the consequences of a "click to accept" might be; but we are also faced with a completely new context, within which the interactions between the different actors of the value chain still need to be properly explored so as to assess on which level the rules should be adopted in order to be most effective and meet the highest degree of acceptance.

With this background scenery in mind, several experts joined a closed workshop on the "New forms of commercial communications in a converged audiovisual sector" organised in April 2014 by the European Audiovisual Observatory (EAO) and the Institute of European Media Law (EMR) in Saarbrücken, with the support of the Institute for Information Law (IViR) of the University of Amsterdam. The purpose of the workshop was to explore the regulatory implications of these developments, with particular regard to the interactions between the several EU directives which address various aspects of the delivery of commercial content through the services and devices of the online environment.

The scene was set by Conor Murray (EGTA) and Christian Grece (EAO). Their keynotes on the emerging techniques of advertising and new funding models for audiovisual media services allowed appreciating the main potential of the new advertising business models that are becoming available as a consequence of users adopting multi-screen behaviour. They both stressed that, especially for online display and mobile advertising, the collection and the exploitation of big data play a crucial role in allowing the delivery of the right message to the right person at the right time.

The applicable rules were explored by Mark Cole (University of Luxembourg). The scattered structure of the converged regulatory puzzle requires digging into a multiplicity of provisions disseminated across a variety of directives – audiovisual media services, e-commerce, misleading commercial activities, unfair competition practices, data protection, e-privacy – and the picture that can be drawn from this leaves the interpreter face-to-face with many grey areas.

Speaking on behalf of the commercial broadcasters, Ross Biggam (ACT) expressed a strong wish for a future-oriented regulatory activity, whether that takes the shape of a revised AVMSD or a wider "content directive", and suggested that rather than focusing on the options of deregulating everybody or regulating the rival, the new regulatory framework should concentrate on key principles, such as the protection of minors, the adoption of ethical standards and the notion of editorial responsibility. Heiko Zysk (ProSiebenSat) stressed the need to involve all main actors in this process: the companies in giving comprehensive and thorough information, the users in paying for the content they watch and legislators in giving more regulatory options that both work cross-border and involve self- and co-regulation.

Having become a means of payment, as mentioned, data are playing a major role in the online environment, where advertising is targeted according to the personal experience of each user. Being that you don't necessarily get (only) what you want when you click", Frederik Zuiderveen Borgesius (IViR) explored the regulatory framework underlying data protection, highlighting the complexity of identifying the correct legal basis for consent to data processing in the case of behavioural targeting, particularly when it comes to the opt-in and opt-out systems used for the tracking of cookies.

The final panel discussion saw Anne Deltour (European Commission), Cornelia Kutterer (Microsoft) and Malcolm Phillips (CAP) elaborate on whether the current legal framework is ready for the converged advertising market and on the possible role of both the industry and of self- and co-regulatory initiatives.

Workshops are not supposed to give answers, but they may help to raise the right questions in a timely manner. This is particularly important when it comes to technology-driven activities, where legislation risks becoming obsolete long before its implementation. A consensus on the main principles could be a good starting point, as shown in the pages that follow.

Strasbourg, November 2014

Maja Cappello
Head of the Department for Legal Information
European Audiovisual Observatory

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Report on the Workshop "New Forms of Audiovisual Commercial Communications in a Converged Audiovisual Sector"

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Advertising and, in the broader sense, commercial communications play a fundamental role for the audiovisual sector. Advertising revenue is used to fund the production and acquisition of popular programmes and other audiovisual content and therefore directly contributes to the financing of the services on offer. The emergence of hybrid consumer devices, such as smart TVs, on which TV programmes can be viewed on the same screen as on-demand or other Internet-based services, together with the growing popularity of mobile consumption of media content (on smartphones or tablets) are creating new business opportunities and models for advertisers and content providers alike. The economic potential of commercial communications is increasing, firstly because of the international audiences that they can reach via the Internet and secondly on account of their low production costs.

However, although these new forms of commercial communication have undoubted advantages, they also raise a number of legal questions. With the emergence of smart TV and other new media, the boundaries between commercial communication and editorial content are becoming increasingly blurred. How and to what extent should users and certain subgroups, such as children and young people, be protected in the future? To what degree is the editorial responsibility of media service providers affected by advertising inserted by third parties? Alongside these aspects of media law, data protection issues are also relevant. Modern technologies make it easier to store and process user data, which can be used for the purposes of behavioural advertising. How much should users and viewers be told about the collection of personal data and how can their privacy be protected?

The current legal position is complicated. Commercial communication is governed at European level by various legislative texts, each only covering certain aspects. The Audiovisual Media Services Directive and the E-Commerce Directive, for example, protect consumers and the integrity of audiovisual content. However, commercial communication can also be affected by the data protection directives and the Unfair Commercial Practices Directive, while European competition law can also influence its development. In order to meet its obligations in practice, the industry is increasingly relying on self-regulatory mechanisms at both European and national levels.

In view of the complexity of the situation, a joint workshop was held on the initiative of the European Audiovisual Observatory (EAO) and the Institute of European Media Law (EMR) in Saarbrücken

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on 4 April 2014.[1] The workshop was divided into a total of nine lectures and several discussion sessions. Firstly, the current state of developments in the market was presented. The legal framework for commercial communication was then described. After that, the restrictions imposed on advertising freedom by aspects of data protection law were explained. This led into a discussion on the suitability of the current legal framework in the light of a converged advertising market. This report summarises the lectures in chronological order and describes the main discussion points from the workshop.

I. New forms of advertising in a converged audiovisual sector

The first part of the workshop was designed to give the participants a basic market-oriented overview of the advertising techniques currently used in the converged media landscape (1) and of the current online advertising market (2).

1. Emerging advertising techniques and new funding models for audiovisual media services

To introduce this subject, Conor Murray[2] gave a brief summary of new advertising techniques and funding models for audiovisual media services. Using various statistics, he showed that, despite the emergence of new media services and types, traditional television is still attracting large audiences and playing the leading role in a converged media landscape. In Great Britain, for example, 97% of the population watched television in January 2013, whereas only 69% used Google in the same month. The situation is similar in Germany, where the average viewer spent much more time in June 2012 watching television than using social media and portals such as YouTube, Facebook, Hulu and Netflix. Television remains one of the most popular media and is being used by more and more people. Nevertheless, online viewing of video content is also increasing. According to estimates for 2014, video accounted for 91% of Internet data traffic, more than twice as much as two years previously. An equally impressive 1 billion mobile devices worldwide were capable of playing videos in 2013. The advertising sector is also growing. In the USA, advertising expenditure was expected to rise to USD 68 billion in the television market and USD 5 billion in the digital market. The market share of digital advertising is predicted to grow by 7% (from 9% in 2014) over the next four years, at the expense of television advertising.

After describing the economic potential of the audiovisual media and commercial communications market, Murray focused on the interests and needs of consumers and users. Consumers expect a personalised, interactive media experience, with a focus on social networks and entertainment, which is accessible on a variety of devices. The so-called "second screen" is growing in importance.[3] Using specific applications ("apps"), mobile devices themselves can help to boost viewing figures and revenue and engage viewers, thereby opening up an additional source of income. The distribution of premium and quality content, along with their public profile and reputation as trustworthy brands, are television broadcasters' major strengths. This positive image could help them to develop an entertainment cycle involving various devices and apps. Well-known reality shows like "The Voice" have already shown that this can be a successful model.

In this context, Murray described the new "CrossMates" series format, produced and broadcast by RTL Nederland.[4] In this series, viewers followed and interacted with their favourite character both during and after the show. For example, they received information about a future storyline. Messages and comments from viewers might be mentioned and discussed by the characters in the programme. This strengthens the relationship with the viewer and builds anticipation for the next episode. The more active a viewer is, the more they are told about how the plot will develop. This format opens up new opportunities for advertisers, since the characters can use sponsored products in the programme

1) The workshop was chaired by Nico Van Eijk, Professor of Media and Telecommunications Law at the University of Amsterdam and Director of the Institute for Information Law (IViR), Amsterdam.
2) Regulatory and Public Affairs Director, Association of Television and Radio Sales Houses (EGTA), Brussels. See Conor Murray's article in this publication.
3) The term "second screen" is used to denote an additional device with a screen (e.g. tablet or smartphone) that, alongside a traditional television broadcast, offers additional services directly related to the television programme.
4) An English-language video about CrossMates is available at: www.egta.com/egta_bites/egta_bites_51_04042014/video.html

and active viewers can be offered prizes in the form of discounts and vouchers. E-commerce can also be boosted via special offers (e.g. for clothes worn by the characters). The Dutch example shows that, by linking the second screen to a TV programme, new revenue sources can be created by means of dynamic, real-time transactions and advertising.

Another innovative format described by the speaker was the "GTST Spring Levend" app produced by RTL Nederland in summer 2013 in connection with a TV series (GTST, "Gute Zeiten, Schlechte Zeiten") in which one of the characters had died in a formation skydiving accident.[5] Each week, one character who had survived the jump was revealed. Additional content and code words were sent to fans via numerous media. Fans were rewarded for participating with opportunities to meet the characters and were able to speculate on social media platforms, thereby contributing to the mystery and to the show's success. Advertisers became part of the plot. The GTST Spring Levend app was downloaded 500,000 times and the website received 17 million hits. This example demonstrates a successful interaction between second screen apps and TV programmes.

Finally, Murray discussed the regulatory framework and noted that it is becoming increasingly difficult to make a clear distinction between regulated and unregulated content, potentially leading to consumer harm. The future regulatory framework should therefore include all the stakeholders involved. The speaker also warned about possible third-party interruptions and distortions of the traditional value chain. Competition for every user is open and all stakeholders are likely to be looking for the most appropriate business models.

2. The online advertising market

In the second lecture of the day, Christian Grece[6] presented an overview of the online display advertising market. He began by pointing out that, with a value of EUR 24.3 billion, online advertising is second behind television advertising (EUR 28.1 billion) in terms of European market share. He distinguished between three types of online advertising. Firstly, search advertising is based on search engine links between specific search terms and a particular company or website. Secondly, classified advertising and directories are mostly found in online versions of newspapers and magazines, in their own separate sections (e.g. property, clothing, cars). Thirdly, display advertising appears on websites in the form of banners, pop-ups and, increasingly, video ads.

Display advertising has grown by almost 10% between 2011 and 2012. On the one hand, the display advertising market is extremely fragmented, due to the involvement of various stakeholders, such as advertisers, publishers and other companies acting as intermediaries. On the other hand, there is a clear trend towards market consolidation, with a small number of global companies ("big players", such as Google, Facebook, Microsoft and Amazon) dominating the market. These companies are investing in the whole value chain in order to offer their customers a single, complete package.

The main players in the display advertising market are advertisers and their agencies, which advertise products and services. In between advertisers and publishers, who sell advertising space, are numerous platforms and networks. Demand-side platforms help advertisers to manage their online advertising campaigns and facilitate the purchase of auction-based audience data in a centralised system. Ad networks act as brokers or intermediaries between advertisers and publishers. They aggregate user groups and sell audience data for better targeting. Ad exchanges are auction-based digital marketplaces that facilitate real-time buying and selling of advertising space using automatised algorithms. Retargeting firms gather data on consumers using cookies and other technologies in order to send the right advert to the right audience. The main objective for the advertisers is to identify which user would find which advert interesting at any particular moment.

Another objective of online advertising is to display advertisements to consumers at exactly the right time. Automatised and programmatic ad buying is also becoming increasingly common. With

5) An English-language video about GTST Spring Levend is available at: www.egta.com/egta_bites/egta_bites_53_18042014/videos.html

6) On-demand audiovisual markets analyst at the European Audiovisual Observatory, Strasbourg. See Christian Grece's article in this publication.

real-time bidding, for example, an ad space is filled in real time with the ad of the highest bidder. The auction is based on algorithms that automatically match user profiles to advertisements. With regard to the need to match advertising to the right user, the speaker mentioned the possibility of consumer profiling using "big data", particularly data from social networks such as Facebook and Twitter.

Finally, the speaker mentioned the growing popularity of mobile advertising, the result of the increasing use of mobile phones and other mobile devices. Thanks to the expansion of broadband networks, larger quantities of data and, therefore, audiovisual content can now be transferred more easily and quickly. The value of the mobile advertising market is expected to rise more than four-fold from USD 3.58 billion in 2013 to USD 15.18 billion in 2017. Internet use via mobile phones and tablets is also expected to increase over that period. This opens up new opportunities for advertisers and operators of television and other audiovisual media services to use "second screens" (i.e. mobile phones) to generate additional revenue streams. However, Grece explained that it was currently still difficult to fund content through mobile advertising due to its lack of profitability. Profit margins are very low because mobile advertising is very cheap. The scale and reach of the business model are therefore particularly important and can only be achieved by large companies that already hold dominant market positions.

In the subsequent discussion, Grece explained that, since cookies cannot be used on mobile devices for technical reasons, user profiles have to be created across all their devices. For example, localisation techniques and other measures are used to identify the characteristics of individual users. One participant pointed out that the overwhelming majority of viewers watch television live. Half of the remaining 10% of viewers watch programmes later the same day. According to surveys, viewers feel drawn to television, a conclusion confirmed by Murray, who mentioned other studies that had suggested that people find it hardest to do without television.

A number of questions were asked concerning the innovative "CrossMates" series and "GTST Spring Levend" app that Murray had described. One participant said that interaction between TV characters and viewers via SMS falls under the legal framework for telecommunications services in the Netherlands. Therefore, companies have to comply with specific rules on subjects such as waiting queues and costs when using such innovative business models. Another participant commented that the additional services for second screens are largely aimed at young people. Murray replied that providers and operators are aware of the demographic change and will, in future, include older generations more intensively in new business models. Finally, one participant stressed that the Dutch formats were merely examples that had been targeted at a very specific sector of the population. Such formats should certainly not be seen as the new standard, but as niche products. TV companies therefore need to be flexible and take a host of measures in order to counteract increasing convergence and the shift towards online services.

II. The current European legal framework – the sets of rules on commercial communication in a converged world

In the second part of the workshop, Mark D. Cole[7] presented the European Union's basic legal instruments concerning commercial communication, focusing in particular on their suitability in the era of convergence.

He began by noting that a whole host of different provisions and legal instruments could be applicable, since there is currently no European Union legislation devoted exclusively and specifically to commercial communications in converged media services. Rather, the law has been retrospectively adapted to new technologies and services. The first text to be analysed was the Audiovisual Media

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

Services Directive (AVMSD),[8] which has also been recognised as the key regulatory instrument in the European Commission's Green Paper[9] of April 2013. It is doubtful whether the Commission's communication on television advertising, which was published ten years previously, when the AVMSD's predecessor, the Television Without Frontiers Directive[10] was still in force, can provide any concrete answers.[11] Despite the rapid, far-reaching economic developments, the AVMSD is binding law.

The Directive distinguishes between two types of audiovisual media services: commercial communications on the one hand and audiovisual content on the other. This distinction highlights the need for separate regulations for commercial communications. The main purpose of advertising regulations is to protect consumers from excessive advertising, as the European Court of Justice (ECJ) has recognised in its case law.[12] Since consumers can exercise greater control over on-demand services, the AVMSD is based on a system of graduated regulation, regulating linear (television) services more extensively than non-linear (on-demand) media services.

The speaker then gave an overview of the relevant provisions of the AVMSD. In addition to the general provisions, such as the information obligations in Article 5 or the ban on discrimination in Article 6, specific provisions on audiovisual commercial communications are enshrined in Articles 9 to 11. Article 9 was the most relevant provision, setting out the key principles of television advertising and applying them to commercial communications. It requires commercial communications to be "readily recognisable as such".[13] Article 9 also sets out content-related rules, such as the ban on discrimination or the infringement of human dignity.[14] Commercial communications cannot advertise certain products and services, such as cigarettes or medicinal products available only on prescription.[15] However, commercial communications for alcoholic beverages are permitted under certain circumstances.[16] The protection of minors, a major target group for new media, is also guaranteed under Article 9. The speaker also referred to the provisions on sponsorship and product placement, both of which are only permitted under certain conditions. For example, the content and, in the case of television broadcasting, the scheduling of sponsored audiovisual media services or of those containing product placement should not be influenced in such a way as "to affect the responsibility and editorial independence of the media service provider".[17] Cole stressed that many services offered on the Internet fall outside the scope of the AVMSD, because they often don't meet the criterion of editorial responsibility. However, these services have to comply with the provisions of the Directive on electronic commerce (E-Commerce Directive),[18] which applies to information society services, as well as commercial communications,[19] but contains few substantive rules for commercial communications. Article 6 of the E-Commerce Directive contains information obligations under which, for example, commercial communications should be "clearly

8) 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 (Audiovisual Media Services Directive) (codified version) [2010] OJ L 95 of 15.4.2010, p. 1, see also Corrigendum, OJ L 263 of 6.10.2010, p. 15 (AVMSD). Available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0013&qid=1404201137112&from=EN

9) European Commission, Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, COM(2013) 231 final of 24.4.2013. Available at https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/convergence_green_paper_de_0.pdf

10) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. OJ L 298 of 17.10.1989, p. 23, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31989L0552, amended by Directive 97/36/EC, OJ L 202 of 30.7.1997, p. 60, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31997L0036&qid=1404201346061&from=EN

11) Commission interpretative communication on certain aspects of the provisions on televised advertising in the "Television without frontiers" Directive, OJ C 102 of 28.4.2004, p. 2, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0428%2801%29:EN:HTML

12) ECJ, Case C-245/01, *RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, ECR 2003, I-12489 (EU:C:2003:580) para. 64.

13) Art. 9(1)(a) AVMSD.

14) Art. 9(1)(c)(i) and (ii) AVMSD.

15) Art. 9(1)(d) and (f) AVMSD.

16) Art. 9(1)(e) AVMSD.

17) Art. 10(1)(a) and 11(3)(a) AVMSD.

18) 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 17.7.2000, p. 1 (E-Commerce Directive), available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&qid=1404201527472&from=EN

19) Art. 2(a) of the E-Commerce Directive in conjunction with Art. 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC.

identifiable as such" and the person on whose behalf commercial communications are made should also be clearly identifiable.[20] These provisions increase transparency and therefore help to protect consumers.

As regards specific legal acts designed to protect consumers, Cole outlined the Unfair Commercial Practices Directive (UCPD),[21] which protects consumers from unfair business-to-consumer commercial practices. Commercial communication can be categorised as an unfair commercial practice if it causes the consumer to take a decision that he would not otherwise have taken.[22] The speaker also referred to Annex I of the UCPD, which lists commercial practices that are considered unfair in all circumstances. For example, "using editorial content in the media to promote a product" without making this clear to the consumer is misleading.[23] Direct exhortations to children in an advertisement are also banned as aggressive commercial practices.[24]

Another relevant area of law concerns data protection. Cole mentioned the general Data Protection Directive of 1995[25] and the 2002 e-Privacy Directive,[26] which was amended in 2009. The concept of consent, which consumers need to give for their data to be processed, is a major problem. For example, users have to be informed in advance about the collection of data for profiling purposes (opt-in system).[27] There was some debate over exactly what information was covered by this requirement. The process of modernising data protection law, in particular the 1995 Directive, was launched through a proposal for a General Data Protection Regulation (GDPR).[28] Cole briefly referred to the definition of profiling proposed by the European Parliament and to the user's right to object to profiling. However, it remains unclear how users should give consent and what information they should be given.

Competition law is also relevant to commercial communication. The speaker highlighted the domination of the market by a small number of US firms. The European Commission has developed the extraterritorial application of EU law in its decisions on merger controls and the abuse of a dominant market position (such as in the Google case). This has also served as a model for the proposal for a GDPR. In conclusion, Cole, like Grece before him, noted the diversification of players in the value chain and proposed a system of shared responsibility between advertisers, media service providers and platform operators. He ended his lecture by referring to the jurisdiction problems that are compounded by providers who offer their services simultaneously in more than one Member State.

In the subsequent discussion, the speaker was asked which of the numerous provisions that he had described he would like to change the most in order to take convergence into account. Cole replied that he would broaden the definition of an audiovisual media service in the AVMSD. However, this extended definition cannot include all types of audiovisual content, such as user-generated content or the

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20) Art. 6(a) and (b) of the E-Commerce Directive.

21) 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, OJ L 149 of 11.5.2005, p. 22 (UCPD), available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005L0029&rid=1

22) Art. 2(d) in conjunction with Art. 5 UCPD.

23) Annex I No. 11 UCPD.

24) Annex I No. 28 UCPD.

25) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995, p. 31, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:01995L0046-20031120&rid=1

26) 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 201 of 31.7.2002, p. 37 (e-Privacy Directive), available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02002L0058-20091219&rid=1, amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, OJ L 337 of 18.12.2009, p. 11, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0136&from=EN

27) Art. 5(3) of the e-Privacy Directive.

28) European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final of 25.1.2012, available at www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2012)0011_/com_com(2012)0011_en.pdf European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) of 12.3.2014, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN

electronic press. The speaker added that such an amendment would not stand alone, but would have consequences for the practical provisions enshrined in the AVMSD, which would need to be adapted to the broader scope of application.

Another participant referred to new forms of advertising, such as native advertising and branded channels,[29] and pointed out some conflicting definitions in the AVMSD. Whereas the definition of an audiovisual media service in Article 1(1)(a)(ii) contains an independent definition of audiovisual commercial communication, Article 1(1)(h) defines it as "images" that "accompany or are included in a programme". The participant asked whether, despite these vague definitions, the AVMSD also applies to services that only broadcast commercial communications and often do not meet the criterion of Article 1(1)(h). The speaker likened this to the different wording of the provisions on the protection of minors contained in Articles 12 and 27. Whereas Article 12 refers to on-demand audiovisual media *services* and has a supposedly broader scope of application, Article 27 only mentions *programmes*. Regarding the concept of "audiovisual commercial communication", the speaker thought the wording was similar to the definition of "advertising". Although "commercial communication" is interpreted more broadly than "advertising", the practical provisions in the AVMSD mostly refer to commercial communications in relation to programmes. The speaker did not exclude the possibility that the AVMSD could apply to commercial communication catalogues, but doubted whether any provisions other than Articles 9 to 11 AVMSD should be meaningfully applied.

Another participant commented on this point from his own national perspective and referred to discussions that had taken place between the national regulator and the European Commission during the implementation phase of the Directive in his country. He explained that the specific reference in Article 1(1)(a) AVMSD had been included at the Member States' request in order to ensure that advertising channels or services that only broadcast commercial communications are covered by the Directive.

Another participant noted a paradigm shift in relation to two essential aspects. Firstly, the regulation of advertising has always been considered legitimate by the industry and by society. Advertisers have accepted the restrictions on their activities imposed by regulation. These days, however, it is difficult to identify the average consumer. Would new forms of advertising, such as targeted advertising, not call the established boundaries into question? Secondly, the current regulations are based on a distinction between editorial and commercial content. Advertising and other commercial information can be distributed as long as the integrity of editorial content is maintained. However, the boundaries between editorial and commercial content are becoming increasingly blurred as a result of new media and advertising techniques. Commercial information can be included in current affairs and news programmes, as in the Dutch examples described by Conor Murray. In the context of these changes, is it not necessary to reconsider the distinction between editorial and commercial content? Cole thought that the AVMSD should no longer be seen as the only instrument that is relevant to new media. Data protection and the legal framework for unfair commercial practices are becoming more important. The speaker suggested that the AVMSD should be reduced down to its provisions on editorial content, including minimum standards, such as the ban on discrimination or the protection of media diversity and pluralism. Other legal instruments are better suited to regulate the effects of commercial communication on consumers, such as the identification aspects of advertising and information obligations vis-à-vis users. The speaker could not predict whether the current legal instruments on data protection and unfair commercial practices give sufficient protection to consumers. However, he thought they should be revised and pointed out that changes at the European level would certainly not take effect in the near future. This has been demonstrated by the preparation and adoption phases of the AVMSD, which has been characterised by lengthy negotiations between the institutions. The Commission's Green Paper of April 2013 explained the need to make changes, but failed to make concrete proposals or draw up a timetable. Cole therefore suggested that alternative and, in particular, that more flexible solutions should be considered rather than simply focusing on the possible revision of the AVMSD.

29) In native advertising, advertisements are written in a journalistic style and placed in a natural environment so they are hard for the user to identify as such. Branded channels are channels that only broadcast commercial communications.

III. Challenges brought by emerging forms of commercial communications

The third part of the workshop was devoted to various themes with particular relevance in a convergent advertising context. The participants began by considering the changing situation regarding editorial responsibility for advertising (1), before examining the data protection issues relating to the use of behavioural advertising from both the consumer's and provider's perspective (2).

1. Editorial responsibility and control

The lecture by Ross Biggam[30] concerned the challenges brought by emerging forms of commercial communications in terms of the editorial responsibility and control exercised by television companies. Advertising remains one of the main sources of income for the television industry and is important for the sustainability of the whole sector, thanks in particular to the reinvestment of advertising revenue in television programmes. Biggam drew a parallel with the developments in the advertising market that led to the adoption of a Commission communication[31] referring to the Television Without Frontiers Directive[32] in 2004. In its communication, the Commission urged the Member States to treat advertising techniques, such as interactive, virtual and split-screen advertising, as compatible with the Directive and to interpret them according to the *"in dubio pro libertate"* principle.[33]

As convergence had increased, the Directive had been revised, with a particular focus on product placement. This is reflected in the current provision of the AVMSD, which has proven worthwhile despite its complex structure. The possibility of using product placement in certain programmes and under certain conditions has enabled television companies to experiment with an additional source of income. In principle, although product placement cannot replace the traditional 30-second advertising spot, it can certainly contribute to broadcasters' income.

The speaker then turned to current developments and attempted to refute the idea that television is relatively slow to innovate. Biggam argued that every part of the television sector is currently facing new challenges and is having to reinvent itself. Television is slow to adapt to new conditions because, unlike the press and music industries, which have been forced by far-reaching changes to develop innovative business models, the television market has remained stable. It is also difficult to evaluate consumer behaviour in relation to new technologies, such as the "red button", which viewers can use to interactively access additional content during a programme. Biggam then discussed the innovations in the advertising market that were already anticipated in the year of the Commission's communication and which are now increasingly becoming reality. The speaker thought that native advertising, in which commercial and editorial content are closely connected, illustrates the fact that not only TV broadcasters, but also advertisers are reforming their business models. Significant change is taking place at business-to-business level, as advertisers are looking for ways of combining the current model with promising techniques from the online sector that are based on data processing. The "Sky AdSmart" service in the United Kingdom, for example, uses existing customer profiles to broadcast advertising targeted at the individual. The information found in the contracts between the pay-TV provider and its customers is being used for advertising purposes. Broadcasters are also experimenting with real-time auctions, although this technology is not yet ready for television.

The speaker said that new forms of advertising are continually being developed and adjusted. Virtual product placement and behavioural advertising are being used more and more. The European Interactive Digital Advertising Alliance (EDAA) is a recently formed industry-based initiative that, with the Commission's support, is introducing user-friendly standards for behavioural advertising.[34]

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30) Director General of the Association of Commercial Television in Europe (ACTE). See Ross Biggam's article in this publication.
31) Commission interpretative communication on certain aspects of the provisions on televised advertising in the "Television without frontiers" Directive, OJ C 102 of 28 April 2004, p. 2 *et seq*.
32) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298 of 17 October 1989, p. 23 *et seq*.
33) Latin expression meaning "if in doubt, favour freedom". In other words, if the legislator has not worded a provision clearly, a broad interpretation of the law should apply.
34) For more information, see: www.edaa.eu

In order to illustrate the future possibilities offered by behavioural advertising, the speaker showed a video produced by the Australian association of commercial television broadcasters.[35] In the video, it was predicted that television content would continue to be made available to a wide audience, while advertising breaks would be personalised using facial recognition technology. This idea was based on the theory that viewers want to see different sorts of advertising depending on whether they are watching alone, with their partner, with children or with a group of friends. For this reason, viewers are prepared to give advertisers certain information, such as the number of people watching television at a particular time. The speaker emphasised that such techniques are an invasion of privacy. However, he thought that some groups of viewers are willing to disclose their data and information in order to receive personalised advertising.

Another challenge for the market concerns connected TV. It is technically possible for programmes to be overlaid with advertising, which would harm the integrity of television content. It is technically possible for a third party, without the knowledge of the broadcaster and producers, to superimpose advertising during live programmes. A modernised AVMSD therefore has to define how third parties based outside the EU should be dealt with. The speaker considered this a crucial aspect of the European regulatory framework, since licences to broadcast individual channels are issued by national regulators. Under the terms of these licences, TV broadcasters accept responsibility for the content that is made accessible to viewers. This mechanism could be used to hold broadcasters liable for all regulatory infringements. However, if regulators were no longer able to enforce laws and the standards laid down in those laws because broadcasters had lost control over what appeared on the screen, this basic principle would have to be reconsidered. The speaker agreed with Mark D. Cole's view that a broad-ranging discussion of issues, such as data protection law, e-commerce and unfair business practices, was necessary in order to analyse these challenges.

This was also reflected in the ACT's contribution to the Commission Green Paper, which recommended a move away from micro-management and towards greater flexibility. However, certain standards contained in the AVMSD should be retained. As far as commercial communications are concerned, it is vital to maintain the provisions on labelling of advertising in order to improve transparency. The notion of editorial responsibility and the associated principle of signal integrity should also be defended. In future, more attention will be paid to editorial responsibility. The ability to identify with whom that editorial responsibility lies for broadcast content is indispensable for the future of the AVMSD. The application of the *"in dubio pro libertate"* principle is appropriate for new forms of advertising. The speaker thought the associated principles of editorial responsibility and TV signal integrity are essential and worth protecting.

In the subsequent discussion, one participant drew attention to the use of cookies for behavioural advertising on the websites of private TV companies in the Netherlands. While broadcasters are investing hugely in researching their viewers' interests so they can target their advertising, third parties benefit from their websites and the user information that they contain, which amounts to "user theft". Ross Biggam replied that many innovations have the potential to be double-edged swords. However, television broadcasters need to build an online presence in order to counterbalance viewer migration to the Internet. The creativity of television advertising and the reliability of viewing figures are a structural advantage for TV companies.

Another participant wondered whether the television industry still trusts viewing figures as a reliable guideline. Another participant replied that it did, adding that it is not a matter of detailed, comprehensive figures, but of values that can be used to initiate further economic processes (the launch of a new product to be displayed in a certain number of shops for a certain length of time). Unlike online advertising, television advertising is reliable and can aid the financial planning of companies on whose behalf advertising is broadcast.

Another participant spotted parallels between the different lectures and a change from traditional regulation of the television market to a broader form of regulation that also deals with unfair business practices. This is accompanied by a shift away from broadcaster responsibility towards advertiser responsibility or liability. One participant doubted whether advertisers are aware of this responsibility,

35) The video is available in English at: www.thinktv.com.au/content_common/pg-watch-2.seo

since they create advertising messages without paying any attention to the relevant legislation. In this connection, Ross Biggam mentioned the problem of advertising on websites that infringe copyright on a massive scale by distributing illegal content. Such advertising is based on algorithms that have no legal personality, which makes it difficult to apply the concepts of responsibility or liability. One participant replied that, although these algorithms are automated, they must be set up and monitored by a natural person or legal entity. Moreover, several self-regulatory initiatives taken by the industry, such as by the European Interactive Digital Advertising Alliance (EDAA) in the field of behavioural advertising, show that market players are responding relatively quickly and in a concerted manner, which in turn might indicate that they are aware of their new, more active role.

From the industry's point of view, affiliate marketing,[36] in which possibly neither the content provider nor the advertiser is aware of illegal content or commercial communications, is a source of concern. Certain legally dubious practices have developed, such as "browser locking", where the affiliate blocks the web browser if the user does not agree to the transaction. Advertisers and providers are very concerned about the chain of responsibility and are prepared to meet certain standards and take responsibility. One participant thought this was an opportunity to call for the advertising industry to be more closely involved in the current debate.

Regarding TV signal integrity, Ross Biggam explained that this is not limited to the AVMSD, but should be seen, in a broader copyright-related context, as a reaction to piracy and distribution problems. In the Flemish Community of Belgium, for example, a provision has been adopted to protect signal integrity from unauthorised distribution. One participant mentioned that the signal integrity principle is linked to telecommunications law, although only where technical integrity is concerned. However, when overlays appear on the TV screen, the technical signal is not affected, which places a question mark over whether telecommunications law applies to overlays. Device manufacturers are becoming increasingly involved in these matters and their role in protecting signal integrity is also discussed. As gatekeepers, they are in an excellent position to influence the range of services offered via their portals. They also therefore have a certain responsibility for the integrity of content that is offered by TV companies or other providers. Finally, the problem of distinguishing between content and advertising was discussed. Ross Biggam recognised that this distinction should remain rooted in a future regulatory framework. He stressed that the need for transparency should not lead to irritation for viewers and users and called for a user-friendly system with, for example, easily understandable wording. Empirical studies should also be carried out in order to measure the effect of labels and warnings on users and thereby improve transparency standards.

2. Limitations of advertising freedom by data protection

In his lecture, Frederik Zuiderveen Borgesius[37] presented an overview of data protection principles and requirements in relation to the use of behavioural advertising.

Borgesius began by describing the different stages involved in the use of behavioural advertising. Firstly, the user's online behaviour had to be monitored. The data is then stored and analysed before, finally, advertising is targeted at the user.

Using numerous screenshots as an example, Borgesius demonstrated how behavioural advertising actually looks to the user. It is noticeable how, in some cases, a very high number of tracking tools are used to gather and analyse information about users' online behaviour.

Borgesius then looked in detail at data protection rules and noted, with reference to the case law of the European Court of Human Rights (ECHR),[38] that Article 8 of the European Convention on Human Rights is applicable to the monitoring of an individual's online behaviour. The Article 29 Data Protec-

36) In affiliate marketing, the affiliate offers a space on its website, which a provider of products or services uses for advertising purposes. Identification numbers enable the provider to identify which affiliate recruited a particular customer and to pay a commission to the affiliate.

37) Postgraduate student at the Institute for Information Law (IViR), University of Amsterdam. See Frederik Zuiderveen Borgesius's article in this publication.

38) ECHR, *Copland v United Kingdom*, application no. 62617/00, 3 April 2007.

tion Working Party[39] has noted that behavioural advertising entails the processing of personal data, since "such devices enable data subjects to be 'singled out', even if their real names are not known".[40]

Borgesius noted that, under Article 8 of the Charter of Fundamental Rights of the European Union, personal data has to be processed fairly for specified purposes and with the consent of the person concerned or some other legitimate basis laid down by law. Since there are currently no specific regulations for behavioural advertising, the only relevant criterion is that of consent. Borgesius stressed that the transparency obligations enshrined in Data Protection Directive 95/46/EC[41] are particularly important, as is the possibility for users to withdraw their consent and stop the processing of their data.

The e-Privacy Directive 2002/58/EC[42] requires any party that stores or accesses information (e.g. by using cookies or similar files) on a user's device to obtain the user's consent, which should be given on the basis of clear and comprehensive information. This provision also applies, in principle, to smart TVs.

Using examples from the Netherlands, Borgesius then demonstrated how consent to store cookies is given. As a rule, users only have two options: they either consent to the processing of their data or do not use the service. If they do not consent, they cannot access the website concerned.

Borgesius therefore argued that public service media should not be allowed to use such tracking walls – or should at least be required to limit use of such data to their own services. After all, the exclusion of a user who wants to protect his data is incompatible with the universal access requirement.

Generally speaking, personalised services should always come with a pause or stop button. A user's refusal to consent should not be limited to targeted advertising, but should include all tracking of his online behaviour.

In a parallel lecture, Heiko Zysk[43] addressed the subject of advertising and data protection from a content provider's perspective and described the opportunities created for audiovisual media service providers by new forms of advertising. Focusing on the effects of data protection law, he discussed the challenges of regulation in a converged media world.

In Zysk's opinion, the gradual disappearance of the distinction between traditional linear media and typically non-linear services made it necessary to adapt existing regulations, from media law to data protection provisions. With this in mind, he thought that convergent regulation should possibly involve both users and providers more closely. This could be achieved by combining legislation with efficient and effective self- or co-regulation on a global scale.

According to Zysk, all three parties involved – providers, users and legislators – still have lessons to learn from convergence and the changes that it has brought about.

Providers need to be more aware that users' confidence in the responsible use of their data is the main prerequisite for sustainable economic success. There is currently no system that enables users to see easily and comprehensibly what they would receive in return for their data, how their data is stored and how data collectors are controlled. A legally flawless, lengthy user agreement is certainly not the answer, since most users give the necessary consent without actually reading it.

Zysk thought that users need to understand that most services that appear to be free have to be

39) The Working Party was set up under Article 29 of Directive 95/46/EC. It is the independent advisory body to the European Union on data protection issues. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

40) Article 29 Working Party, Opinion 2/2010 on on line behavioural advertising (WP 171), 22 June 2010, p. 11, available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf

41) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23 November 1995, pp. 31 *et seq*.

42) 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 201, 31 July 2002, pp. 37 *et seq*.

43) Vice President Governmental Relations & Head of European Affairs, ProSiebenSat.1 Media AG. See Heiko Zysk's article in this publication.

financed somehow. They therefore have to accept that they will be unable to use certain services if they are not prepared to pay for them, either with money or data.

Zysk expressed the hope that legislators, when drafting data protection rules, will adopt a holistic approach that includes all stakeholders, as well as a high level of flexibility. It is important to define territorial responsibility in such a way that companies based outside the EU will be included if they earn their money from European users. The regulations need to go further than simply giving users an opt-in/opt-out switch. Users need to be given more options than just those of either stopping using the Internet altogether or making their data available without restriction.

As far as possible solutions were concerned, Zysk suggested that it is especially important to create a common European framework in the shape of the planned General Data Protection Regulation and ideally to launch some form of global dialogue. It is essential that market players be more closely involved in creating standards or good practice principles in the context of self- and co-regulatory models. Finally, one practical measure that could be considered is the use of stamps of quality. Services that meet basic requirements would receive a silver seal of approval, while all those that also gave users greater control over their data could be awarded a gold seal. The aim of such measures would be to go beyond the legal minimum by enabling users to manage the use of their data themselves.

In the subsequent discussion, one participant agreed with Heiko Zysk's view that providers in the digital world might consider data as a valid currency. However, he wondered who decided the exchange rate or, in other words, the value of a piece of data. Zysk likened the situation to visiting a restaurant. The value of a good meal cannot be fixed, since it always depends on what is on offer at the time. Ideally, providers should briefly inform users what they are offering and how they intend to use their data, at which point users can decide for themselves whether it is worth passing on their data. In order to win users' trust, however, providers should ensure that the reason for processing their data is not totally unrelated to the service being provided. The participant continued his questioning and, in view of the countless third-party providers involved, expressed particular doubts about whether it is possible to provide brief, yet complete information about how data would be used. The speaker agreed that full information and security would not be able to be guaranteed if this approach was adopted. Nevertheless, this is an acceptable starting point. If the conditions for third-party data use are changed, the user's consent would need to be "re-negotiated".

One participant thought that users could certainly be expected to read a data protection notice carefully before agreeing to it in order to use a service. Consumer protection bodies seemed to be winning more and more legal cases in which they had argued for fairer, clearer data protection notices. Another participant asked Heiko Zysk who was responsible for educating users. On the roads, for example, the state plays the role of educator, since it has the exclusive right to issue driving licences. Nevertheless, it is legitimate to ask whether vehicle manufacturers should ensure that users can drive the cars that they have produced. Ultimately, they have a significant interest in people buying their products. Zysk agreed that providers should also help raise users' awareness. However, he did not think they should be held accountable for educating users. Nevertheless, since returning customers are particularly valuable for a service provider, it would certainly make sense for users to be involved in the various processes in a transparent way.

One participant referred to the "take it or leave it" approach mentioned by Frederik Zuiderveen Borgesius and pointed out that, in some cases, this would no longer apply if the company concerned held a dominant market position. With some modern services, such as Facebook, opting out is not an acceptable option for some people. In this case, it is also worth asking whether this represents an abuse of a dominant market position.

Another participant welcomed Borgesius's suggestion that public service media should not be allowed to use behavioural advertising. However, it is important to bear in mind that the use of tracking tools is not limited to the advertising industry, but could also include other forms of online behaviour analysis. He also wondered to what extent private providers could be regulated in this area. Borgesius explained that, under existing data protection rules, even after users have given their consent, stringent precautions have to be taken regarding data use (e.g. transparency and fairness provisions and the data minimisation principle). In many cases, better enforcement of existing measures is required, rather than additional regulation.

One participant then drew a comparison with the situation in the USA, where the most significant cases in these areas have been decided by the competition authority, the Federal Trade Commission (FTC), mainly with reference to rules on unfair commercial practices. The sanctions imposed in these cases have been much more extensive than in Europe. For example, in August 2012, Facebook reached a settlement with the FTC in which it agreed to undergo external independent assessments of its compliance with data protection rules for a 20-year period.[44] One reason for this could be the fact that, in Europe, such cases are traditionally dealt with under administrative law, whereas the American approach tends to be based on competition law.

IV. Is the current legal framework ready for the converged advertising market?

In the final part of the workshop, a panel discussed the extent to which the current legal framework (including co- and self-regulation) is capable of reacting appropriately to changes in the converged advertising market.

In her opening statement, Anne Deltour[45] began by pointing out that the Audiovisual Media Services Directive (2010/13/EU)[46] forms part of the European Commission's so-called REFIT programme,[47] through which the Commission is checking the suitability of regulations and the burden they put on the market players concerned.

She then reported on the provisional evaluation of the numerous contributions to the European Commission consultation initiated through its Green Paper entitled "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values".[48] As far as competition law issues are concerned, the following questions were said to be particularly relevant:

(17) Will the current rules of the AVMSD regarding commercial communications still be appropriate when a converged experience progressively becomes reality? Could you provide some concrete examples?

(18) What regulatory instruments would be most appropriate to address the rapidly changing advertising techniques? Is there more scope for self/co-regulation?

(19) Who should have the final say as to whether or not to accept commercial overlays or other novel techniques on screen?

As expected, there are no comprehensive answers to these questions at present, so it is difficult to identify particular trends.[49]

Regarding the suitability of the competition-related provisions of the AVMSD in the context of convergence, most of the respondents welcomed the equal treatment of linear and non-linear services in *qualitative* advertising provisions. Nevertheless, some thought such provisions unreasonably limit the media freedom of non-linear service providers. The rules on sponsorship and product placement, which some people thought were too detailed, was also criticised. Many people wanted them to be simplified. Even so, it was widely acknowledged that, in particular, the obligations to separate programme material and advertising and to make advertising clearly identifiable as such are indispensable core principles of advertising regulation.

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44) *FTC v Facebook*, case no. 092 3184; see also the relevant documentation at: http://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc

45) Politico-legal expert, GD Connect, European Commission.

46) 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 (Audiovisual Media Services Directive - AVMSD) (codified version), OJ L 95 of 15.4.2010, p. 1, see also Corrigendum, OJ L 263 of 6.10.2010, p. 15.

47) More information about the programme can be found at: http://ec.europa.eu/smart-regulation/refit/index_en.htm

48) European Commission, "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", Green Paper, 24 April 2013, COM(2013) 231 final.

49) Contributions to the consultation are available at: http://ec.europa.eu/digital-agenda/en/news/consultation-green-paper-preparing-fully-converged-audiovisual-world-growth-creation-and-values

In terms of *quantitative* advertising rules, most contributors called for greater flexibility, while some suggested extending the scope of the provisions that currently only apply to linear services to include non-linear services.

Regarding appropriate regulatory instruments, there was clear support for stronger co- and self-regulatory mechanisms, which many participants thought could respond to technological developments more quickly and efficiently. The idea of reducing state regulation has mainly been criticised by consumer protection organisations.

Opinions were more divided regarding who should decide on commercial overlays. Some contributors thought that users should always be able to decide whether commercial information appears on the screen, while others argued that the user's freedom to decide should only apply to overlays from third-party providers (i.e. not from the programme provider itself). Meanwhile, some thought that TV broadcasters or content providers should have the exclusive right to determine the extent to which their signal is (partly) overlaid with third-party content. This view has been criticised in some quarters on the grounds that it would prevent users from personalising screen content, which is one of the distinguishing features of hybrid TV. A few respondents said that producers and authors should have the last word on this issue, if commercial overlays might affect the integrity of the programme concerned.

Anne Deltour closed by pointing out that, since the evaluation and conclusions of the consultation would be determined in close cooperation with the new Commissioner, no official steps would be taken until the new Commission had been appointed.

One participant questioned the value of such consultations. As Anne Deltour's statement demonstrated, the responses were largely predictable. It is therefore no surprise that a wide spectrum of views was expressed and, moreover, the views of the individual interest groups from within the industry were already well-known. The greatest challenge is to determine which arguments are objectively the most relevant, either because they are empirically proven or because they are based on a valid and functional reason.

In his statement, Malcolm Phillips[50] then explained the relationship between state regulation and self-regulatory mechanisms in the United Kingdom. As far as self-regulation is concerned, media convergence has already been on the agenda in the United Kingdom for more than 50 years and is being successfully embraced. Further attempts to adapt the legal framework for audiovisual commercial communication in response to media convergence are more likely to complicate the situation even further.

After giving a brief overview of the current regulatory situation in the United Kingdom, Phillips turned to the impending convergence crisis. In his view, the AVMSD – at least in the form in which it has been implemented in the United Kingdom – promoted divergent regulation, since it is designed so that advertising provisions are only enforceable against service providers rather than advertisers. Since, on account of technological developments, service providers' influence over the actual choice and delivery of advertising is gradually disappearing, this approach is unsustainable. A system such as that used by the Committee of Advertising Practice (CAP) and the Advertising Standards Authority (ASA), in which advertisers are held responsible, is much more efficient.

Phillips suggested that sufficient measures are already in place to deal with foreseeable developments in the audiovisual sector. It is especially important to have confidence in the ability of self-regulatory mechanisms to react quickly to changing user habits and expectations. The development of self-regulation in the United Kingdom has shown that it can successfully adapt to new media and that common standards can be found.

In the final contribution, Cornelia Kutterer[51] considered how political and legislative initiatives have to adapt to the challenges of convergence in the 21st century in order to exert the best possible influence on the European economy.

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50) Regulatory Policy Manager, Committee of Advertising Practice (CAP). See Malcolm Phillips's article in this publication.
51) Director of Regulatory Policy, Microsoft Europe, Middle East and Africa. See Cornelia Kutterer's article in this publication.

She thought it particularly important to distinguish clearly between the "network" and the "service" and to adapt the regulations accordingly. It is important to avoid a knee-jerk reaction of adding unnecessarily to existing rules in the light of new circumstances. At the same time, regulatory authorities and monitoring processes need to be able to keep up with technological and economic developments.

It is also necessary to create an investment-friendly climate for both network infrastructures and services. Specific solutions need to be developed in areas that lack infrastructure because of market failure.

Nowadays, most services are dependent on network technologies based on Internet protocol. The introduction of these new infrastructures has clearly affected market forces. Regulation therefore has to be future-proof and move away from long-established ideas. In the current era of data, Internet and apps, many rules are unnecessary and no longer justified. "New wine needs new wineskins", Kutterer concluded. More confidence should be placed in the business world, as long as it respects the essential principles of competition and consumer protection law.

In the subsequent discussion, one participant enquired about the situation in Norway which, since it is not a European Union Member State, might adopt a different approach to the challenges of convergence. One participant said that Norway is lagging behind somewhat because the provisions of the AVMSD were not incorporated in its domestic law until 2013. There are currently no concrete discussions concerning convergent regulatory authorities, for example with a view to the data protection aspects of connected TV. Another participant commented that the same was true in Slovakia.

One participant said that it had become clear during the day that the market players want a level playing field. This argument was already put forward during the previous revision of the AVMSD. Now, even though an instrument covering all audiovisual media service providers is in place, the level of regulation varies hugely. The upcoming revision of the Directive is to be welcomed, but it is taking too long, especially in view of the fast-moving advertising market. It might therefore be necessary to start reforming advertising rules separately. Revising the 2004 interpretative communication is one conceivable option, although this would also need to be completed as quickly as possible.

One participant explained that they can understand the industry's calls for a level playing field, but also pointed out that users' tolerance of advertising sometimes varies enormously between different types of service. Whereas traditional television advertising is often criticised and the subject of a relatively high number of complaints, Internet users are much more open to commercial communications.

One participant noted that, particularly on the Internet, it is difficult for a supervisory body to identify the responsible party and the applicable regulations. She thought that it is becoming increasingly important for regulators, providers and users to trust one another or to identify the best way of building such trust. Referring to the E-Commerce Directive, which is now almost 15 years old, she explained that it might not be beneficial to wait for the law to be changed. One participant disagreed slightly, referring to the motto, "Trust is good, but control is better". This led directly to the question of how far control should go.

If legislative changes are necessary, one participant referred to the "first do no harm" principle that was applied in the medical world. The legislative or regulatory body should not take precautions unless it knows what the consequences would be.

Another participant commented that modern technologies necessitate a more educational approach to regulation. Television regulations are traditionally based on restrictive measures that might prove ineffective in the converged media world. However, he did not expect either the European Commission or national regulatory bodies to adopt this kind of approach. Rather, the industry would have to be much more closely involved in the development of suitable regulatory measures than it has been in the past.

In this connection, one participant thought that television in Europe would not look any different if the AVMSD did not exist and that the only relevant legal text is the E-Commerce Directive. Market players would have agreed on certain principles anyway. In a globalised world, in which every European TV broadcaster is competing with international providers (e.g. Netflix), it is particularly important to

reduce regulation to the bare minimum and to structure it as intelligently as possible. A stronger focus on solving cross-sector problems is desirable, for example. The participant mentioned some future types of programme guide: programme information is likely to be downloaded more and more via search engines (rather than broadcasters' electronic programme guides), especially on hybrid devices. In this context, a monopoly situation, such as the one that currently exists, is particularly worrying – and makes search engine regulation all the more advisable.

One participant, referring to a book by Nassim Nicholas Taleb, called Netflix a "black swan". The term refers to completely unforeseeable phenomena, whose existence had to be accepted. She therefore wondered whether legislators should also learn to accept that, from time to time, regulation does not have a direct answer to certain developments.

V. Summary

"In theory there is no difference between theory and practice. In practice there is." (Yogi Berra)

Both the various lectures and the related discussions showed, first and foremost, that regulation in the converged media world must not get caught up in the theoretical, but should be adapted to practical realities. All possible types of service and use must be taken into account. The online advertising market in particular is becoming increasingly important and in the future will remain an area of innovation for service providers for whom it is opening up new revenue models. The increasing use of personal data as a currency is also creating the need for new learning processes for legislators, providers and users alike.

It is true that traditional linear television remains the most popular medium and clearly still stands apart from more modern, non-linear services in the advertising market. TV advertising is indispensable for the survival of the television market and helps to finance attractive content and programme formats. However, the current legal framework, which does not provide a level playing field, is not future-proof. All the participants welcomed efforts at the European level to adjust the legal framework governing the media. In order to protect the integrity of audiovisual works and other TV images, attention was drawn to the need to maintain the principles of editorial control and responsibility in the television sector. In this context, numerous warnings were also issued against the danger of focusing too much on the creation of convergent *rules*, without at the same time ensuring convergent *supervision*. Technology- and service-neutral rules can only have the desired effect if compliance with them is monitored and demanded by supervisory bodies that are given a sufficiently broad remit.

The workshop showed clearly that, in today's fast-moving media market, properly functioning, efficient regulation cannot be introduced without the close involvement of the market players themselves. Alongside the traditional – and, to a certain extent, successfully established – form of self-regulation, transparent legislative processes (e.g. involving prior consultations) or incentive regulation models are practicable options.

The discussion also showed that new regulatory measures are necessary. It would be unfortunate if the legislator failed to tackle the reform process with sufficient determination, fearing, possibly with good reason, that it might struggle to introduce universally applicable regulations covering all services.

However, inactivity is not an option. There needs to be a future-oriented legal counterbalance to the rapid development of the advertising and TV market. Only if it provides a clear framework can regulation guarantee legal security for all stakeholders and suitable protection for consumers.

Emerging Advertising Techniques and New Funding Models for TV Broadcasters

Conor Murray
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In the face of widespread forecasts to the contrary, traditional linear TV has failed to suffer its expected collapse. In reality, viewing figures for TV have proven surprisingly robust against the attempts of on-demand Internet video, mobile communications and social media to steal consumers' attention away from broadcast content.[1]

Regardless of its proven durability, the TV industry still faces challenges in this era of audiovisual convergence. Three factors, amongst others, can be identified that have come together to potentially destabilise today's broadcast TV business:

- the growing difficulties faced by viewers in finding the content that they actually want to watch;
- the move of Over The Top (OTT) players into content production;
- the emergence of multi-screening – concurrent use of mobile devices (smartphones and tablets) while watching TV.

The uptake in mobile devices allows the user to more easily curate his or her content, a role traditionally played by the TV channel. As consumers use mobile devices to make choices based on programmes rather than channels, power is shifting away from the channels towards content producers. Consequently, as the search for desirable content transfers to mobile devices, traditional broadcasters lose one of their key selling points – a position at the top of the Electronic Programme Guide (EPG).

The past few years has seen the entrance of competitors such as Netflix, Amazon, Microsoft and Yahoo into premium original content production to attract consumers. This is highly significant and has the potential to be the biggest game changer in the TV business, with viewers for the first time purchasing an OTT service to receive new content, instead of consuming existing content. This mirrors how cable and satellite platforms have gained paying subscribers in the past couple of decades.

According to an Ofcom report,[2] over half of TV viewers in the UK now use their smartphone and/or tablet while watching TV. It is therefore necessary for the TV industry to further develop ways of providing cross-platform elements to the TV-viewing experience, whether that is through content search, engagement with social media or improvements to the programme that is being watched. The difficulty for traditional TV broadcasters is that the mobile world is not their natural domain. Device control and content search is the realm of equipment manufacturers and platform operators. Social media is, understandably, dominated by social media actors. It is in the provision of content-

1) In the UK, for every minute spent on YouTube, the average person spends nearly an hour watching linear television (Source: January 2013, BARB, UKOM). In Germany, if YouTube were a TV Channel, its market share would be less than 1%. Linear TV is watched 130 hours per month – almost 44 times more than YouTube (3 hours) (Source: AGF/GfK, TV Scope 5.0 (KFA 0/1, Age 3+) and Comscore (Home + Work), January 2013; IP Deutschland 4 June 2013).
2) Ofcom, "Ofcom Communications Market Report 2013", 1 August 2013, available at: http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/2013_UK_CMR.pdf

specific applications that broadcasters have an obvious opportunity to engage with the audience more effectively.

The above three factors combined have the potential to speed up the shift in TV consumption from the traditional television screen to mobile devices, while at the same time accelerating the adoption of OTT services offering premium content. This should not immediately take viewers away from the classical channels, but it does increase the likelihood of audience fragmentation and signals a power shift towards content producers and OTT players.

Broadcasters have time to react to these developments, but they must make best use of this time to ready themselves and re-shape their offerings for this new era of viewer consumption. They need to assess what they see as their role, what their mission is and how their unique selling point can bring added value to the audience. The newly converged audiovisual landscape is typified by a high quantity of available content, but a comparatively low availability of quality content. Quality programming is the key to securing viewer engagement and is one of broadcasting's major strengths. Broadcasters therefore need to concentrate on delivering high-level content over all available distribution channels. Factors include questions relating to the aggregation, curation and financing of content, as well as lower reliance on EPG positioning and a greater focus on presence in online market places.

I. Commercial communications

When considering what impact audiovisual convergence has had and will continue to have on commercial communications, we need to look at two distinct elements. Firstly, the emerging advertising techniques that broadcasters and their sales houses are adopting as they embrace the new trends in TV viewing and secondly, the fact that the traditional 30-second TV spot is not a relic, but is still fundamental to brands and channels alike. The advertisement break is, as it always has been, a forum for new innovations and creative ideas.

For both broadcasters and advertisers, the determining factor is always the consumer. For consumers, TV content is content regardless of where it is found or viewed. TV is a generic term for the content that is being produced. How, then, to cater to the growing, sophisticated video consumers and the multi-screen audience? Viewers demand and expect a personalised, interactive, social and entertainment experience on an ever-increasing number of devices. Broadcasters are exploring the potential of programme-specific second screen applications to maintain viewer attention and to monetise it. Devices have now become TV-audience and revenue boosters. This plays on the traditional strengths of broadcasters, namely the provision of high quality video (TV) content and of known and trusted brands. Broadcasters are increasingly striving to ensure that viewers remain on their own-branded platforms to delve deeper into the interactive experience, maintaining ownership and monetising their content. In theory, everything that the consumer would like to engage with may be found on broadcaster's own applications and websites. Delivering enhanced television services not only feeds the viewer's appetite for compelling content, it also increases viewer engagement, creating additional revenue-generating opportunities.

Naturally, this has had an influence on advertising. This leads to the question of what the new revenue models and emerging advertising techniques are in this connected environment.

Before going any further, it is necessary to understand what is meant when discussing the second screen. According to one source, the second screen experience can be defined as the use of a screen-based device concurrent with the consumption of another form of linear content on a separate screen.[3]

To fully understand the potential of this developing market one needs to grasp the reach and scale of the second screen. Recent research from the United States[4] shows that one in six viewers use social media during primetime shows and that half of that social media usage is related to TV. Nonetheless,

3) Grossman B., "Second Screen Strategy: Planning For (And Against) A Multi-Screen World", 7 May 2014, available at: http://ben-grossman.com/second-screen-strategy-planning-multi-screen-world

4) Council for Research Excellence, "Talking Social TV 2", 10 April 2014, available at: www.researchexcellence.com/documents/research/80.pdf

traditional TV promotions remain more effective than social media; promotions and trailers are the number one driver for the decision to view new shows. What is quickly recognisable and widely acknowledged is that traditional TV is driving social TV.

Within the realms of what can be described as social TV, there are at least four types of revenue models which can be identified. Firstly, there are digital companion advertisements, meaning device-based advertisements that are synchronised to the exact time that the advertisement runs on TV. Secondly, there is contextual search, which relates to what people are watching on TV, as advertisers buy search words based on what people are watching. Thirdly, social commerce, which is the sale of items linked to the programme, pushing targeted ads via participation-TV platforms. Lastly, there are promotions during major live sporting events, such as the World Cup for example, where interactive gaming experiences are offered, increasing the content owner's opportunity to generate revenue from watch and win, as well as increasing viewer engagement.

1. TV companion applications

What becomes even more obvious is that one of the keys to unlocking the potential of the multi-screen environment and satisfying consumer demand lies with the use and development of interactive applications. Broadcasters can offer content-sensitive applications, value-added services and targeted advertisements to enrich the user experience, increase viewer engagement with premium content and improve interaction and socialisation amongst viewers and their friends.

Applications are worth analysis for many reasons, one of which is that 85% of tablet and smartphone owners use their devices while watching television.[5] Viewers using a synchronised application to view TV programming showed a 26% higher engagement[6] rate than their single screen viewing counterparts.

When evaluating the second screen landscape, four types of applications are recognisable. They can be placed into two categories: in front of the TV and place-shifted. In the case of the former, there are synchronous consumption applications, those which contain extra content and functionality related to a TV programme and that are designed to be used at the same time as viewing of the show itself. There are also remote control applications, which are used to replace a remote control or the TV's EPG in order to find programme information, make choices or send commands. In the place-shifted category one comes across remote consumption applications, which give access to TV programmes via the web when a viewer is out of home or away from their main TV service. The fourth type of application is remote management applications, which allow viewers to review programme options and send commands to a TV system in their home.

2. Regulatory concerns and opportunities

There are, however, some causes for regulatory concern. When it comes to existing legislation, regulation of second screen and online editorial content is considerably lighter than regulation of the first screen. For commercial communications, it is more a question of slightly different rules rather than an entirely different order of regulation. The principal cause for concern is that regulated and unregulated content are increasingly hard to distinguish, potentially leading to consumer harm. If one envisages a possible future regulatory framework taking account of audiovisual convergence, the first consideration is that it must cover all the actors involved. Third parties, such as online-ad networks, have the ability to distort the classical value chain in several ways. Firstly, by monetising eyeballs and recommendations via advertising models from the online world, for example through targeted ads funded on a click-through model. Secondly, by pushing and monetising added-value contextual enhancement (for instance shopping or betting opportunities) to a TV programme independent from TV regulations. Thirdly, by influencing viewers' programme selections independently of the EPG and EPG

5) The Nielsen Company, "The Digital Consumer 2014", February 2014, available at: www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2014%20Reports/the-digital-consumer-report-feb-2014.pdf

6) Moses L., "The Type of Second-Screen Apps That Keep Users Engaged the Most: How advertisers can best leverage them", Adweek, 22 September 2013, available at: www.adweek.com/news/advertising-branding/type-second-screen-apps-keep-users-engaged-most-152538

regulation,[7] via for example, curated or social recommendations. Lastly, by enabling viewers to watch video on their first screen that may be illegally streamed and, in so doing, providing an opportunity for viewers to cord cut.

On a more concrete level, there have already been some legal challenges surrounding connected TV and people's personal data. For example, in July 2013 the Dutch data protection agency published a report[8] stating that TP Vision, a manufacturer of Smart TVs, was in breach of the Dutch Data Protection Act.[9] This was due to their collection of people's personal data for targeted advertising without receiving prior explicit consent from the viewer.

A similar incident occurred in Belgium where the *Privacycommissie* (Privacy Commission) is investigating aspects of privacy concerning smart TVs and set-top boxes from certain TV providers.[10] In both cases, the government agencies acknowledged that since Smart TVs are a relatively new phenomenon, there is still little awareness of the risks that are present when using their online functionalities.

As long as technology continues to evolve at a pace with which it is impossible for legislation to keep up, it is likely to give rise to more legally obtuse scenarios. However, as the legislative environment surrounding the AVMS Directive[11] has matured, it has enabled broadcasters and their sales houses to develop new advertising techniques that have increased their revenue-generation capacities. One such example is product placement, which is no longer restricted to the insertion of an actual product into a show, but can also be done post-production in a virtual manner. For example, an empty billboard can turn into an ad, as can food and beverage packaging. The directive places restrictions on undue prominence of the product and requires that editorial responsibility must be maintained. This allows for the financing of a programme, as long as it is not affected/shaped. In order to better understand the status of audiovisual commercial communications after full implementation of the AVMS Directive, egta (association of television and radio sales houses) has produced a publication, available upon request, which examines the interpretation, case law and professional implications at the national and EU level.

3. Innovation on the first screen

As has already been mentioned, TV, and specifically the traditional 30-second television advertising spot, retains the capacity to reach the largest number of consumers. In 2013, viewers worldwide watched TV for 3 hours 14 minutes per individual per day. This is the third highest global average daily viewing time ever recorded. Over the past 20 years in the five major European markets, individuals watched an additional 43 minutes of television per day. Over the same period there was an increase by 50 minutes in the United States.[12]

7) Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 337, 18 December 2009, p.11.

8) College bescherming persoonsgegevens, "Onderzoek naar de verwerking van persoonsgegevens met of door een Philips smart tv door TP Vision Netherlands B.V." (Report of the Data protection authority on TP Vision), July 2013, available at: www.cbpweb.nl/downloads_pb/pb_20130822-persoonsgegevens-smart-tv.pdf. For more details see also, Obradović R., "Smart TV's in Breach of Dutch Data Protection Act", IRIS 2013-9/21, European Audiovisual Observatory, 2013, available at: http://merlin.obs.coe.int/iris/2013/9/article21.en.html

9) *Wet van 6 juli 2000, houdende regels inzake de bescherming van persoonsgegevens (Wet bescherming persoonsgegevens)* (Data Protection Act), available at: http://wetten.overheid.nl/BWBR0011468/geldigheidsdatum_16-05-2014

10) Briel R." Belgium to investigate privacy of smart TVs",Broadband TV News, 28 January 2014 http://www.broadbandtvnews.com/2014/01/28/belgium-to-investigate-privacy-of-smart-tvs/

11) 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 L 95, 15 April 2010

12) Eurodata TV Worldwide, "One Television Year in the World 2014", available at: www.mediametrie.com/eurodatatv/solutions/one-television-year-in-the-world.php?id=57

However, there are many ways to use the advertising spot on TV and advertisers and broadcasters are continuously trying innovative ideas to work within the established ad-break format. Some of the more noteworthy innovations are described in detail below.[13]

3.1. Event breaks

This is an advertiser turning the break into a TV event. Event breaks are an excellent way to launch a new brand or kick-off a campaign and offer lots of potential publicity. T-Mobile's "Welcome Back", a three minute ad set in an airport arrivals lounge, is a great example of a brand turning an ad break into a piece of entertaining content in its own right. On occasion, the advertiser will pre-promote their event break with a series of teaser ads on broadcast TV and online.

3.2. Themed breaks

Themed breaks are designed by broadcasters and so offer advertisers their implicit endorsement. One of the most innovative and recent examples is offered by the Lego themed ad break which was released to promote the Lego movie.

3.3. Advertiser breaks

This is when the entire break is framed by one advertiser, but features other brands that relate to it. An excellent example is Microsoft's Bing break, where a relevant Bing search query appeared before every ad and then the other brand ads appeared as if in answer to the query.

3.4. Advertorials

An advertorial is an ad that has the qualities of a programme and acts like a programme. The narratives of advertorials can run over several ad breaks and build intrigue for viewers. They can be trailed and promoted and of course extended and exploited off-air like a real programme. But because they are in commercial airtime they can overtly feature the product like any other ad. Ikea's Kitchen Squad created their own makeover format in which people's kitchens were replaced in secret.

3.5. Tailored/contextual ads

Advertisers can tailor an ad to a specific programme or programme environment in order to build a closer relationship with the content. This is partly thanks to relative regulatory flexibility around commercial TV, including being able to extend the format of the programme to the ad break or using performers from shows in the ads. This congruency with the content appeals to fans of the programme and gives the ads more relevance, which can increase their stand-out.

3.6. Live ads

Live ads can be exhilarating, generate a lot of publicity and attract a large, anticipative audience for the live event. Honda's live sky dive in 2008 started a trend that is now a more regular part of TV. This category of break is particularly appropriate for products for which prices and availability need to be as up to date as possible. Betting brands run live ads during sporting events, offering viewers the latest odds to encourage in-play betting.

13) See www.thinkbox.tv

II. Conclusion

Today's audiovisual environment is constantly evolving and will continue to do so as long as technological progress is taking place. In this environment, it is important to acknowledge that today's consumers are multi-screeners who demonstrate that watching TV with a smartphone or tablet is one of the most popular leisure activities of the mobile era. In this landscape, TV can be seen to drive the use of applications, while simultaneously watching TV is becoming normalised. TV-watching has never required nor achieved 100% of people's attention. Three in ten Americans report that they do something else while watching TV (30%) and only 14% say that they do not do any other activity while watching TV.[14] To a certain extent, second screen applications represent a new opportunity to make sure that this something else is connected to TV. Put simply, the anytime, anywhere and on any device nature of TV increases the number of opportunities to reach the viewer beyond the advertising slot.

All advertising media are now increasingly being forced to prove to media agencies and their clients their sales-driving effects and return on investment. In the medium term, healthy audience levels, programming and technological innovation (DVRs, IP connectivity, addressable advertising) will continue to drive the growth of TV advertising. In order to maintain this level of appeal and capacity to reach more than other media, broadcasters will continue to be dependent on formats that can deliver large live audiences.

Measures must be taken to ensure that broadcasters, who took the financial risk of acquiring a programme from the producer or creator or of financing an in-house production, maintain these revenue streams. Similarly, authors and rightful owners should be remunerated for the exploitation of their works, including in the online environment or via new platforms.

It is necessary to make some final conclusions on the regulatory outlook as regards commercial communications and audiovisual convergence. In terms of processes, it has already been announced that the European Commission will publish the second application report[15] of the AVMS Directive in May 2015. They have also announced that next year will see a review of the Directive. Taken together with last year's public consultation on audiovisual convergence,[16] it is clear that evolving patterns of TV consumption will trigger regulatory attention. From a broadcaster's point of view, certain issues are of paramount importance moving forward. These include: safeguarding the existing levels of consumer protection in commercial communications; maintaining the principle of editorial responsibility; and guaranteeing the signal integrity of broadcasters.

The second screen space is still an immature area, characterised by evolving technology, functions, business models and infrastructures. Therefore, it is difficult to make any categorical conclusions at this early stage. However, it is developing at an impressive rate and the European Commission and national regulators are correct in taking the time to analyse whether intervention may be necessary.

14) Harris Poll, "Distracted TV Viewers", 15 June 2011, available at: www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/818/ctl/ReadCustom%20Default/Default.aspx

15) European Commission, First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU "Audiovisual Media Service Directive" Audiovisual Media Services and Connected Devices: Past and Future Perspectives, Brussels, 4 May 2012, COM(2012) 203 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012DC0203

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

The European Online Advertising Market

A Short Introduction to the European Online Display Advertising Ecosystem

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Over the past decade, the World Wide Web has risen in importance in our modern societies, quickly investing, changing and challenging many established ecosystems, especially in the media landscape. At the beginning, limited by small bandwidths (dial-up connections), the web mainly challenged the established music ecosystem, the written press, newspapers and libraries, but, with the expansion of broadband capabilities thanks to technical innovations (ADSL, optical fibre) allowing for a smooth transmission of video streams and faster video downloads, the proliferation of connected devices and of screens and the changing audiovisual consumption patterns of consumers (especially of Generation Y), the traditional audiovisual sector as a whole (television, cinema, home video) is being challenged and our existing media ecosystem has entered a period of mutation and innovation.

With the entrance of so-called "Over-the-Top" (OTT) companies (such as Google, Facebook, Apple or Netflix), new players have invested in the European audiovisual sector and are entering in frontal competition for advertising budgets and the "eyeballs" of customers. The online advertising market is growing fast, introducing new opportunities, as well as threats to the established commercial television sector (and even the advertising sector as a whole). The importance of data and customer profiles in this online landscape is immense; collecting and using data provides a competitive advantage and those who are in the best position to do so are already taking and establishing a dominant position on the online advertising market. Technical innovations, the appearance of new forms of communication and connections (social networks) and the rising importance of mobile devices are quickly transforming traditional business models. As the competition for "eyeballs" is intensifying, players (traditional and new entrants) have to successfully adapt to the new challenges of the advertising market in order to secure their future.

This short overview presents the changes affecting the European online advertising market and its main financial figures, exposes in a little more detail the display advertising market (the most pertinent for the broadcasting sector) and its functioning, and finally gives an outlook on future developments. The aim is not be exhaustive, but rather to present actual trends in 2013 that have a significant impact on the display advertising market and give a peek into the complex functioning of this new, innovative technology and data-driven advertising market.

I. Overview of the European online advertising landscape – main financial figures[1] and ecosystem

1. A change in the advertising ecosystem

The changes on the demand and supply side resulting from technical innovations and new entrants have fragmented audiences and transformed the multiple closed and controlled media ecosystems that were predominant in Western societies into a single open and uncontrolled one. Where before content was scarce, the web has introduced an abundance of it. Traditional media companies and new entrants, known as OTT players, are in competition for the attention of consumers and getting this attention in order to succeed in the digital landscape is increasingly difficult in a global connected online landscape. The media ecosystem has become an attention economy,[2] where the attention of customers is a scarce resource. Another main trend is the importance and use of data, be if for advertising purposes or analysing viewing patterns.

Advertising-financed broadcasting is therefore in an increased competition with OTT players on the advertising market. This competition is two-sided:[3] on one side, there is a competition for the "eyeballs" of customers; on the other side, a competition for advertising budgets and campaigns from advertisers and their agencies. The rise of audiovisual consumption anytime, anywhere and on any device, especially from younger generations, has introduced audience fragmentation and poses a challenge to those traditional players who have to adapt to this now increasingly open advertising market.

A significant trend of this battle for "eyeballs" is the production and commissioning of original content by those new entrants (e.g. such as YouTube's,[4] Crackle's,[5] Vimeo's[6] original series) and the creation of a new audiovisual ecosystem on Google's YouTube with "Multi-Channel Networks"[7] (MCN) generating advertising revenue for the channels operators, as well as for Google. The acquisition[8] in 2014 of YouTube's leading MCN, Maker Studios, by The Walt Disney Company for USD 950 million and the acquisition of 60% of the MCN Studio Bagel[9] by the French pay-TV operator Canal+ is a good illustration of this trend. As "eyeballs" continue their migration online and people are sharing the time they devote to media between traditional and online destinations, traditional audiovisual companies (broadcasters, studios) and OTT players are innovating in order to capture a share of the rising online advertising revenue, generated by an increased shift of advertising budgets towards the online space.

For now, TV remains the most popular medium for advertising, leading Europe's advertising market in 2013 with EUR 28.1 billion, but the change has started. As underlined in Mary Meeker's presentation on 2014 Internet trends[10] at the Code Conference, several trends are furthermore accelerating the pace of change. First of all, screens are proliferating. World-wide, mobile devices (smartphones, tablets) sold

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1) Financial data on the European online advertising market is difficult to collect, as various sources with different methodologies exist. The figures published by IAB Europe are compiled by IHS ScreenDigest, a long-time source of a variety of data for the European Audiovisual Observatory. Therefore, we decided to rely on those figures in this article. The Internet Advertising Bureau (IAB) is the trade association for online and mobile advertising.
2) Goldhaber M., "The Attention Economy and the Net", *First Monday* 2(4), 7 April 1997, available at: firstmonday.org/article/view/519/440
3) Anderson S. and Gabszewicz J., "The media and advertising: a tale of two-sided markets" in Ginsburgh V. and Throsby D. (eds.), *Handbook of Cultural Economics*, Elsevier Science, August 2005, available at: economics.virginia.edu/sites/economics.virginia.edu/files/anderson/fullfinaltale_0.pdf
4) Wallenstein A., "YouTube, DreamWorks Animation to Produce Daily Original Series", *Variety*, 9 January 2014, available at: variety.com/2014/digital/news/youtube-dreamworks-animation-to-produce-daily-original-series-exclusive-1201040884/
5) "Crackle Unveils New Original Programming and Renews Three Hit Series at 2014 Digital Content New Fronts", *Marketwatch*, 30 April 2014, available at: www.marketwatch.com/story/crackle-unveils-new-original-programming-and-renews-three-hit-series-at-2014-digital-content-newfronts-2014-04-30
6) Kastrenakes J., "Vimeo gets into original content with short comedy series 'High Maintenance'", *The Verge*, 29 May 2014, available at: www.theverge.com/2014/5/29/5760790/vimeo-first-original-content-high-maintenance
7) Kozlowski L., "Multi-Channel Network 101", *Forbes*, 30 August 2013, available at: www.forbes.com/sites/lorikozlowski/2013/08/30/multi-channel-networks-101/
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9) Keslassy E., "Canal Plus Acquires Leading YouTube Channels Network Studio Bagel", *Variety*, 3 March 2014, available at: variety.com/2014/biz/news/canal-plus-acquires-leading-youtube-channels-network-studio-bagel-1201124490/
10) Meeker M., "2014 Internet trends report", *Kleiner Perkins Caufield Byers*, 2014, available at: s3.amazonaws.com/kpcbweb/files/85/Internet_Trends_2014_vFINAL_-_05_28_14-_PDF.pdf

4 to 5 times more than TVs in 2013; even if TVs are still the most widespread device, with 5.5 billion units on a world-wide basis, tablets and smartphones, representing a total of 2 billion units in 2013, are quickly catching up and changing viewing habits through their usage. In 2013, mobile devices were used for 166 minutes per day, compared to a usage of 148 minutes for TVs; in the USA, the usage of mobile devices is 194 minutes per day compared to 147 minutes for TVs.[11] This proliferation of mobile devices has enhanced another trend, that of the so-called "second screen".[12] Second screen is defined as the use of another "screen", such as a mobile device, alongside the "first" screen, the television, creating a potential new revenue stream for audiovisual companies.[13] Meeker also shows that in the USA, millennials (also called "Generation Y", i.e. those born between the early 80s to the early 2000s) watch 34% of their total TV time online, roughly 3 times more than non-millennials in 2013. As a result, they are therefore increasingly choosing their audiovisual content themselves, thus becoming the decision-makers with regard to their consumption, in opposition to the old prescription/curation model used in a closed broadcast environment. This trend goes hand-in-hand with changing viewing habits and the appearance of so-called "binge viewing", i.e. watching several episodes of a TV series in a single session. If we link those evolutions with the predictions of Netflix's CEO Reed Hastings, i.e. that Internet TV is replacing linear TV; screens are proliferating; remote controls are disappearing; and apps are replacing channels,[14] we can conclude that the shift of audiovisual consumption from linear broadcast TV towards the Internet has already started and will gain in importance over the coming decade, before finally replacing the traditional broadcast model. Of course, the traditional broadcast ecosystem, after having resisted this evolution for several years, is adapting to this new environment by investing the online space: pure "OTT"' offers from traditional broadcasters, catch-up TV such as the BBC's iPlayer, second screen offerings by TV channels, acquisition of pure online players, such as MCNs, by media groups now operating on the web, where scale and reach are essential and users can rise from millions to billions, and global juggernauts (e.g. Google's YouTube, AOL, Yahoo!, Facebook) have already taken a leading position.

The ever-rising use of personal data collected on users of websites[15] places the exploitation of this personal data in the centre of the targeting capabilities of those players. As advertisers want to target specific user profiles, companies in the possession of "big data" allowing for a refined targeting of advertisements to users, possess a competitive advantage,[16] at least in the starting phase.[17] The use of "big data" and targeting of specific profiles is also transforming the way in which online display advertisements are sold, with the advent of programmatic buying of ad inventory and real-time bidding platforms, as this article explains on the next pages. The possibilities, if exploited to a full extent, could radically improve the advertisement business for marketers by allowing the exclusive targeting of customers who could be potential buyers of the product/service advertised, thus presenting the opportunity to reduce advertising expenditure or employ the resources more efficiently. A famous quote, attributed to John Wannamaker[18] and/or Henry Ford, states that, "Half the money I spend on advertising is wasted; the trouble is I don't know which half." For now, the online advertising market is still far away from having proven its efficiency and effectiveness to advertisers and marketers, but the better use of data has the possibility of changing this fact. This use of data also poses concerns and risks regarding the privacy of users, as the tracking, gathering and disseminating of personal information is still a "black box" for the general public and awareness has just started to rise in Western societies.

Before the functioning of the display advertising market is presented in more detail, the following section provides the main financial data on the European online advertising market in 2012.

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11) Lechevallier P., "Télévision et vidéo: la mutation du marché s'accélère", *ZD Net*, 30 May 2014, available at: www.zdnet.fr/actualites/television-et-video-la-mutation-du-marche-s-accelere-39801757.htm

12) Warren C., "When Did the 'Second Screen' Become a Thing?", *Mashable*, 2 May 2013, available at: mashable.com/2013/05/02/second-screen/

13) See also the contribution of Conor Murray in this publication.

14) Hastings R., "Netflix Long Term View", *Netflix Investor Relations*, updated 21 April 2014, available at: ir.netflix.com/long-term-view.cfm

15) "Big data" - be it through the utilisation of "cookies", unique ad IDs); this is not only true for the media sector, but for a large variety of traditional business models that are impacted by the use of "big data".

16) ATKearney, "Big Data and the Creative Destruction of Today's Business Models", 2013, available at: www.atkearney.fr/documents/10192/698536/Big+Data+and+the+Creative+Destruction+of+Todays+Business+Models.pdf

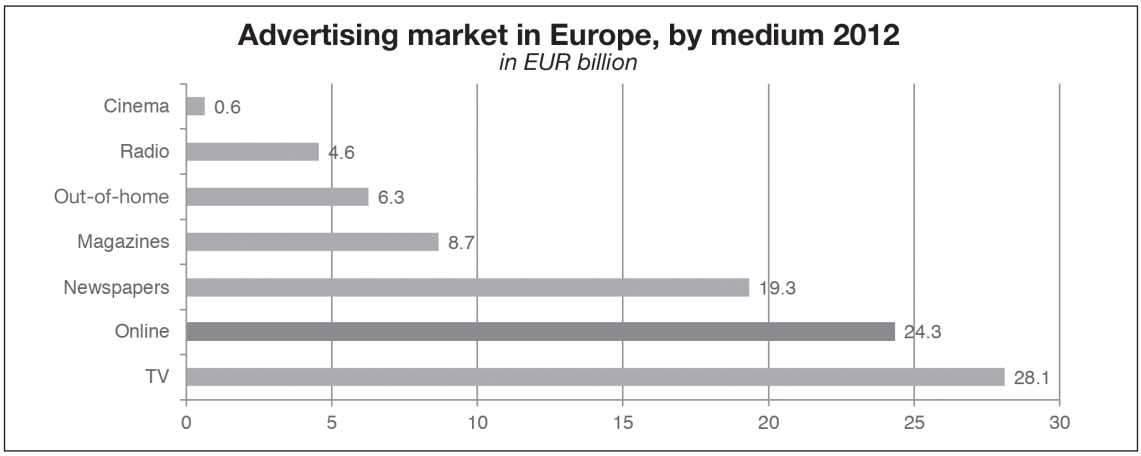
17) Selikowitz D., "Big Data: From Competitive Advantage to Table Stakes", *Harvard Business School Blog*, 11 April 2014, available at: blog.hbs.edu/dighbs/big-data-from-competitive-advantage-to-table-stakes/

18) Wannamaker (1838 –1922) lived before the appearance of commercial television and is considered a pioneer in marketing, operating department stores in the USA.

2. Main data on the European online advertising market

According to figures published by IAB Europe[19] and compiled by IHS Screen Digest in the 2012 IAB Europe Adex Benchmark Report,[20] the online landscape was the second advertising medium in Europe in 2012, with a market value of EUR 24.3 billion, only preceded by Television with EUR 28.1 billion (see Table 1 below). Not only is online advertising the second biggest advertising medium in Europe, it is also the advertising medium which is growing the most rapidly, despite economic turmoil (+11.5% year-to-year growth rate, compared to -2.7% for the total advertising revenue).

Table 1: European advertising market in 2012



Source: IAB Europe Adex Benchmark 2012/IHS ScreenDigest

The online advertising market is split up into three main categories: search advertising, classified advertising and directories and display advertising. These are defined by the IAB as follows:

- Search advertising:[21] "Fees advertisers pay Internet companies to list and/or link their company site or domain name to a specific search word or phrase (includes paid search revenues)."
- Classified advertising and directories:[22] "A form of advertising which is particularly common in newspapers, online and other periodicals which may be sold or distributed free of charge. Classified advertising is called such because it is generally grouped under headings classifying the product or service being offered (headings such as Accounting, Automobiles, Clothing…) and is grouped entirely in a distinct section, which makes it distinct from display advertising. Display advertising typically contains graphics or other art work and which is more typically distributed throughout a publication adjacent to editorial content."
- Display advertising:[23] "a form of online advertising where an advertiser's message is shown on a destination web page, generally set off in a box at the top or bottom or to one side of the content of the page" (examples include banner ads, online video ads, pop-ups, etc.)

Display advertising is the most relevant form of online advertising to the audiovisual sector. As we will expose in more detail in the Part II, video advertising has introduced new capabilities for marketers and brands to engage with consumers which were not possible before with simple banner ads and pop-ups. Therefore, it comes to no surprise that display advertising is the second biggest category for online advertisements in Europe, behind search advertising, representing 32.4% of the European online advertising market in 2012 for a value of EUR 7.8 billion and growing at 9.1% compared to 2011.

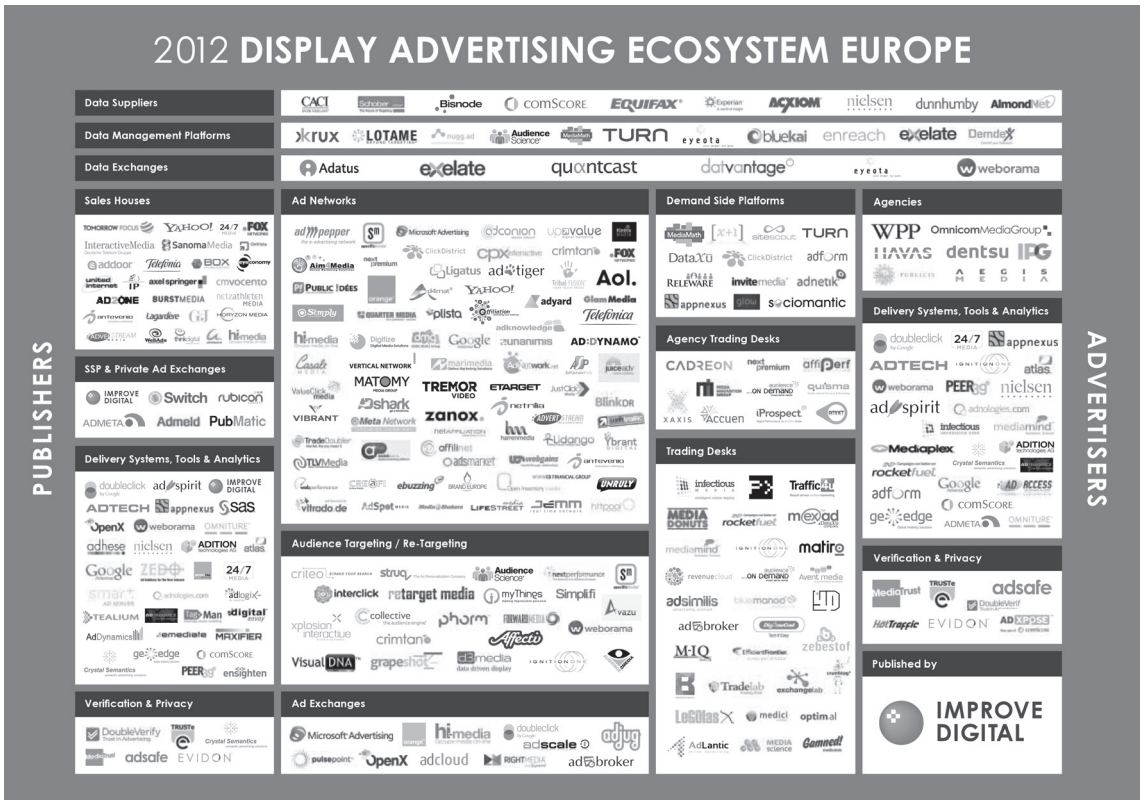
19) IAB Europe collects statistics for 26 European countries. More information available at: www.iabeurope.eu
20) IAB Europe, "Adex Benchmark 2012", 28 August 2013, available at: www.iabeurope.eu/files/8113/7778/9154/IAB_Europe_Adex_Benchmark_2012_Report_Final_2MB.pdf
21) IAB, "Glossary of Interactive Advertising Terms v. 2.0", available at: www.iab.net/media/file/GlossaryofInteractivAdvertisingTerms.pdf
22) IAB UK, "Jargon buster", available at: www.iabuk.net/resources/jargon-buster
23) *Supra* note 21.

3. The online display advertising ecosystem

The online display advertising ecosystem is a very complex and fragmented one, with many players intervening throughout the whole value chain (see figure 1 below).[24] Yet, the high number of players and the general complexity of the market should not make us blind to the fact that a consolidation process is ongoing, with global players (e.g. Google, Yahoo!, Microsoft, AOL, Facebook) dominating the market and investing in almost every aspect of the tech advertising ecosystem in order to offer an integrated package to their customers. In addition, these big ad tech firms are acting as publishers, selling a complete "package" to their customers (for example, Google's YouTube sells ad space through Google's ad network and exchange DoubleClick; OTT players are investing in original content to further differentiate themselves from their competitors).

On the two extremities of the market are publishers, who sell advertising space, and advertisers, who wish to place an advertisement on the publisher's website in order to reach its audience (traditional two-sided market). In between are many players who intervene on different parts of the advertising process and act as intermediaries (buying, selling, ad exchanges and networks, targeting, technical verifications, analytics, verification and privacy controls, etc.)

Figure 1: The European display advertising ecosystem 2012[25]



Source: Exchangewire

As the big number of players and intermediaries render the comprehensive coverage of the entire ecosystem difficult, a choice has been made to focus only on the most significant ones in order to limit complexity.

24) The original image of the American online display advertising ecosystem was created by LUMA partners, an investment firm and has since been adapted to the European online advertising market, available at: www.lumapartners.com/lumascapes/display-ad-tech-lumascape

25) Image by Exchangewire, available at: www.exchangewire.com/wp-content/uploads/2012/05/IMPROVE-DIGITAL_DISPLAY-ADVERTISING-ECOSYSTEM-EUROPE-2012.jpg

3.1. Main players on the Display advertising market

The main players on the Display advertising market are the following:

- Advertisers/marketers and their advertising agencies: these players need to advertise their product/service and therefore buy ad inventory spaces in order to advertise to the publisher's audiences.
- Demand side platforms (advertisers): this refers to advertising technology platforms which allow marketers to manage their online media campaigns by facilitating the buying of auction-based display media and audience data across multiple inventory and data suppliers in a centralised management platform.
- Ad networks: ad networks act as sales representatives/brokers and therefore play the role of an intermediary between advertisers and publishers. They aggregate audiences, sell packaged inventory and data for better targeting. The main companies in this area are Double Click (Google), Yahoo! Publisher Network and adCenter (Microsoft).
- Ad exchanges: ad exchanges are online auction-based marketplaces that facilitate the buying and selling of inventory across multiple parties ranging from direct publishers, Ad Networks and Demand Side Platform (DSP) (Google's AdEx, Yahoo's Right Media). These automated marketplaces enable sellers to monetise inventory via acceptance of the highest bid from buyers in order to advertise to the right/specific audience at the right time e.g. Double Click (Google), Right Media (Yahoo!), AdECN (Microsoft). Those auctions are made in real-time in order to increase efficiency.
- Retargeting firms: retargeting firms gather data on consumers by using cookies and other data gathering technologies in order to allow to address the "right" ad to "right" audience.
- Publishers: publishers sell their audiences attention by selling ad spaces. Publishers are video sites (such as Google's YouTube, Dailymotion, TV channel websites), newspaper websites, blogs and almost every website which relies on advertising revenue for financing and sells advertising spaces.

Even if the number of intermediaries is high and their function and functioning complex to understand, the important fact is that the online advertising market is changing the overall process of ad buying and selling through the introduction of various technologies. Also, although it is true that a multitude of players exist in those markets, a handful of integrated companies, such as Google, AOL, Microsoft and Yahoo!, are dominating the market and ensuring the perpetuation of this domination through acquisitions and mergers.

II. The main objectives and trends of online display advertising

1. Main objectives of online display advertising

Display advertising is more complex than the two other forms of online advertising, i.e. search and classified advertising. In search advertising, the key words used for the search gives the interest of the consumer away. In classified and directory advertising, the consumer is directly looking for the product/service in which he or she is interested.

In online display advertising, however, advertisers need to have additional information on the consumer in order to display an ad of interest to him or her (even if contextual advertising can give a hint as to the interests of the consumer). For a long time after the start of the commercial and public Internet, online display advertising was mainly composed of banner and pop-up ads, which weren't specifically targeted at users. Moreover, the static banner ads or pop-ups were perceived as annoying, as most Internet users tend to confirm after having experienced them. The popularity of ad-blocking and pop-up blocking software further underlines the negative perception of those forms of advertisements;[26] it is worth mentioning that Google had forbidden pop-up ads on its websites.[27]

26) McCoy S. et al., "A Study of the Effects of Online Advertising: A Focus on Pop-Up and In-Line Ads", *Proceedings of the Third Annual Workshop on HCI Research in MIS, Washington, D.C., December 10-11 2004*, pp. 50-54, available at: interruptions.net/literature/McCoy-HCIRMIS04.pdf

27) Google, "No pop-up ads allowed on Google", available at: www.google.com/help/nopopupads.html

The main objective of display advertising is to get the right advertising message at the right time to the right person. This is done by using multiple ad technologies and processes. These are explained in more depth below.

1.1. Right advertising message

Collection of personal information ("big data")

Getting the right advertising message to the right person is primarily[28] done through the use of "big data" (personal information) collected on users (through the use of cookies, by assigning individual users a unique ID number in order to track them through multiple connected devices). This in return allows targeting users based on their profile (preferences, interests, age, revenue, etc.) The use of personal information by private companies is receiving more scrutiny from the general public, as it is not always clearly stated which data is collected, kept and used to track persons through their journey on the web. This article is too short to expose all the issues associated with the use of "big data" for commercial purposes. It shall therefore simply be signalling here that the collection and use of personal data is, in Europe as well as in the USA, receiving more attention from society, regulators and law makers.

Online video advertising

The right advertising message is also brought before users by online video ads. The use of online video advertising, a market estimated to be worth EUR 662 million in 2012 (growing by +50.6 each year and representing 13% of the European display advertising market) is growing in double digits, enhanced by larger bandwidth and network capabilities. The drivers of growth for online video advertising are multiple:

- Video is a branding[29] medium for advertisers,[30] which allows combining TV and online ads to create joint ad campaigns, with additional content made available on the web (content marketing).
- The abundance of video content available on the web makes the insertion of video ads (pre-roll, mid-roll and end-roll) into video clips feasible. Users are increasingly consuming online video (be it on user-generated content platforms, advertising-financed video sites, social networks or newspapers websites) and therefore the online space is offering much space and video inventory that can integrate video advertising. This form of advertisement is in increased competition with the traditional audiovisual advertisements broadcasted on TV and that is sustained by the creation of original content by OTT players.
- Increased network capabilities in Europe[31] facilitate the delivery of video content.

1.2. Right time

Getting the right advertisement is only one of the objectives of online display advertising. The second objective, displaying it at the right time, is used through real-time bidding (RTB)[32] and programmatic ad space buying. RTB is similar to the functioning of a stock market. Publishers make their inventory (and therefore their audience visiting their website) available for auction to advertisers and marketers on ad exchanges. The process is completely automatised through the use of computers and takes place in fractions of seconds. The auction process is based on algorithms which match user profiles to advertisers' bids on those profiles ("valuable" profiles to which advertisers want to show their ads), maximizing prizes for profiles and ad spaces and aiming to match ads with the right

28) The exploitation of big data is not the only way of getting the right advertisement in front of the right person (contextual advertising).

29) IAB UK, "Brand Building Online FAQs", available at: http://www.iabuk.net/sites/default/files/research-docs/Brand%20Building%20Online%20FAQs.pdf

30) Elliott S., "For Online Video Publishers, a New Tack on Luring Ad Dollars", *The New York Times*, 7 May 2014, available at: www.nytimes.com/2014/05/08/business/media/for-online-video-publishers-a-new-tack-on-luring-ad-dollars.html

31) Akamai, *Akamai's State of the Internet*, Q4 2013 Report, Volume 6 Number 4,available at: www.akamai.com/dl/akamai/akamai-soti-q413.pdf

32) Ballve M., "RTB Or Real-Time Bidding Is The Future Of Digital And Mobile Advertising –Here's What You Need To Know", *Business Insider*, 26 September 2013, available at: www.businessinsider.com/rtb-or-real-time-bidding-is-the-future-2013-9

audience in the process. The tendency for ad buying is evolving towards programmatic buying[33] (with no human interactions involved) and RTB, as it is more efficient than negotiating each ad space with publishers and ad networks.

1.3. Right person

The third objective for display advertising is to advertise to the right person, a person that could show interest in the product or service advertised to him or her. This is, again, achieved by using the information collected on the person to establish their profile. The popularity of social networks, such as Facebook and Twitter, has enabled those publishers to collect in-depth information on their users, valuable to advertisers. The personal profile established on a user is then used to target him or her with a specific advertisement.

The increased proliferation of connected mobile devices, such as smartphones and tablets, complicates the ability of ad tech firms to track users across different devices[34] (cookies do not work on mobile connected devices and they do not synchronise across different browsers). The recent developments are moving towards the establishment of a unique ad ID number[35] for each user (based on various technical information collected on the mobile device and desktop), which allows tracking users between multiple devices. Google, for instance, is able to track users across Android phones, Gmail and the Chrome browser and Microsoft can track users across applications. It is clear that the capability of tracking a user across devices through their online journey is becoming essential, as usage is rapidly changing and adapting to mobile devices.

2. Trends relevant to online display advertising – the advent of the mobile consumer

2.1. A new revenue stream – mobile advertising

The increase of mobile devices and the use consumers make of them is offering advertisers and publishers new ways to connect with consumers. Mobile connected devices enable localisation and therefore geo-fencing and geo-marketing, that is to say advertising based on the location of the user. With this new form of commercial communication, an ad is only displayed to a user if he or she is in a specific geographical position. The increased usage of mobile connected devices, combined with an increase in online video consumption, is furthermore expanding the addressable market for advertisers. A consumer can be reached everywhere, anytime and no longer only when he or she is in front of a computer, which limited the addressable market and ways of interacting with him or her.

The strong increase witnessed in the past years in mobile advertising is in line with the usage of connected mobile devices and their proliferation among Europe's population. Mobile advertising was valued at USD 3.58 billion in 2013 in Western Europe according to eMarketer data[36] and is projected to rise to USD 15.18 billion in 2017.

Looking at the usage of mobile Internet capable phones in Europe, eMarketer estimates that 40% of the population in Western Europe is using the web at least once per month from a mobile phone and this number is set to rise to 66% of the total Western Europe population by 2017. The popularity of tablets, especially for online video consumption, is furthermore reinforcing this trend.

33) Hof R., "Programmatic Advertising To Gobble Up Even More Ad Budgets – Report", *Forbes*, 15 May 2014, available at: www.forbes.com/sites/roberthof/2014/05/15/programmatic-advertising-to-gobble-up-even-more-ad-budgets-report/

34) Cain Miller C. and Sengupta S., "Selling Secrets of Phone Users to Advertisers, *The New York Times*, 5 October 2013, available at: www.nytimes.com/2013/10/06/technology/selling-secrets-of-phone-users-to-advertisers.html

35) Rosenberg A., "ID Is Key: Unlocking Mobile Tracking & Cross-Device Measurement, Part 2", *The Makegood*, 14 August 2013, available at: www.the-makegood.com/2013/08/14/id-is-key-unlocking-mobile-tracking-cross-device-measurement-part-2/

36) eMarketer, "Display, Mobile Key Drivers of Western European Digital Ad Spending Growth - Investment in digital ads more mature in Germany, France", 8 November 2013, available at: www.emarketer.com/Article/Display-Mobile-Key-Drivers-of-Western-European-Digital-Ad-Spending-Growth/1010371

Mobile connected devices allow advertisers to make use them as a "second screen", interacting with the consumer in front of a TV through his or her connected mobile device. The possibilities offered by "second screens" are large and currently brands are experimenting with various ways of engaging with consumers in front of their television sets through the use of second screens. Social networks, such as Facebook and Twitter, are developing technologies to combine TV advertisements and programmes with engaging content displayed on the phone screen. The aim of second screen advertisements is to further engage consumers by displaying relevant information and ads to them directly related to the content they are already consuming on the TV set.

2.2. Limitations of mobile advertising

While mobile advertising is offering new possibilities for marketers, advertisers and publishers to engage with consumers and opening new streams of revenues, several limitations and difficulties persist.

It is difficult yet to monetise content on mobile devices for publishers, as this form of advertisement is not completely trusted by advertisers and marketers who question the engagement and delivery of ads on mobile devices. Are people really watching ads on mobile devices or do they see them as an annoyance? The mobile ad tech sector and publishers are putting their best efforts into reassuring and proving the efficiency of mobile advertisements, but this has not yet fully convinced the whole sector. As with banner ads in the beginning of the web, new forms of advertisement need time to develop and show their full capacities and mobile ads are in this way no different. The situation becomes even more problematic for publishers, as mobile viewership is increasingly gaining in importance in their overall viewership. For publishers it is therefore essential to find ways that guarantee the efficiency, reliability and effectiveness of mobile advertisement in the eyes of advertisers and marketers.

The mobile advertisement market is a low margin business (a fact which has effects on the results even of a dominating company like Google).[37] Online advertisements are less costly than TV ads and mobile advertisements are less costly than online advertisements. It is therefore crucial, as with every low-margin business, to achieve the necessary scale and reach. Only global, international players can aggregate the necessary audiences to make their mobile advertisement business profitable. It is therefore no wonder that, according to eMarketer,[38] only two companies dominated the Global mobile ad market in 2013: Google, with 52.3% of the global mobile market, and Facebook, with 15.8%. This strong dominance shows the importance of scale and reach, which only few companies possess in the global Internet advertising market.

III. Outlook

The growth of online display advertising is driven by several trends, as this short introduction has shown. First of all, the rising number of persons online, the increased consumption of video content and rising network capabilities are expanding the addressable market for online display advertising. The usage of online video as a branding tool for advertisers and marketers further underlines this trend, as video offers many more possibilities for engaging with a potential consumer than pop-ups or banner ads, the most widespread forms of display advertising before the advent of online videos. The utilisation of "big data" and the profiling of consumers that that data allows enable a more precise targeting and personalisation of display advertisements and, therefore, an increased efficiency for advertisers and marketers. Online display advertising companies are also taking advantage of the recent technological innovations and integrating them into their ad tech business. Real-time bidding and programmatic buying are good examples of how technology is enabling a more accurate and streamlined selling and buying of ad inventory, facilitating the process for buyers and sellers. Proliferation of mobile connected devices is opening a new addressable market, extending the potential reach for online display advertisements, while also enabling new forms of advertisements, such as the mobile device as a second screen and localisation-based ads.

37) Efrati A., "Google's Revenue Reignites Mobile Worries", *The Wall Street Journal*, 18 July 2013, available at: http://blogs.wsj.com/digits/2013/07/18/googles-revenue-reignites-mobile-worries/

38) eMarketer, "Google takes home half of worldwide mobile Internet Ad revenue", 13 June 2013, available at : www.emarketer.com/Article/Google-Takes-Home-Half-of-Worldwide-Mobile-Internet-Ad-Revenues/1009966

The shift, that just started in 2013, is one of passing from mass advertising (as it was done on broadcast TV) towards the individualised and personalised forms of advertising that are possible in the online landscape.

Limitations are rising, as the online advertising space is a lower margin business than was the case with TV (where a limited number of channels existed in a closed and controlled environment, as opposed to the online space, where no control exists and content is abundant). The low ad prices of the online ad market makes it a low margin business, where scale, reach and interoperability are of uttermost importance. The high fragmentation of this market, combined with the high number of players trying to capture ad budgets, favours the global digital players who are dominating the market. The leading players on the ad tech and online advertisement market are Google, Facebook, Microsoft, AOL, Yahoo!, Amazon and Twitter, companies that operate globally and have an large user base. The market has a tendency to concentrate, as those global players are acquiring smaller ad tech companies in order to reinforce their dominant position. In order to be effective and dominant in the market, a company has to operate on a global scale and possess an important customer/user base.

However, concerns about online display advertising remain. Firstly, marketers and advertisers still have doubts as to the measurability, effectiveness and reach of online advertisements. The online ad industry is producing a huge amount of reports, surveys and notes in order to reassure advertisers on those issues, but the low prices for ad inventory in the online space compared to broadcast TV demonstrates that more proof (or time and experience) is yet needed. Broadcast TV had, during the last century and the beginning of this one, plenty of time to commission studies that showed how high a return advertisers can expect on their investment when advertising on television. The online advertising industry needs similar "proof" in order to be able to begin to charge prices remotely approximate to those of broadcast TV. Finally, concerns also exist about traffic fraud and robots[39] being used in order to generate false impressions of ads, which no human being has ever seen. As always with new technologies, time is needed in order to clear the process and establish confidence in the market. But with the changing consumption habits of consumers (especially younger generations) regarding content and an increased demand for online content, markets and advertisers will migrate to where the "eyeballs" are: the online landscape.

Last but not least, Western societies are increasingly concerned with the use private (and also public) organisations are making of the data collected. The recent surveillance scandals (e.g. that of NSA surveillance) have alerted the public to how their data is being collected and used against them. People are increasingly worried about commercial companies establishing profiles on them and tracking every move they make on the web for commercial purposes. Attention has gathered around this subject and it is yet not clear how the situation will evolve.

As a final word, an Internet saying perfectly describes what web users should expect: "If you are not paying for it, you're not the customer; you're the product being sold".

39) Shields M., "Bots and 'Drone Pools': The Deep Bag of Tricks in Video-Ad Fraud", *The Wall Street Journal*, 26 May 2014, available at: online.wsj.com/news/articles/SB10001424052702304893404579530000548363992

The Current European Legal Framework

The Sets of Rules on Commercial Communication in a Converged World

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I. Introduction

The current European legal framework applicable to commercial communication is as complex as it is heterogeneous and consists of numerous legal instruments which each cover a specific area. The complexities are intensified by the emergence of new media services, brought about by increasingly fast technological progress. Thus, it is uncertain which regulatory regime applies to new "converged" services and whether they at all fall under the territorial scope of EU law.

This contribution aims at providing an overview of the most relevant sets of rules applicable to commercial communication. It examines, in particular, the Audiovisual Media Services Directive, the E-Commerce Directive, the Unfair Commercial Practices Directive and the Directives on data protection. Instead of approaching the topic via concrete examples for "modern" types of commercial communication and asking whether and in what way these are regulated by EU law, the following sections will lay out the (potentially) applicable rules. This approach allows for the application of this analysis to specific examples, many of which are presented in the other contributions of this publication. It is striking that once again – as was the case with the interpretative communication of the European Commission in 2004 clarifying the applicability of television-related standards to new forms of advertising – it is commercial communication in the way it is offered and the way it is consumed that challenges the limits of existing rules and poses the question whether new and specific provisions are needed.

1) 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 and Director for Academic Affairs at the Institute of European Media Law (EMR) in Saarbrücken since July 2014. He is very grateful for the extensive support in preparation of the contribution to Jenny Metzdorf, LL.M., who is his research associate on the AVMSD I and II projects (www.medialaw.lu) and is writing her thesis on regulatory practices concerning the AVMSD.

II. The legal framework of the European Union relevant for commercial communication

1. Audiovisual Media Services Directive

1.1. Overview and scope of application

The Audiovisual Media Services Directive of 2007 (AVMSD)[2] contains rules regulating audiovisual media services. It was passed to amend its predecessor, the Television without Frontiers Directive, initially adopted in 1989 and modified in 1997, which concerned certain aspects of television broadcasting only. The scope of the AVMSD is broader, encompassing traditional broadcasting, as well as on-demand audiovisual media services and taking increased convergence of media into account. While television broadcasting implies the simultaneous viewing of a programme included in a chronological schedule, on-demand services are consumed "at the moment chosen by the user and at his individual request".[3]

The Directive is based on a graduated approach to regulation, covering linear audiovisual media services (television broadcasting) more extensively than non-linear (on-demand) audiovisual media services. This two-tier approach is reflected in, for instance, the rules protecting minors or the rules promoting European works and in particular in commercial communications, as will be shown below. Recital 79 AVMSD indicates that "detailed rules" for non-linear services "appear neither to be justified nor to make sense from a technical point of view. Nevertheless, all audiovisual commercial communication should respect not only the identification rules but also a basic tier of qualitative rules". By contrast, both qualitative and quantitative standards apply to television advertising. Yet, the obligations imposed on broadcasters were alleviated by the AVMSD, which acknowledges the difficulty in generating sufficient advertising revenues in view of technologies allowing viewers to avoid advertising.[4]

In addition to economic goals pursued by the regulation of commercial communication, cultural and social reasons are pertinent too. Recital 59 AVMSD highlights that "the availability of harmful content in audiovisual media services is a [general] concern" which necessitates the imposition of rules protecting "the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including audiovisual commercial communications". The protection of minors is thus an objective underlying the rules on advertising in the AVMSD. More generally, the standards laid down in the Directive serve the aim of consumer protection, such as protection against excessive advertising on television, as held by the Court of Justice of the European Union (CJEU) in the case of RTL/NLM.[5] Yet, data protection issues emerging with the increased personalisation of content (like the creation of consumers' profiles) are not specifically regulated by the AVMSD, but are addressed by the current reform and the Commission's proposal for a General Data Protection Regulation. In its Green Paper of 2013, the Commission acknowledges the importance of enhancing "consumer trust in innovative business models" in this respect.[6]

Importantly, the application of the rules regarding commercial communications depends first upon whether the service is within the scope of the Directive. Pursuant to Art. 1(1)(a)(i), an audiovisual media service is defined as a:

> *service as defined by Articles 56 and 57 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.*

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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 [2007] OJ L 332/27, 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) of 10 March 2010 [2010] OJ L 95/1 (hereafter: AVMSD). See also Corrigendum, [2010] OJ L 263/15.
3) Art. 1(1)(e) and (g) AVMSD.
4) Recital 85 AVMSD.
5) Case C-245/01, RTL *Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, EU:C:2003:580, para. 64.
6) Commission Green Paper, "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values" COM(2013) 231 final, 24 April 2013, para. 3.3, p. 14.

The criteria are cumulative and several elements are further defined in Art. 1(1) AVMSD. Yet, other concepts such as "editorial responsibility" or "principal purpose" are ambiguous and difficult to apply in practice. In view of connected TV, which merges broadcasting and the Internet on the television screen, key principles and notions of the AVMSD have further come under pressure. The Directive identifies three kinds of audiovisual media services: (i) television broadcasts, (ii) on-demand services[7] and (iii) audiovisual commercial communication defined as:

> *images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.*

Audiovisual commercial communication thus constitutes a special sub-group of services governed by the Directive. Separate definitions of common forms of commercial communication, like "television advertising", "sponsorship" and "product placement" are included in the Directive. The following section pinpoints the material rules applicable to audiovisual commercial communication.

1.2. The specific rules on commercial communication

1.2.1. Generally relevant provisions

Before examining the key provisions concerning commercial communication, several general provisions applicable to all audiovisual media services are detailed. Art. 5 AVMSD, in particular, sets out the kind of information which service providers are obliged to "make easily, directly and permanently accessible" to service recipients. These include, inter alia, the name of the service provider, the geographical address and email address or website. This ensures that consumers can reach service providers conveniently. The rule is a horizontal obligation which is not only found in the AVMSD, but also in the E-Commerce Directive of 2000,[8] which covers information society services as analysed below.

Furthermore, Art. 6 AVMSD bans content inciting to "hatred based on race, sex, religion or nationality". This prohibition equally applies to audiovisual commercial communication, as it captures all audiovisual media services. Interestingly, Art. 7 AVMSD encourages service providers to "gradually [make their services] accessible to people with a visual or hearing disability". Sub-titling of audiovisual works (e.g. feature-length films) or audio-description thereof are common practices. In principle, such tools should be extended to commercial communication, as Art. 7 AVMSD refers to the generic term "services," which encompasses advertisements.

1.2.2. The key provision of Art. 9 AVMSD detailing general principles for commercial communication

The most relevant provision specifically concerning audiovisual commercial communication can be found in Art. 9 AVMSD. The rule prescribes general standards with which commercial communication must comply. These entail qualitative obligations, as well as requirements for or limitations to the inclusion of certain products or services. Users must be able to recognise audiovisual commercial communication.[9] As a consequence, "surreptitious" commercial communication (hidden advertisements) is impermissible and other "subliminal techniques" are not to be used.[10] Moreover, commercial communication must respect human dignity and cannot "include or promote discrimination" or encourage behaviour

7) For an overview see Cole M., "The European Legal Framework for On-demand Services: What Directive for Which Services?" *in* Nikoltchev S. (ed.), *The Regulation of On-demand Audiovisual Services: Chaos or Coherence*, IRIS *Special*, European Audiovisual Observatory, Strasbourg, 2011, p. 35-45; Cabrera Blázquez F. J., "On-demand Services: Made in the Likeness of TV?" *in* Nikoltchev S. (ed.), *What is an On-demand Service?*, IRIS *plus* 2013-4, European Audiovisual Observatory, Strasbourg, 2013, p. 7-27; Scheuer A., "Convergent Devices, Platforms and Services for Audiovisual Media, Challenges Set by Connected TV for the EU Legislative Framework" *in* Nikoltchev S., *Converged media: Same Content, Different Laws?,* IRIS *plus* 2013-3, European Audiovisual Observatory, Strasbourg, 2013, p. 7-22.

8) 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 [2000] OJ L 178/1.

9) Art. 9(1)(a) AVMSD.

10) Art. 9(1)(a) and (b) AVMSD.

prejudicial to health, safety or the environment.[11] These represent important values and public interest objectives. Interestingly, the advertising of alcoholic beverages is allowed in principle. It is only limited in the sense that the commercials are not allowed to be directly "aimed at minors" and must not "encourage immoderate consumption of such beverages".[12] By contrast, the advertising of cigarettes or other tobacco products, as well as medicinal products and medical treatments available on prescription are strictly prohibited.[13]

With a view to protecting minors, any audiovisual commercial communication that is harmful or detrimental for minors is impermissible. This is further specified and implies that commercial communication cannot:

> *directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.*

In addition to these precise requirements, Art. 9(2) AVMSD calls on service providers to develop codes of conduct regarding unhealthy food (so-called HFSS food: food that is high in fat, salt or sugar). It has to be noted that the separation of editorial from commercial content as applies to television advertising is not explicitly prescribed for audiovisual commercial communication. Nonetheless, a light version of the principle of separation exists for commercial communication included in non-linear services, as they have to be "recognisable" as such. In that way the consumer has the ability to adjust to the situation in which the actual separation does not exist.

1.2.3. Sponsorship and product placement

Apart from Art. 9 AVMSD, which is dedicated to all kinds of audiovisual commercial communication, Art. 10 and 11 AVMSD set out further requirements for specific forms of commercial communication, namely sponsorship and product placement. The sponsorship of programmes or services is generally permissible, while product placement is prohibited and only by virtue of an exception allowed in certain types of programmes, such as cinematographic works, films, series and other light entertainment formats.[14] As a result of the way the provision is set out, this type of commercial communication is in actual fact permissible in the context of most formats, whilst it is – importantly – banned in children's programmes or news and current affairs programmes. In parallel to this, informative programmes cannot be sponsored, while for children's programmes, documentaries or religious programmes Member States are free to determine whether sponsorship is allowed.[15] The two provisions reflect particular concerns brought about by the specific nature of these types of commercial communication. In contrast to traditional spot advertising, which is inserted in blocks during commercial breaks, sponsorship credits and product placement are included in programmes and therefore not so obviously separated from the perspective of the viewer.

The aim of these provisions is that the content of programmes shall not "be influenced in such a way as to affect the responsibility and editorial independence" of the service provider.[16] In addition, consumers are protected by the fact that sponsorship credits and product placements must not "directly encourage the purchase or rental of goods or services (…) by making special promotional references".[17] Above all, product placement and sponsored programmes are to be identified in order to appropriately inform viewers.[18] Since product placement is featured within a programme and as part of its content, giving "undue prominence to the product" is prohibited. Similar to the general standards laid down in

11) Art. 9(1)(c) AVMSD.
12) Art. 9(1)(e) AVMSD.
13) Art. 9(1)(d) and (f) AVMSD.
14) Art. 11(2) and (3) AVMSD.
15) Art. 10(4) AVMSD. For an example of application in context with a "media library" cf. Matzneller P., "BKS on Programme-Specific Advertising in ORF Media Library" IRIS 2014-2:1/5. On the diversity of transpositions of the relevant provisions in the AVMSD, Cole M. and Metzdorf J., *The EU Audiovisual Media Services Directive – Comparative Commentary on the AVMSD and National Implementation*, Munich, 2015 (in preparation).
16) Art. 10(1)(a) and 11(3)(a) AVMSD.
17) Art. 10(1)(b) and 11(3)(b) AVMSD.
18) Art. 10(1)(c) and 11(3)(d) AVMSD.

Art. 9 AVMSD, product placement of cigarettes and other tobacco products, as well as medicinal products and medical treatments is prohibited.[19] Likewise, programmes cannot be sponsored by undertakings producing these products or services.[20]

1.2.4. Further important provisions

As the notion of audiovisual commercial communication covers – for traditional television broadcasts – advertising and teleshopping, the rules applicable to these services are briefly described to make obvious the existing differences to the rules applicable to all audiovisual media services. Apart from the fact that they apply exclusively to television, they are generally stricter than those formulated for all audiovisual media services. The key principles are the principles of identification and separation set out in Art. 19(1) AVMSD.[21] Accordingly, viewers must be able to identify and recognise advertising and teleshopping, which are, moreover, to be kept "quite distinct" from editorial parts of the programme "by optical and/or acoustic and/or spatial means".[22] Commonly, advertising and teleshopping occur in blocks between programmes and isolated spots must be kept to a minimum,[23] but are admissible to a larger extent than in previous versions of the Directive. When commercials are inserted between programmes, the "integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme" must not be jeopardised.[24] The Directive also specifies the frequency of the interruption, prescribing that a break can only be screened "for each scheduled period of at least 30 minutes".[25] This rule exempts series, serials and documentaries and it applies to children's programmes only in so far as these are longer than 30 minutes. In religious services, no advertising and teleshopping can be programmed.[26] In total, 12 minutes of advertising and teleshopping may be included within an hour, excluding self-promotional announcements.[27] Furthermore, alcoholic beverages may be advertised in compliance with Art. 22 AVMSD, which ensures the protection of minors. In this respect, advertising and teleshopping may not, inter alia, "be aimed specifically at minors" and "link the consumption of alcohol to enhanced physical performance or to driving" or "encourage immoderate consumption of alcohol".[28] With respect to teleshopping, Art. 21 AVMSD forbids teleshopping for medicinal products and treatments.[29] The insertion of so-called teleshopping windows is permissible, provided that these are clearly identified and last a minimum of 15 minutes.[30] Before the AVMSD was amended in 2007, the Commission clarified in an interpretative communication in 2004 that (and in what form) the rules of the "Television without Frontiers" Directive (TWFD) applied to advertising techniques like split screen, virtual and interactive advertising.[31]

1.3. The relevance of the notion of "programme" and relationship to other Directives

Some minor issues are worth mentioning, as they affect the interpretation of the rules applicable to audiovisual commercial communication. The first question is whether audiovisual commercial communication constitutes a programme within the meaning of Art. 1(1)(b) AVMSD. Accordingly, a programme:

19) Art. 11(4) AVMSD.
20) Art. 10(3) AVMSD.
21) A case is currently pending before the Court of Justice of the European Union which concerns the interpretation of Art. 19 and 23 AVMSD and in particular the principle of separation (in relation to a split screen, which features the closing credits of a programme on one side and a catalogue of programme announcements on the other side of the screen) and the classification of sponsorship credits (broadcast in connection with other (non-sponsored) programmes), as well as the duration of permissible advertising time. Pending case C-314/14, *Sanoma Media Finland Oy/Nelonen Media, Helsinki*.
22) Art. 19(1) AVMSD.
23) Art. 20(1) and 19(2) AVMSD.
24) Art. 20(1) AVMSD.
25) Art. 20(2) AVMSD.
26) Art. 20(2) AVMSD.
27) Art. 23 AVMSD.
28) Art. 22(a), (b) and (e) AVMSD.
29) Art. 21 AVMSD.
30) Art. 24 AVMSD.
31) Commission Interpretative Communication on certain aspects of the provisions on televised advertising in the "Television without frontiers" Directive [2004] OJ C 102/2.

means a set of moving images with or without sound constituting an individual item within a schedule or catalogue […] and the form and content of which is comparable to the form and content of television broadcasting. Examples of programmes are feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama.[32]

Although the AVMSD does not expressly stipulate that commercials do not constitute programmes, this can nevertheless be inferred from the formulations of the definitions relating to audiovisual commercial communication and other forms thereof, which do not refer to the term "programme".[33] On the contrary, the definitions of broadcasting and on-demand service explicitly refer to this notion. In addition, the list of examples included in the definition of a "programme" outlined above does not mention audiovisual commercial communication. In a similar vein, the rules outlining the general principles for television advertising and teleshopping employ the term "programme".

This differentiation may have consequences for the application of the rules on the protection of minors under the Directive. Art. 12 AVMSD requires that content which "might seriously impair the physical, mental or moral development of minors [is] only made available in such a way as to ensure that minors will not normally hear or see" on-demand services. This provision unequivocally refers to services. By contrast, Art. 27 AVMSD lays down the standards for "programmes" which are detrimental to children. The use of the term "service" in Art. 12 AVMSD and "programme" in Art. 27 AVMSD may be accidental, but it would seem as if the term service is broader (including audiovisual commercial communication) than the notion of a programme. In any case, the protection of minors in audiovisual commercial communication is guaranteed by the general rule applicable to all audiovisual media services as stipulated in Art. 9(1)(g) AVMSD.

Before examining provisions of other relevant European law instruments, it is noted that recital 82 AVMSD highlights that the AVMSD does not affect these other Directives. With regards to the E-Commerce Directive, Art. 4(8) AVMSD stipulates a rule of conflict giving priority to the application of the AVMSD.

2. E-Commerce Directive

2.1. Scope of application

The E-Commerce Directive (ECD) applies to information society services and aims at facilitating their circulation between Member States;[34] it was an early reaction to the increasing importance of business conducted via the Internet before the turn of the century. It encompasses the free movement of commercial communications as stated in Art. 1(2) ECD. Information society services are defined by virtue of another Directive of 1998.[35] Thus, information society services are services "normally provided for remuneration, at a distance, by electronic means and at the individual request of a [service] recipient".[36] The criteria "at a distance", "by electronic means" and "at the individual request of a [service] recipient" are further clarified. Importantly, an indicative list of services is provided in the Annex of the Directive of 1998, excluding television broadcasting as covered by the TWFD and, by analogy, on-demand audiovisual media services falling under the AVMSD. The ECD is typically applied when the service takes the form of electronic media consumed online which is not considered to be an audiovisual media service. At the time the Directive was adopted – and even more so today – this covered online advertisements as a means to finance a service.[37]

32) Art. 1(1)(b) AVMSD.
33) Art. 1(1)(h) – (m) AVMSD.
34) Art. 1(1) 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') [2000] OJ L 178/1.
35) Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L 217/18.
36) Art. 1(2) of Directive 98/48/EC.
37) Recital 18 ECD.

Commercial communication is defined as:

any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.[38]

The wording is reminiscent of the formulation contained in the AVMSD.[39] Furthermore, the definition of commercial communication outlined in the ECD excludes:

- *information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address;*
- *communications relating to the goods, services or the image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration."*[40]

In general, the standards outlined in the ECD are very basic, as they purport to enable the free flow of information society services within the Union and give legal certainty to service providers, in particular with respect to the liability of intermediary service providers.[41]

2.2. Information requirements for commercial communications under the ECD

The requirements for commercial communications "which are part of, or constitute" an information society service are postulated in Art. 6 ECD. Thus, commercial communications, as well as the advertiser ("the natural or legal person on whose behalf the commercial communication is made") must be "clearly identifiable".[42] Moreover, "promotional offers, such as discounts, premiums and gifts" which are legally marketed in the Member State where the service provider is established must also be "clearly identifiable". In addition, the terms and conditions should be "easily accessible and be presented clearly and unambiguously".[43] The same standard applies to "promotional competitions or games" included in commercial communications.[44] These standards represent consumer protection principles and ensure that users of information society services are aware of the consumption of commercial communications and are being informed about their conditions.[45] At the time, this seemed especially relevant because previously existing divisions between different forms of content, as in other media, did not seem to be easily transferable to the online context.

3. Legal acts concerning specific content in commercial communications

In addition to the sector-specific media law Directives analysed above, there are several EU Directives which address certain types of content or, alternatively, particular products and services, such as medicines or food ingredients.[46] These are also relevant within the context of connected TV, as they contain specific rules concerning commercial communication for these products and services.

38) Art. 2(f) ECD.
39) Art. 1(1) (h) AVMSD.
40) Art. 2(f) ECD.
41) See Art. 12-15 ECD.
42) Art. 6(a) and (b) ECD.
43) Art. 6(c) ECD.
44) Art. 6(d) ECD.
45) Valcke P. and Dommering E., "Comments on the ECD" *in* Castendyk O. *et al., European Media Law*, Kluwer Law International, 2008, para. 42-44; Spindler G., "E-Commerce in Europa, Die E-Commerce-Richtlinie in ihrer endgültigen Fassung", *Multimedia und Recht,* 2000, p. 14.
46) See Marwitz P., "Werberegulierung durch EU-Gesetzgebung", *Kommunikation und Recht,* 2004, 5, p. 212.

3.1. Tobacco Advertising Directive

One of these horizontal Directives is the Tobacco Advertising Directive (TAD) of 2003.[47] It applies to the printed press, radio services and information society services and lays down a ban on the promotion of tobacco products. The TAD does not specifically refer to broadcasting and on-demand audiovisual media services, as the same ban on tobacco products is stipulated in the above-mentioned sector-specific rule of Art. 9(1)(d) AVMSD. "Advertising" is defined as "any form of [commercial communication] with the aim or direct or indirect effect of promoting a tobacco product".[48] The absolute prohibition on advertising tobacco products in print media is extended to information society services pursuant to Art. 3(2) TAD. Thus, the same standard applies across all kinds of media, whether print, audiovisual or electronic.

3.2. Further example: the Directive concerning Medicinal Products for Human Use

Similarly, the Directive concerning Medicinal Products for Human Use of 2001 (MPD) illustrates this approach.[49] The Directive applies to medicinal products "intended to be placed on the market in Member States".[50] The Directive contains several provisions governing the advertising of medicinal products. Art. 86(1) MPD clarifies that the term advertising entails "advertising [...] to the general public", which includes advertising in audiovisual media services or information society services. Similar to the TAD, the MPD establishes a general prohibition of any advertising of a medicinal product of which a "marketing authorization has not been granted in accordance with Community law".[51] This rule is also replicated in Art. 21 AVSMD with regard to teleshopping. In addition, the MPD prohibits advertising of medicinal products available on prescription, a ban which is also explicitly stipulated in the AVMSD.[52]

4. Legal acts concerning commercial communication and unfair commercial practices

The next set of legal texts relates to certain kinds of advertising like misleading and comparative advertising and practices considered unfair. The Directive concerning Misleading and Comparative Advertising (MCAD) of 2006 is applicable to business-to-business practices and gives Member States the possibility to derogate by setting higher standards.[53] Its counterpart, the Unfair Commercial Practices Directive (UCPD) of 2005 applies to business-to-consumer practices and establishes full harmonisation.[54] The UCPD is broader in scope, as it is not confined to misleading and comparative advertising. It could be argued that these Directives are applicable to providers of audiovisual media services and advertisers alongside the AVMSD, even if recital 82 AVMSD negates the parallel application of these legal instruments. Art. 2(d) UCPD identifies commercial communication and in particular advertising as a business-to-consumer commercial practice.[55] Thus, the rules of these Directives may play a role in the relationship between (i) service providers or advertisers themselves and (ii) service providers and users of audiovisual media services.

With regards to misleading and comparative forms of advertising, the MCAD provides definitions of advertising (which resembles the one contained in the AVMSD), misleading advertising and comparative advertising. Misleading advertising means commercials which "deceive or [are] likely to

47) Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L 152/16. See also, Corrigendum [2004] OJ L 67/34.
48) Art. 2(b) TAD.
49) Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L 311/67.
50) Art. 2(1) MPD.
51) Art. 87(1) MPD.
52) Art. 88(1) (a) MPD and Art. 9(1)(f) AVMSD.
53) Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L 376/21.
54) 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 [2005] OJ L 149/22.
55) Art. 2(d) UCPD.

deceive persons to whom [they are] addressed or whom [they reach] and which, (…) [are] likely to affect their economic behaviour or which, (…) [injure or are likely to] injure a competitor".[56] Moreover, comparative advertising implies advertising which "explicitly or by implication identifies a competitor or goods or services offered by a competitor".[57] Misleading advertising is to be abandoned in the internal market.[58] Hence, Art. 3 MCAD lists several factors which help to determine misleading information, such as "the characteristics of goods or services", "the price or the manner in which the price is calculated", as well as "the nature, attributes and rights of the advertiser".[59] Still, comparative advertising is allowed under certain conditions in line with Art. 4 MCAD. These conditions concern the comparability of goods and services, the prohibition on misleading or confusing market participants or discrediting the goods or services provided by competitors.[60]

Furthermore, unfair commercial practices are generally forbidden in line with Art. 5(1) UCPD. Nonetheless, the Directive recognises "the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally".[61] Such presentations are not considered unfair and thus escape the scope of the Directive. The perspective from which this is assessed is that of an "average consumer", which the CJEU has defined in its jurisprudence as "reasonably well informed and reasonably observant and circumspect".[62] The concept of the average consumer, which as such is difficult to apply in practice, is further blurred in the context of connected TV, where commercial overlays during programmes are technically feasible and consumers' inexperience with new media is light-heartedly exploited. Nonetheless, the Annex I of the UCPD sets out a list of commercial practices which are in all circumstances to be considered unfair. The annex distinguishes between misleading and aggressive commercial practices. Thus, the promotion of a product within editorial content in exchange for remuneration is viewed as misleading and unfair as long as consumers are not informed.[63] This rule is reminiscent of the rule on product placement contained in the AVMSD and the general requirement that audiovisual commercial communication be recognisable and identifiable. In addition, advertisements which directly exhort children to buy the advertised product are considered as aggressive and unfair commercial practices and thus impermissible.[64]

The same standard can be derived from Art. 9(1)(g) AVMSD and more specifically from Art. 10(1)(b) and 11(3)(b) AVMSD. With respect to the relationship between the UCPD and the AVMSD, it is suggested that the UCPD covers a wider range of commercial practices, whereas the AVMSD is more specific to audiovisual media services.[65] Still, practices like misleading or aggressive television "phone-in competitions" could be addressed by the UCPD.[66] Whether both Directives apply simultaneously depends on the service and practice concerned.

5. Legal acts concerning data protection

Because of the emergence of new technologies and tools which track user behaviour and preferences, data protection law is also highly relevant for connected TV and similar devices offering targeted advertising and the possibility to personalise services. The possibilities for providers to collect user data are numerous due to the reverse channel of these devices. Thus, the EU's data protection Directives are relevant for commercial communications. The Directive on the Protection of Individuals with regard to the Processing of Personal Data of 1995 (DPD) purports to safeguard peoples' right to privacy.[67] The processing of data is lawful under the conditions and principles outlined.

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56) Art. 2(b) MCAD.
57) Art. 2(c) MCAD.
58) Art. 5 MCAD.
59) Art. 2(a)-(c) MCAD.
60) Art. 4(a), (b), (d) and (h) MCAD.
61) Art. 5(3) UCPD.
62) Case C-210/96, *Gut Springenheide GmbH and Tusky v Oberkreisdirektor des Kreises Steinfurt*, EU:C:1998:369, para. 31.
63) Annex I no. 11 UCPD.
64) Annex I no. 28 UCPD.
65) Henning-Bodewig F., "Die Richtlinie 2005/29/EG über unlautere Geschäftspraktiken", *Zeitschrift für Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil,* 2005, p. 630.
66) Kabel, J., "Audiovisual Media Services and the Unfair Commercial Practices Directive", IRIS *plus* 2008-8, European Audiovisual Observatory, Strasbourg, 2013, p. 2, 6; Savin A., *EU Internet Law*, Edward Elgar Publishing, 2013, p. 181.
67) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

In this respect, Art. 6 and 7 DPD set out qualitative rules, such as data scarcity, and prescribe that data may be collected only for "specified, explicit and legitimate purposes".[68] In addition, the assembling of data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed".[69] Data subjects may require the erasure or rectification of data where such data is kept up to date.[70] Moreover, the identification of the data subject must be terminated once the original purpose for the collection of the data has been reached.[71] Above all, Art. 7 DPD requires that the data subject has unambiguously consented in advance to the processing of the data on an informed basis.[72] This principle marks a sharp contrast to today's era of "big data", where data is collected in immeasurable quantities and used for purposes other than those initially indicated.[73] Techniques like targeted advertising will thus have to conform to the requirement of consent before observing users' surfing behaviour and preferences is permitted.

Furthermore, the Directive on privacy and electronic communications of 2002 (e-Privacy Directive or ePD) which was subsequently amended in 2006 and 2009, aims at ensuring fundamental rights, like the right to privacy and confidentiality, with respect to the processing of personal data in this specific sector.[74] The ePD, also known as the "Cookie Directive" since the amendment in 2009, supplements the DPD and serves as lex specialis in the electronic communications sector.[75] The ePD applies independently of whether the information stored or accessed in the cookie consists of personal data. If the information collected is considered to be personal data within the meaning of the DPD, the latter applies in addition. As behavioural advertising often entails the processing of personal data, it has to conform to the standards of both Directives.

Art. 5 ePD guarantees the confidentiality of communications. Its third paragraph requires that:

> *the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent […].*[76]

In other words, where cookies or comparable technical means are employed on websites to track user conduct, providers are obliged to inform users about the purposes of the collection and processing of data and users must have given their consent. This rule was modified by the reform of 2009 and henceforth requires an express "opt-in" by users through previous agreement.[77] Although this clarification was intended to empower users by addressing the problem of the tracking of users' visits to websites, technological developments soon moved from contextual and segmented advertising to a more profile-oriented collection of data (behavioural advertising), which accumulates data over

68) Art. 6(1)(b) DPD.
69) Art. 6(1)(c) DPD.
70) Art. 6(1)(d) DPD. See also case C-131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, EU:C:2014:317, paras. 93, 94.
71) Art. 6(1)(e) DPD.
72) Art. 7(a) DPD.
73) For an example of implications that big data collection has in the case of connected TV (German example) see: Keber, T., "Big Data im Hybrid-TV – Mit dem zweiten sieht das Erste besser", *Recht der Datenverarbeitung* 5/2013, p. 235. Recently, Giurgiu, A. and Metzdorf, J., "Smart TV – Smarte Regulierung?" *in* Taeger J. (ed.), *Big Data & Co. – Neue Herausforderungen für das Informationsrecht*, Tagungsband Herbstakademie 2014, OlWIR Oldenburg, p. 709-726.
74) 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 [2002] OJ L 201/37, as amended by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54 and Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L 337/11.
75) Art. 1(2) ePD.
76) Art. 5(3) ePD.
77) Lynskey O., "Track[ing] Changes: An examination of EU regulation of online behavioural advertising through a data protection lens", *European Law Review,* 36(6), 2011, p. 877, 878.

time and from numerous places.[78] The Article 29 Working Party issued an opinion in December 2011 which contains best practice recommendations on online behavioural advertising.[79] In its opinion, the Article 29 Working Party clarifies that certain cookies are exempt from informed consent (like security cookies).[80] It also points out that a pop-up constitutes only one of several means whereby consent may be received and that a static information banner at the top of websites or splash screens are adequate alternatives.[81] More problematic is the combination of online behavioural advertising and geolocation on mobile devices (like smart phone geotracking).[82] This is the case for applications ("apps") which localise users and simultaneously show commercials on the basis of a profile resulting from the geotracking. It is questionable whether the user will have consented to receiving advertisements when accepting the app's terms of service. In general, few Member States have implemented the revised Cookie Directive of 2009 in their national legal orders by explicit new provisions.[83] The lack of transposition seems, so far, to be tolerated by the Commission, which nonetheless urges Member States to comply with the obligation.[84] Importantly, the Commission considers self-regulation by the advertising industry as an appropriate regulatory tool.[85]

As the European framework for data protection is currently being reformed, a brief look is taken here at the proposal for a General Data Protection Regulation (GDPR), in view of how it may impact the area of commercial communication.[86] In November 2013, the European Parliament suggested amendments to the Commission's proposal of 2012.[87] Particularly relevant for commercial communication in an online environment is the definition of "profiling", included in Art. 4(3a) GDPR. According to this, profiling is defined as:

> *any form of automated processing of personal data intended to evaluate certain personal aspects relating to a natural person or to analyse or predict in particular that natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.*[88]

Above all, a right to object to profiling has been integrated in the draft Regulation.[89] However, profiling is permissible where it is necessary for the conclusion of a contract, expressly authorised by law or based on the data subject's consent.[90] Still, profiling which results in discriminating against data subjects is prohibited. Interestingly, the relationship of the GDPR to the ePD is detailed in the proposal. Pursuant to Art. 89 of the Commission's proposal, the GDPR is not intended to impose additional obligations concerning the processing of personal data. The ePD will no longer serve as lex specialis. In sum, these initiatives, although they have not formally been adopted and may still be modified (particularly since the negotiations have been cumbersome so far and it is not yet clear in what direction the new Commission will be able to push the proposal), underline that the European

78) Ibid, p. 875, Rammos T., "Datenschutzrechtliche Aspekte verschiedener Arten ‚verhaltensbezogener' Onlinewerbung", *Kommunikation und Recht,* 11, 2011, p. 693. Cf. also: Article 29 Data Protection Working Party, *Opinion 2/2010 on online behavioural advertisin*g, adopted on 22 June 2010, available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf

79) Article 29 Data Protection Working Party, *Opinion 16/2011 on EASA/IAB Best Practice Recommendation on Online Behavioural Advertising*, adopted on 8 December 2011, available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp188_en.pdf

80) Ibid, para. III.2, p. 9.

81) Ibid, para. III.3, p. 9.

82) Rammos T., "Datenschutzrechtliche Aspekte verschiedener Arten ‚verhaltensbezogener' Onlinewerbung", *Kommunikation und Recht,* 11, 2011, p. 695.

83) Kroes N., European Commission, "Online privacy – reinforcing trust and confidence", Online Tracking Protection & Browsers Workshop, Brussels, 22 June 2011, Speech/11/461, available at: http://europa.eu/rapid/press-release_SPEECH-11-461_en.htm

84) Ibid.

85) Ibid. See also IAB Europe EU Framework for Online Behavioural Advertising, April 2011, available at: www.iabeurope.eu/files/9613/6984/1480/2012-12-11_iab_europe_oba_framework.pdf. Cf. on the issue Steinhoff, A., "Nutzerbasierte Online Werbung 2.0", *Kommunikation und Recht,* 2, 2014, p. 86.

86) European Commission, "Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data", COM(2012) 11 final, 25 January 2012.

87) Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 22 November 2013.

88) Ibid, Art. 4(3a).

89) Ibid, Art. 19 and 20.

90) Ibid, Art. 20(2)(a) – (c).

legislature is aware of the need for enhanced data protection in a converged media landscape. The developments are thus significant for the presentation and inclusion of commercial communications on connected devices. In the meanwhile, the CJEU is playing its role in further defining important concepts in data protection law that help in better understanding how to evaluate data-intensive commercial communication: the previously unclear and still disputed question whether an IP address and comparable data are themselves or only in connection with identifying data to be regarded as personal data has been developed in the direction of an affirmative answer.[91]

6. Impact of Competition law

In the advertising market, an area which also needs to be highlighted is that of European competition law. The sector is characterised by very few players acting globally, several of which have dominant positions. So, the Commission has brought several actions under Art. 102 TFEU (abuse of dominant position) against Google, which in the past years has purchased services like "AdSense" and "DoubleClick", after having reviewed the acquisitions under the Merger Regulation. Most recently, the Commission has investigated Google's activities which privilege its own search services and has succeeded in making it so that Google displays the services of three competitors next to its own services.[92] Google's activities possibly also raise questions under Art. 101 TFEU (agreements restricting competition), as it oftentimes is the only provider operating globally, for example in real-time-bidding. Interesting in this context is the question of the extraterritorial application of EU law on market participants established abroad and the approaches pursued by EU, as well as foreign, for instance US, authorities. As the effects of such anti-competitive behaviour also affect the European market, from the perspective of EU competition law applying the European rules is not to be regarded as being extraterritorial.

III. Concluding remarks

The overview above demonstrates the fragmented legal framework applicable to commercial communication in a converged media sector. The AVMSD lays down precise standards, but its scope of application is restricted to audiovisual media services. More widely used online are information society services covered by the ECD, which prescribes some basic standards for commercial communication. The UCPD also prohibits certain practices considered unfair and is applicable in business-to-consumer contexts. In this respect, European competition law is a tool for the regulation of anti-competitive behaviour. In addition, several Directives regulate all kinds of commercial communication of certain products, like cigarettes. The European data protection acquis, which is currently under review, ensures the right to privacy in the context of the processing of data for the purpose of targeted advertising.

Due to this scattered legal structure, significant problems remain, in particular at the crossroads of different services. The protection of minors in online games is problematic, especially when in-game advertising is directed at children.[93] By the same token, when apps on mobile devices are accompanied by advertisements, it is doubtful whether users are aware of the commercial content and whether they have been informed about (or have taken note of) the inclusion of commercial communication.[94] Consumers are thus lured into the use of free apps, which may be funded by advertisers to an extent unknown by the users. This is aggravated by the diversification of providers in the chain and the territorial reach of the European Union. Nonetheless, the Court of Justice of the European Union in the

91) Cf. in this sense CJEU, Case C-70/10, *Scarlet Extended/SABAM*, EU:C:2011:771, para. 51.

92) European Commission, "Antitrust: Commission obtains from Google comparable display of specialised search rivals", Press release, IP/14/116, 5 February 2014, available at: http://europa.eu/rapid/press-release_IP-14-116_en.htm

93) The German Federal Court held in July 2013 that the language of an advertisement included in the online game "Runes of Magic" was directed at minors. See: BGH, I ZR, 34/12.

94) Cf. comparably Decision by the UK Advertising Standards Authority in July 2014 concerning a "freemium game" ("Dungeon Keeper"), which was regarded as misleading to advertise it as "free": ASA Adjudication on Electronic Arts Ltd, 2 July 2014, Ref. No. A14-258907, available at: http://www.asa.org.uk/Rulings/Adjudications/2014/7/Electronic-Arts-Ltd/SHP_ADJ_258907.aspx#.VBCal6NZW6M. Cf. generally Article 29 Data Protection Working Party, *Opinion 02/2013 on apps on smart devices*, adopted on 27 February 2013, available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp202_en.pdf

case of Google Spain has confirmed the application of the DPD to Google via its Spanish subsidiary,[95] but the direction in which both EU law and the Court's jurisprudence is heading clearly is that of making the law applicable to processing taking place within the European Union, irrespective of seat issues. In that sense, competition law could be utilised and the future data protection framework will likely address the issue of reasonability by introducing a one-stop – or better one-market – principle which gives companies legal security. As a final thought it should be noted that the negative reactions to the activities of secret services on the Internet will doubtless impact the use of commercial communication in future, as possibilities of anonymous communication and internet use solutions are being revisited.

95) C-131/12, *Google Spain SL*, paras. 55-57.

Challenges Brought by Emerging Forms of Commercial Communication: Editorial Responsibility and Control

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I. Commercial communications and television: why does it matter?

The author of this piece – and, dare I presume, quite a few of its readers – has spent many enjoyable hours poring over the details of the Audiovisual Media Services Directive[1] (AVMSD). Time well spent, certainly, but there is a risk that one can lose sight of why commercial communications on television are so important. Not because of the interesting legal issues thrown up by audiovisual media services nor because of some of the abstract notions of "consumer protection" or "level playing field" which are regularly traded whenever this Directive is under discussion. Actually, commercial communications on television have a much more fundamental role: quite simply, they fund the programmes that Europeans love to watch.

It is well-known that television consumption is growing, but how are the programmes which viewers are watching actually made in the first place? It is too often taken for granted that a high-end drama production can cost EUR 1.5 million per hour, that 40% of commercial broadcasters' revenues are reinvested in content, that the depth and quality of sports coverage has improved beyond recognition since sports rights markets were opened up to competition in the late 1980s or that Europeans today have a choice of 300 news channels. None of this would be remotely imaginable without a flourishing, competitive and innovative marketplace in audiovisual commercial communications. Today, for all the breathless predictions which have been made over the years about the death of linear television, commercial communications remain a fundamental pillar, along with subscription revenues and state funding, of an audiovisual sector which continues to flourish and develop.

For those of us who work in and with television broadcasters, some of these strengths can be double-edged. When broadcasters point out that they are hyper-regulated at the European and national level to an extent unimaginable for their online and offline competitors, politicians may use the counter-argument that it is precisely because of the influence of broadcasting as a source, often the main source, from which citizens get their news and current affairs coverage that justifies this level of regulation. Television is "not a business sector like any other", as Members of the European Parliament are fond of saying.

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 [2010] OJ L 95/1.

II. Not the first time this issue has been discussed: the EC Interpretative Communication on New Forms of Advertising

It therefore becomes clear that the issue we are dealing with is neither an abstract legal and competition issue nor, in the case of new techniques, a technological one. Moreover, the issues are not necessarily new. The European Commission has previously been called upon to test the regulatory framework around commercial communications against new market and technological developments, namely in the EC Interpretative Communication on New Forms of Advertising of 2004.[2]

It is understood that the European Commission has, in the past couple of years, given some thought as to whether a further Interpretative Communication might now be needed. However, I am not convinced that this would be the right approach at present, not least because a comparison between 2004 and 2014 suggests that there are significant differences between then and now.

1. The institutional landscape

The Interpretative Communication of April 2004 was adopted only weeks before the largest-ever enlargement of the European Union, with the accession of ten "new" Member States on 1 May 2004. Although all ten countries had, by legal requirement, implemented the Television without Frontiers Directive (TVWF – the predecessor of the AVMSD) as part of the *acquis communautaire* during accession negotiations with the EU, part of the motivation for drawing up an interpretative communication may well have been that a number of national regulators (including, but not restricted to, those in the "new" markets) were at that time relatively inexperienced in the daily application of the detailed provisions of the TVWF Directive.

2. The issues

Although sometimes regarded as a text focussing only on new advertising techniques, in fact the official title of the Interpretative Communication from 2004 refers to "certain aspects" relating to television advertising and the TVWF Directive and the Communication considers many issues which were not a direct result of technological innovation, such as calculation of the hourly amount of advertising, insertion rules, product placement, mini-spots and teleshopping.

The main issues which were at that time driven by technological innovation were interactive advertising, virtual advertising and split screen.

3. The solution

The solution in the 2004 Communication was a pragmatic and helpful one: after examining each technique in detail, the Commission recommended that the new techniques were compatible with the TVWF Directive and urged national regulatory authorities to interpret these and other new techniques *in dubio pro libertate*. This was not the end of the discussion around innovation and commercial communication, as the subsequent revision of the TVWF Directive (or, more accurately, its conversion into the AVMSD) was dominated, to a disproportionate extent, by discussions around the legality of product placement, an issue which was finally resolved in the AVMSD, though not without some imaginative legal constructions.

2) Commission interpretative communication of 23 April 2004 on certain aspects of the provisions on televised advertising in the "Television without frontiers" Directive, [C (2004) 1450 - OJ C 102 of 28 April 2004].

III. Comparison then and now

As predicted by industry and national regulatory authorities[3] at the time, these techniques have not been revolutionary, but rather have made useful though modest contributions to broadcasters' revenues (and hence their ability to invest in content).

So if the 2004 Communication is regarded as a useful tool, might it offer a precedent for Commission action today?

Certainly the first concern, that there may be a need for "advice" to relatively young national regulatory authorities, no longer applies. These authorities have developed a wealth of experience on how to implement the AVMSD, experience which is now systematically shared in the fora of the European Platform of Regulatory Authorities (EPRA) and the new European Regulators Group for Audiovisual Services (ERGA). In any case, not many new bodies will have to interpret the AVMSD – EU membership is now settled for the foreseeable future, with the most recent accession having enlarged the EU only from 27 Member States to 28. The latest "new" member state, Croatia, is already fully up to speed in terms of the expertise needed to apply the AVMSD, not least as a result of its national regulatory authority being a long-standing vice-chairman of EPRA.

IV. Innovation in TV advertising (and related areas)

More importantly, the nature of technological change and innovation in television today cannot be compared with that of ten years ago. Today, technological innovation in television advertising is no longer restricted to a few isolated issues. Television, according to some, has been relatively slow to innovate. To quote Commissioner Kroes, in a speech from June 2010:

> *"Broadcasting may have been less affected by advertising trends, but that may not be a good thing in the long term. As a regulated market, strongly influenced by public management of spectrum resources in particular,, European free-to-air television has clearly been insulated from the wake-up call the press is now going through. There have been basic responses to advertising fragmentation […] but the real storm may yet be coming. I wonder what is being done to stabilise the boat?*

How are you diversifying your revenues? Are there new pay TV business models you can tap into, to give one example? What print and online platforms can you monetise to support your programming?

Are you ready for new business opportunities that may come your way? To give one example, online distribution of audiovisual works […] Is change required in this field?"[4]

In fact the Commissioner can be reassured that the commercial TV sector is in the process of reinventing every aspect of its business model:

- In programme-making: there has been a clear move away from 100% broadcaster funding to co-financing for more expensive and complex productions;[5]
- In pay-TV: subscriptions are increasingly made available to subscribers on multiple devices[6] and on the basis of new forms of contract;[7]
- Distribution deals, whether for free or pay TV, are increasingly made across several platforms and at the time of the consumer's choosing (catch-up, download and play).

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3) See OFCOM, *The Future of Television Funding*, Human Capital on behalf of Ofcom, September 2005, available at: http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/future

4) Kroes N., "European Media Revolution – Viability through Innovation", Keynote address at the Media Lounge event of ACT, EGTA, WFA, AER, ENPA, EPC, FAEP, (Speech/10/351), 30 June 2010.

5) See for example Ofcom International Communications Report 2013 : "*The industry is seeing more of this co-funding model as producers across countries come together to create programmes for multiple markets, such as the collaboration between the BBC and the Discovery Channel to create wildlife series Africa for consumption in various countries*", Ofcom, *International Communications Market Report 2013*, 12 December 2013, available at: http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr13/international/

6) For example see the Sky Deutschland service Sky Go, available at: www.sky.de/web/cms/de/sky-go.jsp?intcmp2=home:s:sky go&alllnk=home:s:skygo

7) See www.nowtv.com

As for advertising, broadcasters have acknowledged the need, for at least a decade, to decrease dependence on the strong, but mature source of revenue that is the 30-second spot. Free-to-air broadcasters' diversification strategies and targets differ, but the basic objective is the same and new advertising techniques play a role in this. But one should not exaggerate: there may, superficially, be some truth in the argument that there is a relative lack of innovation in commercial communications in broadcasting when compared to other parts of the new media value chain. Possible reasons why this might be the case are, firstly, that television advertising remains stable.[8] As such, new techniques will be regarded as complementary to, rather than substitutes for, the core business. Secondly, consumer uptake (and hence advertiser interest) in some new techniques has been patchier than was predicted in 2004; virtual advertising has for example not yet developed into a significant stand-alone income stream for many broadcasters.

V. What might come next?

However, it can be expected that the next wave of innovation in audiovisual commercial communications may be much more wide-ranging than that of 2004, falling into three main categories. First, we may expect new iterations of techniques already reviewed in 2004. So while the Communication and subsequent AVMSD both discuss product placement in some detail, the technology has advanced to allow for practices such as virtual product placement (it should be mentioned in passing that the challenge to the principle of separation of editorial and commercial content is no longer exclusive to the audiovisual sector with the growth of "native advertising" practices in many parts of the media). Secondly, we expect further innovation at the B2B level with sales houses seeking to combine the best of the established model with techniques from the online era or (though the technology has not yet worked in broadcast) real-time auctions. Finally, we will see the emergence of completely new techniques, such as online behavioural advertising.

It is the complexity of the regulatory issues raised by this emerging world which is perhaps the strongest argument against viewing these issues as simply another iteration of "technology impacting on the TVWF/AVMS Directive". For example, the issues around online behavioural advertising (OBA) already, at the time of writing in mid-2014, range beyond the AVMSD and take us into the realms of the E-Commerce Directive and the Data Protection Directive (possibly to be supplanted by a Regulation). These issues have been dealt with by all stakeholders forming the European Interactive Digital Advertising Alliance, a "cross-industry self-regulatory initiative to introduce pan-European standards to enhance transparency and user control for online behavioural advertising".[9]

Yet OBA will continue to develop. The technology is already being developed which allows, not just for targeting via the viewer's IP address, but for facial/retinal recognition that allows content to be tailored to the individuals actually watching the programme, the theory being that viewers will want to see different advertisements depending on whether they are watching alone, with their partner or with a group of friends. It is of course obvious that such a service may encounter strong consumer resistance, given the obvious privacy concerns,[10] but equally clear that the issues raised here are more fundamental than can be dealt with by a further "tweak" or "interpretation" of the AVMSD. And even if this deliberately provocative vision of the future does not translate into mass-market appeal, it is widely accepted in the industry that there will be a shift towards programmatic buying of advertisements and that this will be done in new, innovative ways:

> *"Dynamic ad insertion – the ability to use "big data" to insert an ad into a slot based on when and where the viewer is watching – and increasingly, who the viewer is – should allow networks to reap the same, if not greater, profits from advertising by providing more targeted audiences. At the same time, it will (hopefully) save the viewer from irrelevant ads while cutting down on their frequency".*[11]

8) European Audiovisual Observatory statistics showed 2.1% average growth among the largest 20 private broadcasting groups in Europe in 2012, see European Audiovisual Observatory, "Private TV groups in Europe achieve overall growth despite recession", Press release, 9 April 2013.

9) See www.edaa.eu for more details.

10) The possible service and the potential privacy issues are discussed in the 2020 Vision Series Two, "The New TV Landscape", available at: www.thinktv.com.au/content_common/pg-watch-2.seo

11) Wolk A., "The Future of Monetising Television", *The Guardian*, 9 May 2014, available at: www.theguardian.com/media-network/media-network-blog/2014/may/09/future-tv-advertising-pvr-vod

VI. Editorial responsibility: technology now poses a profound and unprecedented challenge to the foundation of our regulatory system

Another example of the complex and fundamental nature of the challenges posed to the regulation of commercial communications by new technologies lies in the possibility for a third party, based outside the EU, to superimpose advertising on a connected TV service without the knowledge of a broadcaster, producer nor indeed of the brand in question. Such practices – and again, at this stage it is a technological possibility rather than a market reality – would pose a profound and unprecedented challenge to the regulatory system, given that the architecture of European and national media regulation is based on the operator accepting, in a broadcasting licence, responsibility for what appears on screen. If this responsibility can no longer be (reasonably) enforced, then it may be that European and national regulators must engage in a wider discussion about what and whom we regulate and how and why we do so.

VII. Interpretative communications of AVMS only a partial fix

In these circumstances, another interpretative communication of the AVMSD (or technically a first such communication, as the 2004 Communication interpreted the TVWF Directive) would appear to offer at best only a partial fix to the challenge of regulating these new techniques. Indeed, the very structure of the AVMSD rests, as that of the TVWF Directive did before it, upon an assumption that there will be a distinct market for television (or at best "TV-like") advertising, which can be quantified and regulated. This appears to be questionable both from the market perspective (as data-driven video display advertising will work equally well on "broadcast" and "online" models and may reduce the frequency of advertising) as from the regulatory one, with regulatory issues raised by media convergence now also covering, at least, the Unfair Commercial Practices Directive, as well as the Data Protection and E-Commerce Directives. As a result, a co-ordinated interpretation of the regulatory issues may be improbably complex also at the operational level, as this would involve at least four Directorate-Generals of the European Commission, i.e. CONNECT, Justice, SANCO and MARKT.

VIII. Principles identified by the ACT

If a new interpretative communication is not the answer, what then can be expected of the incoming European Commission?

In our response to the public consultation "Audiovisual Content in the Digital Age", the ACT called for content regulation at EU level to "move away from micro-management and towards greater operational flexibility". The point here is that we believe there are, frankly, better uses of European officials' time and of public money than agonising over some of the current, very detailed provisions in the AVMSD (and I acknowledge that the level of detail, notably around product placement, is often inserted by Member States or members of the European Parliament rather than by the European Commission). This does not mean that there is no role for the European Union in regulating audiovisual content. Rather, it is important as a first step to recall – and this should be a common point among all stakeholders and institutional partners – that all the necessary checks and balances inherent in European law-making processes mean that a draft proposal to revise the AVMSD tabled in, say, mid-2017 will not be applied on a daily basis by national regulatory authorities for a further five or six years and therefore will remain in force for most if not all of the following decade. As a result, it is essential that the European Commission sets out a forward-looking vision to establish which principles from the old world of broadcast regulation should be carried forward into a fully converged world, in a regulatory framework, which will endure until 2030. Such an approach may also, indirectly, help solve the traditionally vexed question of the scope of the Directive, as the notion of "TV-like services" may at some stage become less relevant as a means of determining the appropriate tier of regulation for a given audiovisual content service – particularly if consumers no longer differentiate between "linear" and "non-linear" in terms of the level of regulatory protection they expect.[12]

12) It is common ground between most stakeholders and regulators that this is not yet the case, as evidenced in OFCOM research, see Ofcom, *On-demand Services: understanding Consumer Choices*, prepared by Essential Research, October 2012, available at: http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/Research_Report.pdf

There is perhaps a natural, maybe healthy, suspicion on the part of regulators and politicians when industry advocates make points such as these. Is this simply a call for deregulation – or, for those calling for a levelling-up of certain rules, to "regulate my rival"? Yet far from leading to a call for the market to regulate everything or for the AVMSD to be abolished, this form of media convergence at the consumer level could reinforce the importance of some key principles of the AVMSD which will become more important, rather than less so, in the future. Although we do not have and will not have until the end of 2014 at the earliest an official summary by the European Commission of the responses received to the Green Paper consultation, there appears to be an emerging consensus that the protection of minors is a key priority for whatever instrument may eventually replace the AVMSD. There is also broad agreement that it is important to maintain current standards of ethics in commercial communication, including transparency and labelling, as well as rules around privacy and probably involving a greater role for self-regulation in commercial communications than is the case today.

However, whatever principles are agreed upon – on minors, on ethics, on other issues – there may be a higher-level challenge to their enforcement. As noted above, it will be important to defend the principle of editorial responsibility, without which actual compliance with any EU or national rules becomes very difficult. This may also help in the connected TV example mentioned above, as one means of doing this, as has been under discussion at the World Intellectual Property Organisation for some time, is to guarantee the signal integrity of broadcasters as a *quid pro quo* for editorial responsibility, given that this responsibility cannot be guaranteed if third parties interfere with the broadcast signal. In the example of a connected TV service, it would then be clear that commercial overlays and other novel techniques should therefore not be possible without the prior consent of the owner of the broadcast signal in question.

Despite the central role of editorial responsibility in assessing whether a service falls under the definition of an audiovisual media service, the concept was not mentioned in the TVWF Directive nor in the Commission's proposal for the AVMSD. Rather, it was first introduced via the European Parliament (by MEP Ruth Hieronymi) as a clarification of the scope of the Commission's proposal, so as to read "a service as defined by Articles 49 and 50 of the Treaty provided under the editorial responsibility of a media service provider the principal purpose of which is the provision of programmes consisting of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC and/or of audiovisual commercial communications".[13]

Although a relatively new innovation in the harmonised layer of content regulation (TVWF/AVMSD), the principle of editorial responsibility itself is neither revolutionary nor related to EU legislation: media owners have been assuming editorial responsibility for as long as newspaper publishers have defended defamation cases.

IX. But how to do it?

In a post-AVMSD world (whether the Directive will have been revised or merged into a wider content directive is a discussion for another day), editorial responsibility should have a key role. This will require careful consideration of the different legal traditions of editorial responsibility, whether of the licensed broadcasting sector, the non-licensed print media (which has an equally strong code of editorial responsibility, but based on a self-regulatory approach) or the online world (which has traditionally been reluctant to embrace the notion of the editor, partly for understandable reasons such as the complexity of systematically pre-moderating all user-created content). This work will also need careful delineation so as not to call into question the principle, also familiar from the broadcasting world, that a "dumb pipe" should not be held liable for content over which there is no editorial function. But it is precisely this form of bigger-picture debate in which the European institutions need to engage, if the EU is to have a media regulation framework fit for the next decade.

13) European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2006-559

Data Protection for Convergent Media

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Advancing media convergence and globalisation is creating new challenges as far as data protection regulation is concerned. Since the broadband boom, it has increasingly become the norm for media that were previously separate to be accessed on the same consumer device. As the distinction between traditional linear media, such as television, and typically non-linear services, such as video-on-demand or social media, disappears, it also becomes necessary to adapt regulations, from media law to data protection provisions. However, since there are no longer geographical boundaries between media providers, it is questionable whether new laws, that would only be valid in certain territories, can meet the need for a holistic, future-oriented regulatory system or whether a convergent "Regulation 3.0" should not involve users and providers much more closely, perhaps by laying a foundation of legislative provisions and combining it with greater support for efficient and effective self- or co-regulation on a global scale.

I. The short path from "media museum" to the networked multimedia world

In 2010, EU Commissioner Neelie Kroes, addressing various media organisations, said that Europe should not become a media museum.[2] European media companies should see change in a digitised world as a challenge or – better still – an opportunity.

Today, it is clear that virtually all media companies in Europe are active players in the digital economy, admittedly with varying levels of enthusiasm and success.

Nevertheless, the distribution of moving images is clearly at the forefront. This is the opinion not only of providers of television or similar Internet-based services, but of the Internet industry itself. By 2018, 80-90% of network traffic is expected to be generated by video[3] – which is why the opportunity to view moving images is a key motivating factor behind consumer demand for fast Internet connections

1. Content integration

Whereas the main focus of debate in decades gone by was the need to find a convergent consumer device, today the reality looks different: numerous consumer devices – from smart TVs to smartphones – are able to link content with different applications. And this is precisely what differentiates today's

1) For further information about ProSiebenSat.1 Media AG's areas of activity, see www.prosiebensat1.com
2) Neelie Kroes, "European media revolution – viability through innovation", 30 June 2010, SPEECH/10/351, available at: http://europa.eu/rapid/press-release_SPEECH-10-351_en.htm
3) White Paper "Cisco Visual Networking Index: Forecast and Methodology, 2013-2018", 10 June 2013, available at: http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.pdf

reality from the theories of the past: convergence is not a question of technology, but a question of content. In other words: to which content, from among all e.g. television content, can most value be added? There is no general formula for such added value: for example, there might be a voting function for a smartphone, a chatroom for a tablet or a video-on-demand library for a smart TV. The aim is to achieve a classic "win-win situation": the chatroom is popular because there is a talent show that people want to talk about with friends online. And the talent show itself is more exciting for viewers if friends can watch it in different places and chat about it at the same time.

The theory that the Internet would cannibalise television was therefore never more inaccurate than today. And speaking from the perspective of a former traditional broadcaster, we would say that if the Internet did not exist today, we broadcasters would want to invent it.

2. Globalisation of content providers

The purely quantitative increase in Internet video content is currently attracting a huge amount of attention. Once again, in this context, it is widely claimed that broadcasting is dead – even though, with average daily use of 235 minutes, television still leaves other media trailing in its wake.[4]

Unfortunately, less attention is being paid to the fact that, with every new broadband connection in Europe, the importance of the national regulation of providers and content and of the European regulatory framework is gradually being eroded.

Nevertheless, European providers are competing directly with their non-European counterparts – at least on consumer devices.

This is the challenge that European and national providers and legislators must face, rather than holding on to the pipe dream that a large pan-European media provider might eventually appear in the market.

3. A new currency for new services

In the beautiful new convergent media world, people often forget that every video clip, app, film, chatroom, browser game and website was produced by someone who can expect to receive an appropriate reward for their creative effort.

In the past, the financing models for linear media content have been largely based on two main pillars: the viewer paid either directly, whether for private pay-TV or through licence fees, or indirectly by watching advertising.

Meanwhile, it has become clear that these financing models cannot be transferred directly to the Internet: paywalls only work with a few services and viewers are extremely reluctant to watch more than a single advertising spot when using online video services. On the other hand, consumers tend to demand high-quality and therefore usually expensive content on the Internet. In our opinion, if we are to resolve this financing dilemma, we need to accept the emergence of data use as a third currency, one that makes it financially viable to provide the content that users want. And we must also accept that traditional linear content will be increasingly cross-financed by this third pillar of funding.

II. Data protection concerns everyone

The introduction of any new currency is always greeted with misunderstanding, fear and prejudice – remember the early days of the euro? The actual usefulness of the new currency fades into the background in these discussions, while the focus is on the potential dangers, whether rational or irrational, founded or unfounded. In the debate over the use of data for media services, the opposing

4) Figure for 2012 taken from Eurodata TV Worldwide, "One TV Year in the World", 2013 issue.

positions seem clear: on one side, the providers who collect data want to know as much as possible about everyone and to commercially exploit this knowledge without any legal restrictions, while on the other, the users see their intimate details disappear into the data collectors' mainframe computers and think they have lost control over them. Finally, there are the legislators, who have to protect one side from the other.

However, we do not think this view is either accurate or constructive. Rather, all three parties – companies, users and legislators – are at the beginning of a learning curve and must now work together to create a viable legal basis for responsible data use.

1. What companies must learn

We are still at the start of a process in which the use of behavioural or personal data to finance media content through personalised advertising or e-commerce offers tailored to the user will, in principle, become as fundamentally important as it already is to social media and search engine providers.

Now is therefore the appropriate time to correct mistakes in this early phase of the process and to set the right course for the future.

Users' confidence in the responsible use of their data is the main prerequisite for providers' sustainable economic success. The more or less happy-go-lucky attitude of many users who currently seem happy for their data to be used on the Internet should not be misinterpreted as long-term apathy among all users. In our opinion, it is very likely that a factor such as "data transparency" will, in the near future, become a relevant benchmark for commercial providers on the Internet. Furthermore, even in 2012, around 40% of EU citizens had never made an online purchase – no doubt partly because the promotion of the Internet still needs improving in some member states. However, even in member states that traditionally have a high penetration rate for broadband Internet connections, such as Sweden, Finland and the United Kingdom, a significant 20-30% have never shopped on the Internet.[5]

It is doubtful whether users are currently aware how much their data is worth or whether the service for which they pay with their data is actually worth that amount. For example, the possibility of uploading photographs on the Internet for free and, in return, receiving free cloud storage space is undoubtedly worth something. However, whether it is sensible to transfer all exploitation rights over these images for eternity is open to question. It seems probable to us, however, that more and more users will, in future, pay closer attention to the service they receive in return for their data.

In a similar way to the "Fairtrade" food label,[6] which tells shoppers that the company concerned meets certified standards linked to the purchase of commodities, a "Fairtrade" label on the Internet could inform users that they are receiving a good or reasonable service in return for the data they are were asked to provide.

There is no doubt that the technology and systems used to collect and process user data are extremely complex.

The average smart TV, smartphone or tablet user would struggle to explain what it means if his or her online behaviour is captured, aggregated with that of other users and therefore made partly anonymous again, before being sold to and then used by other companies. On the other hand, the answer cannot be to present the user with a 40-page, legally flawless licence agreement that hardly anyone reads, but that everyone simply accepts with a mouse click.

There is no system that enables users to see easily and comprehensibly what they will receive in return for their data, how their data is stored and the controls that data collectors are subject to.

Here also, a happy medium between thorough and comprehensible information needs to be found.

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5) Eurostat, "Nearly 60% of EU internet users shop online", Press release, 147/2013, 15 October 2013, available at: http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/4-15102013-AP/EN/4-15102013-AP-EN.PDF

6) More information available at: www.fairtrade.eu

However, a look at other industries may also be helpful here. For example, hardly anyone can really check or understand whether a child's car seat is actually of good quality. However, consumers can see at a glance whether the seat has an ECE label and for what age group it is suitable.

2. What users must learn

The Internet and most content available online is characterised by a free service culture.

Users expect all content to be available on their devices at all times – and, of course, that they should not have to pay for it.

Even in an era when the Internet has, to some extent, achieved the status of a public good, users need to understand that (almost) all services that are available "for nothing" need to be financed somehow. Conversely, anyone who is not prepared to pay, either with money or data, will be excluded from using numerous services.

It is therefore both fatal and negligent for politicians to tell users that they can prevent all use of their data while at the same time continuing to use the Internet in all its facets.

If we assume that the use of online services will, in future, depend more rather than less on individual users' willingness to pay with their data, we will have to consider sooner or later whether a new kind of "digital divide" will emerge between "opt-in users" and "opt-out objectors".

Although it is understandable that the demands of consumer protection organisations are primarily directed at companies that process data, there can be no future-oriented framework for data use unless all users are actively involved.

In particular, the aforementioned need for more transparent information on data use by companies requires a minimum level of user involvement – particularly if it concerns the development of media literacy among children and young people.

3. What legislators must learn

As mentioned above, data collection and processing is a complex process for which there can be no simple "one size fits all" system of regulation. A holistic approach that covers all stakeholders is just as necessary as a high level of flexibility that can also embrace future technological developments.

Creating a comprehensive regulatory framework that takes into account consumer protection objectives, as well as giving the creative industries sufficient room to develop, is a huge challenge. The more one realises how many parties are involved, the clearer this becomes, since data can be collected by consumer device manufacturers, Internet access providers and media or e-commerce services based both within and outside the EU. Of course, the role of the user must also be defined: how much autonomy should users be given and what level of regulatory protection is considered necessary? The planned General Data Protection Regulation should, for the first time, create a framework that includes companies based outside the EU that nevertheless earn their money from European consumers. We warmly welcome this initiative, along with the recent decision of the Court of Justice of the European Union, according to which economic activity in a member state is a sufficient reason for European law to be applied to search engine providers that do not consider themselves to be based in the EU.[7]

We believe it is absolutely necessary that legislators recognise that – as already mentioned – the proceeds from personalised advertising in on-demand services offered by media service providers, for example, constitute a third pillar of funding for TV content. The further we move away from the "media museum" criticised by Commissioner Neelie Kroes, the more important these proceeds

7) Case C-131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, Judgment of the Court of Justice of the European Union, 13 May 2014.

become. However, revenue from TV advertising and pay-TV remains equally important. Development potential must also be guaranteed for these other pillars of media content funding – not least by modernising and freeing from bureaucracy the legal framework for audiovisual media services in the sense of the Audiovisual Media Services Directive (AVMSD). Otherwise, media law would remain stuck in the "regulatory museum" of the 1990s.

We believe it is essential that users are involved in the creation of a common regulatory framework. We do not think it is sufficient to include a simple opt-in/opt-out switch on every website or connected device and then consider the problem solved. This concept is already proving weak in relation to implementation of the "Cookie Directive":[8] once the user has seen the warning notice about the use of cookies for the 100th time, this option will, at some point, be ignored. Moreover, many websites simply no longer work without the use of cookies. Rather than trusting in the radical solution of opt-in/opt-out switches for data transmission, the regulators should look for a more intelligent answer and give users more options than just that of stopping using the Internet altogether or using everything exactly as it is presented.

III. The underestimated problem of "big data"

However, the collection of data that users more or less voluntarily leave behind on the Internet does not only concern the relationship between users and media service providers. As "big data", all of this information is not just relevant to users' privacy, but its availability to market players also needs to be clarified. For even when a viable basis for data collection that complies with data protection law is available, that does not mean that non-discriminatory access to the data is guaranteed.

There is a danger that the information that can be collected about users and their online behaviour, such as from their use of search engines, where data is accumulated in enormous quantities, will be monopolised by the same market players as those that currently hold a *de facto* monopoly on Internet searches.

However, it would be fatal if an abuse of this market power prevented European media service providers from accessing the data of European users who had granted permission for such use.

If there is a consensus – regardless of whether approval is given in principle – that user data has high commercial value for the funding of European media content, politicians must ensure that access to this new "fuel" for the Internet is not dominated by just a few market players.

Guaranteeing the competitiveness of European media and Internet companies must therefore be part of a holistic data protection concept.

IV. Possible solutions

In an age of globalised media content and e-commerce, the creation of a level playing field must be a key objective of regulation. This concerns the standard regulation of comparable content or services offered via different distribution methods or from different countries of origin. It should involve legislative provisions, as well as self- and co-regulation. For the jurisdictions in which European law applies, compliance with the country of origin principle must take top priority.

1. Legislative provisions

It would be helpful if the member states that remain sceptical about the planned General Data Protection Regulation were to give up their opposition and eventually clear the way, so that we in Europe can at least take the first step towards creating a common level of protection for all citizens and a standard regulatory framework for all companies active in Europe.

8) 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) [2002] OJ L 201/37.

It is also important that the creation of such a common European framework take precedence over the specific interests of individual member states. Ultimately, this refusal to support the General Data Protection Regulation is not only harmful for Europe's position in the debate on global data protection standards, but also damages the competitiveness of companies in individual member states in relation to providers from outside the EU.

2. Cross-border self-regulation

Companies that provide and market online behavioural advertising have, as part of a virtually global process, developed a standard framework for labelling and opt-out mechanisms for the first time. Under the title "Your Online Choices", users, regardless of whether they are in the USA, Europe or Australia, can find out how online behavioural advertising works, how it is labelled and how they can opt out of this kind of online advertising. Thanks to standardised labels, European users can recognise this advertising just as easily on American websites as on a website from their own country.[9]

Along with many other companies and partly through our membership in the European umbrella organisations for private television (ACT) and commercial radio and television broadcasters (egta), we were involved in developing the "Your Online Choices" good practice principles.

Self-regulatory models are certainly not universally popular with supervisory and legislative bodies. It is too easy to jump to the conclusion that they are simply a convenient way of avoiding excessive regulation. However, we cannot accept such criticism when it comes to this model for the self-regulation of online behavioural advertising. Indeed, the discussions between the companies involved, which lasted over a year and were sometimes highly controversial, resulted in the creation of a framework that, for the first time, takes into account the legal principles and sensitivities of the European Union member states, as well as those of the United States.

Criticism of these current standards for the self-regulation of online behavioural advertising is perfectly legitimate, since they are not perfect.

However, if we really want European users of the Internet or of other Internet-based services to enjoy an acceptable level of data protection when they use non-European services, rigid legislative provisions alone will not suffice.

Furthermore, because of the very nature of the Internet, we cannot yet say with any certainty what the regulatory requirements for data protection will look like in five or ten years' time. Regulations and directives alone can no longer keep pace with the development of the Internet – but they can and should provide the necessary guidelines.

It seems to us that, in order to define these guidelines more precisely, it is not only desirable, but absolutely necessary that market players be more closely involved in creating standards or good practice principles in the context of self- and co-regulatory models.

3. Global dialogue

If we consider the Internet to be a global space, the discussion on common standards must not stop at the European Union's borders. Common standards must be global standards.

There is little point in us blowing our own trumpet and praising ourselves for the high level of user data protection in the EU, if a large proportion of European data traffic is carried outside our legal territory.

9) Further details available at: www.youronlinechoices.eu

We have also seen in recent years – mention of ACTA, SOPA and PIPA should suffice – that, in the age of "liquid democracy" and social networks, dialogue concerning basic legal conditions on the Internet is relatively meaningless unless users are involved.

However, if our objective is not only to protect data, but in particular to increase citizens' autonomy in controlling the transmission of their data and therefore increase their confidence in companies' responsible use of their data, the dialogue must be open and transparent.

It would be great if Europe began and promoted this dialogue – if not immediately at global level, at least in transatlantic form, bringing together companies, users, institutions and politicians from the world's two largest economic areas.

4. Multi-level stamp of quality

In terms of practical implementation, we would like to see at least a two-level approach that not only takes into account indispensable legislative provisions, but also acknowledges co- and self-regulatory standards that strengthen users' autonomy and make data use more transparent.

In a similar way to stamps of quality or safety certificates in other branches of industry, standardised data protection and data management labels could enable users to see at a glance the level of protection offered by an individual service.

Services that meet basic requirements, such as EU legal provisions concerning privacy or data security, would receive a silver seal of approval.

Services that also give users greater control over their data, that is that make provision for user "data management", could be awarded a gold seal.

The aim should therefore not only be to strive for the legal minimum, but to go further by establishing mechanisms that enable users to manage the use of their data themselves – and thereby not only ensure passive confidence in data protection, but strengthen users' autonomy by giving them an active role in the process.

New Forms of Commercial Communications and Data Protection Law

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This contribution gives an overview of the requirements for commercial communications that follow from European data protection law.[1] In many cases, the Data Protection Directive (Directive 95/46/EC) applies to new forms of commercial communications and lays down requirements concerning the processing of personal data.[2] In addition, the e-Privacy Directive (Directive 2002/58/EC) requires consent for the use of most tracking technologies, such as tracking cookies.[3]

I. New forms of commercial communications

One of the main novel developments brought about by new forms of advertising is the possibility of targeting advertisements at individuals. Two people who, at the same time, visit the same website or watch the same digital television channel can now be shown different advertisements. Such new methods of advertising can be summarised with the phrase behavioural targeting. This marketing technique involves the monitoring of people's online behaviour to use the collected information to show people individually targeted advertisements. Relevant online behaviour can concern browsing behaviour on the World Wide Web, but also, for instance, digital television viewing behaviour or people's interactions with smart phone apps.

A commonly used technology for behavioural targeting involves cookies. A cookie is a small text file that a website publisher stores on a user's computer to recognise that device during subsequent visits. Many websites use cookies, for example to remember the contents of a virtual shopping cart (first party cookies). Advertising networks are firms that provide ads on thousands of websites. Such ad networks can place and read cookies as well (third party cookies). As a result, an ad network can follow an internet user across all websites on which it serves ads. Third party tracking cookies are placed through virtually every popular website. A visit to one website often leads to receiving third party cookies from dozens of ad networks.

1) This contribution builds on the author's PhD research: "Behavioural targeting and privacy. How to regulate?" (forthcoming).
2) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).
3) 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) (Official Journal L 201, 31 July 2002, pp. 37-47), as amended by the Citizen's Rights Directive (Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Official Journal L 337, 18 December 2009, pp. 11-36)).

II. The right to privacy and the right to the protection of personal data

The right to respect for private life or right to privacy is a fundamental right in the European legal system and is included in the European Convention on Human Rights.[4] The European Court of Human Rights interprets the Convention's privacy right generously. For instance, the Court says information derived from monitoring somebody's internet usage is protected under the right to privacy.[5]

The Charter of Fundamental Rights of the European Union lists the fundamental rights and freedoms recognised by the European Union. The Charter was adopted in 2000 and has been legally binding since the adoption of the Lisbon Treaty of 2009.[6] The Charter copies the text on the right to private life almost word-for-word from the European Convention on Human Rights.[7]

The Charter contains a separate right to the protection of personal data in Article 8. According to this, "[s]uch data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her and the right to have it rectified."[8] The Charter adds that these rules shall be subject to control by independent Data Protection Authorities.

III. Data protection law and new forms of commercial communications in a converged audiovisual sector

1. Data protection principles

Data protection law is a legal tool that aims to ensure that the processing of personal data happens fairly, lawfully and transparently. Data protection law grants rights to people whose data are being processed (data subjects) and imposes obligations on parties that process personal data (data controllers).[9]

This contribution focuses on the Data Protection Directive rather than on the national implementation acts. For the interpretation of data protection law, the contribution draws on opinions published by the Article 29 Working Party, an independent advisory body that consists of representatives of the Data Protection Authorities of the member states, the European Data Protection Supervisor,[10] and a representative of the European Commission. The Working Party's opinions are not legally binding, but they are influential. Judges and national Data Protection Authorities often follow the Working Party's interpretation.

Since its inception in the early 1970s, data protection law has evolved into a complicated field of law. In a slight adaptation of a classification by Bygrave, the core of data protection law can be summarised in nine principles: the principle of fair and lawful processing, the transparency principle, the principle of data subject participation and control, the purpose limitation principle, the data minimisation principle, the information quality principle, the proportionality principle, the security principle, and the sensitivity principle.[11]

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4) Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 005, 9 November 1950, latest amended version available at: http://conventions.coe.int/treaty/en/treaties/html/005.htm
5) ECtHR, *Copland v. United Kingdom*, No. 62617/00, 3 April 2007, par. 41-42.
6) See Article 6.1 of the Treaty on the European Union (consolidated version, 2012). The institutions of the EU must comply with the Charter. The Member States are also bound to comply with the Charter, when implementing EU law (Article 51 of the Charter).
7) The Court of Justice of the European Union says the right to privacy in the Charter and the Convention must be interpreted identically (CJEU, C-400/10, *J. McB. v L. E.*, 5 October 2010, par. 53).
8) Article 8(2) of the Charter of Fundamental Rights of the European Union.
9) See Article 2(a) and 2(d) of the Data Protection Directive.
10) Article 29(2) of the Data Protection Directive. The European Data Protection Supervisor (EDPS) is the supervisory authority responsible for monitoring the processing of personal data by the European Union institutions and bodies (see Article 41 of Regulation (EC) 45/2001 on personal data processing by the Community institutions and bodies).
11) This contribution uses, with a slightly different terminology, Bygrave's taxonomy of eight principles and adds the transparency principle. Bygrave includes this in the fair and lawful principle. See: Bygrave LA, *Data privacy law. An international perspective*, Oxford University Press 2014, chapter 14 (hereafter: Bygrave 2014).

The principle of fair and lawful processing is the overarching norm of data protection law. Personal data have to be processed "fairly and lawfully", says the Data Protection Directive.[12] The lawfulness requirement is reasonably clear: data processing has to comply with data protection law and other laws. Fairness is vaguer. Among other things, it requires transparency.[13]

The transparency principle could be seen as the most important principle next to the fair and lawful principle.[14] Data processing must take place in a transparent manner and surreptitious collection is not allowed (unless an exception applies, for instance for national security). The law obliges controllers to provide a data subject with information about their identity and the processing purpose and all other information that is necessary to guarantee fair processing. A controller can use a privacy policy to comply with data protection law's transparency requirements. These requirements also apply if a controller does not seek the data subject's consent, but relies on another legal basis for data processing.[15]

The principle of data subject participation and control aims to involve the data subject. Involvement of the individual can only be achieved if she/he is aware of the processing. People derive several rights from the data subject participation and control principle. For instance, in some cases controllers are only allowed to process personal data with the data subject's consent. In many other cases, people have the right to object to data processing.[16] Data subjects have the right to obtain information from a controller about whether their data are being processed and for which purposes.[17] The data subject also has the right to rectify or erase data.[18]

The purpose limitation principle says that personal data must be collected for specified, explicit and legitimate purposes and not further processed for incompatible purposes.[19] The first requirement is sometimes called the purpose specification principle. Personal data may be processed on the basis of the consent of the person concerned or another legal basis. These other legal bases are listed exhaustively and can only be relied upon if the processing is "necessary".[20] Section 4 below returns to the requirement of a legal basis for processing.

The data minimisation principle prohibits excessive processing in relation to the processing purpose. The principle can be recognised in various provisions. For instance, a controller may not process more personal data than necessary or store data longer than necessary.[21]

The proportionality principle was mainly developed in case law.[22] In the words of the Court of Justice of the European Union, "the principle of proportionality requires that [measures] be appropriate for attaining the legitimate objectives pursued (…) and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives."[23] Proportionality plays two roles in data protection law. First, it is a general principle of data protection law. Second, proportionality is often relevant when applying the provisions of data protection law, for instance when a provision uses the word "necessary".[24]

The data quality principle requires an appropriate level of accuracy, completeness, and relevancy of personal data. Controllers must take reasonable steps to ensure they erase or rectify inaccurate data. In principle, the data controller must comply if a data subject requests to have incorrect data rectified.[25]

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12) Article 6(1)(a) of the Data Protection Directive.
13) Recital 38 of the Data Protection Directive.
14) See De Hert P. and Gutwirth S., "Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power", in Claes E. et al. (eds), *Privacy and the Criminal Law*, Intersentia 2006.
15) See Article 10 and 11 and Recital 38 of the Data Protection Directive and for exceptions: Article 13.
16) Consent: Article 7(a), 8(2)(a), 26(1)(a); object: Article 14 of the Data Protection Directive.
17) Article 12(a) of the Data Protection Directive.
18) Article 12(b) of the Data Protection Directive.
19) Article 6(b) of the Data protection Directive.
20) Article 7 of the Data Protection Directive. See also Article 8(2) of the Charter of Fundamental Rights of the European Union.
21) Article 6(1)(c) and 6(1)(e) of the Data Protection Directive.
22) Bygrave 2014, p. 147.
23) CJEU, C-293/12 and C-594/12, *Digital Rights Ireland Ltd and Setlinger and Others*, 8 April 2014, par. 46.
24) Kuner C., "EU Data Protection: Proportionality Principle" (2008) 7(44) *BNA Privacy & Security Law Report*, pp. 1615-1619.
25) Article 6(1)(d) and Article 12 of the Data Protection Directive.

The security principle requires an appropriate level of security and confidentiality of the data being processed. Data controllers must protect the data against unauthorised disclosure or access and other unlawful forms of processing.[26]

The sensitivity principle refers to the stricter regime for "special categories" of personal data. Examples are data revealing racial or ethnic origin, religious beliefs, and data concerning health or sex life. The processing of such special categories of data is in principle prohibited, unless a legal exception applies, such as medical necessity. A member state can choose to allow data subjects to override this prohibition by giving their "explicit consent".[27] Apart from these special categories of data, the nature of data is relevant when applying data protection law. The more sensitive personal data are, the more strictly the rules of data protection laws should be applied.[28] If somebody's political opinion or sexual preferences could be inferred from his or her media consumption patters, it could be argued that personal data regarding such media usage is subject to the stricter regime for special categories of data.

Next to the core principles of data protection law, a second group of rules can be distinguished, which mainly concern enforcement of the principles.[29] For instance, compliance with data protection law is subject to control by independent Data Protection Authorities.[30]

The Data Protection Directive distinguishes "data controllers" from "data processors". The data controller is the party that determines the purposes and means of the personal data processing.[31] The controller is responsible for compliance.[32] A data processor is a party that processes personal data on behalf of the controller.[33] The distinction between controllers and processors is difficult to make sometimes. The difficulty is apparent with behavioural targeting, because many parties can be involved in delivering an ad. The Working Party says ad networks and website publishers are often joint data controllers, as they jointly determine the purposes and means of the processing. For instance, the website publisher allows the ad network to place cookies through its site. According to the Working Party a website publisher cannot escape its responsibilities by saying it does not know what ad networks do through its website.[34]

In principle, the Data Protection Directive prohibits transfer of personal data to countries outside the European Union, if those third countries do not offer an adequate level of protection to personal data.[35] There are exceptions to this prohibition. For instance, the data subject can override this prohibition by giving consent for a transfer.[36] And for the United States, which does not have the status of a country with "adequate" protection, a special "Safe Harbour" arrangement is in place. According to this, briefly, controllers from the United States from certain sectors are deemed to offer an adequate level of protection, if they agree to comply with the data protection principles.[37]

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26) Bygrave 2014, pp. 164-165. See Article 16 and 17 of the Data Protection Directive.
27) Article 8 of the Data Protection Directive.
28) It appears Bygrave does not categorise this general attention to the nature of personal data under the sensitivity principle (Bygrave 2014, pp. 165-167).
29) Bygrave L.A., *Data protection law: approaching its rationale, logic and limits*, Kluwer Law International, 2002, pp. 70-83.
30) Article 8(3) of the Charter of Fundamental Rights of the European Union.
31) Article 2(d) of the Data Protection Directive. The Directive also defines "third parties" and "recipients" (Article 2(f) and 2(g)).
32) Article 6(2)(b) and 23(1) of the Data Protection Directive.
33) Article 1(e) of the Data Protection Directive. The processor has mainly responsibilities regarding confidentiality (Article 16).
34) Article 29 Working Party, "Opinion 2/2010 on online behavioural advertising" (WP 171), 22 June 2010, p. 11.
35) Article 25 and 26 of the Data Protection Directive.
36) Article 26(1)(a) of the Data Protection Directive.
37) See the website about the Safe Harbour programme at: www.export.gov/Safeharbor. The Safe Harbour programme was always controversial, but criticism grew after the Snowden revelations about international surveillance by American Intelligence Agencies in 2013 (see: Committee on Civil Liberties, Justice and Home Affairs, "Report on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs" (2013/2188(INI)), 21 February 2014, available at: www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2014-0139&language=EN

2. Material scope of data protection law

European data protection law is triggered when "personal data" are processed. Behavioural targeting often entails the processing of pseudonymous profiles: individual, but nameless profiles. Does the processing of such information entail the processing of "personal data"? Usually the answer is yes, according to European Data Protection Authorities.

The Data Protection Directive defines personal data as: "any information relating to an identified or identifiable natural person ('data subject')."[38] A person is identifiable when he or she can be directly or indirectly identified. The Directive's preamble says: "to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person."[39] Hence, the preamble suggests it is not decisive whether it is the party holding the data or another party that can identify a person. The exact scope of the personal data definition must be set by the courts.

The Court of Justice of the European Union, the highest authority on the interpretation of European Union law, has not ruled on behavioural targeting yet. But there is relevant case law. The discussion about behavioural targeting is similar to the debate about IP addresses. In a 2011 decision, *Scarlet v. Sabam*, concerning IP addresses in the hands of an internet access provider, the Court said that those IP addresses were personal data.[40] The Court thus confirmed that information without a name can be personal data. The Court used ambiguous language and therefore it is unclear whether IP addresses should be considered to be personal data when they're not in the hands of an internet access provider. For parties that do not offer internet access, it is harder to tie an IP address to a name. They may still try to argue that IP addresses are not personal data in their hands.

According to the Working Party, data that can distinguish a person within a group are personal data. The Working Party adds that cookies used for behavioural targeting are personal data because they "enable data subjects to be 'singled out', even if their real names are not known".[41] Many scholars agree that data protection law usually applies to behavioural targeting.[42]

In the audiovisual media sector, many parties that do behavioural targeting have or can easily obtain the name of the individual to whom they target advertising. For instance, if a provider of smart TV engages in behavioural targeting towards its subscribers, the provider typically knows the name and address of its subscribers.

In sum, it seems safe to assume that data protection law applies to behavioural targeting in most cases.

3. Territorial scope of data protection law

The Data Protection Directive contains rules to establish whether controllers from outside the European Union have to comply with the European rules.[43] The two main rules regarding territoriality can be summarised as follows. First, European data protection law applies when processing is carried out in the context of the activities of an establishment of a controller on European Union territory. By way of illustration, according to the Court of Justice of the European Union, European data protection law applies when a search engine operator has a subsidiary in a Member State and that subsidiary sells and promotes advertising space offered by the search engine and orientates its activities to that member

38) Article 2(a) of the Data Protection Directive.
39) Article 2(a) and Recital 26 of the Data Protection Directive.
40) CJEU, C-70/10, *Scarlet v. Sabam*, 24 November 2011, par. 51.
41) Article 29 Working Party, "Opinion 2/2010 on Online Behavioural Advertising" (WP 171) 22 June 2010.
42) See for instance: De Hert P. and Gutwirth S., "Regulating profiling in a democratic constitutional state" in Hildebrandt M. and Gutwirth S. (eds), *Profiling the European Citizen,* Springer, 2008; Leenes R., "Do they know me? Deconstructing identifiability" (2008) 4(1-2) *University of Ottawa Law and Technology Journal*, p. 135. See for another view: Zwenne G., "*Diluted Privacy Law*", University of Leiden, 12 April 2013, http://zwenneblog.weblog.leidenuniv.nl/files/2013/09/G-J.-Zwenne-Diluted-Privacy-Law-inaugural-lecture-Leiden-12-April-2013-ENG.pdf
43) Article 4 of the Data Protection Directive.

state's inhabitants.[44] Furthermore, several of the largest firms that do behavioural targeting are formally established in Europe, such as Facebook and Apple (Ireland) and Microsoft and Netflix (Luxembourg).

Second, European data protection law applies when the controller is not established in the European Union, but uses equipment situated on European Union territory for personal data processing.[45] Many non-European firms use equipment, such as data centres, in Europe. The Working Party says that European data protection law applies to any party that places or accesses tracking cookies on a device in Europe, because in such cases the firm makes use of equipment (the user's device) in Europe.[46] This interpretation has not been tested in court yet.

For Article 5(3) of the e-Privacy Directive, the consent requirement for the use of tracking cookies and similar technologies, the territorial scope may be different. Article 5(3) applies to "anyone" that wants to access information stored in a users' device or wants to store information in a user's device (see below). This seems to suggest that Article 5(3) could also apply to parties from outside the European Union.[47]

The territorial scope of data protection law has been analysed extensively elsewhere. For this contribution the conclusion suffices that data protection law often applies to firms that are usually regarded as non-European firms.[48]

4. Legal basis for personal data processing

The Data Protection Directive only allows personal data processing if it can be based on consent or on one of five other legal bases. For commercial communications the most relevant legal bases are: a contract, the balancing provision, and the data subject's consent.[49]

A controller can process personal data if the processing is necessary for the performance of a contract with the data subject (Article 7(b) of the Data Protection Directive). For instance, certain data have to be processed for a credit card payment or for a newspaper subscription. This requirement of necessity sets a higher threshold than one that would demand that the processing be "useful" or "profitable". Some internet firms suggest a user enters a contract by using their services and that it is necessary for this contract to track the user for behavioural targeting. This interpretation seems incorrect. According to the Working Party, a controller can only rely on the legal basis contract if the processing is genuinely necessary for the provision of the service.[50] The Working Party's view implies that, in general, controllers cannot rely on this legal basis for behavioural targeting.

The analysis becomes more complicated if a firm uses the same personal data to do behavioural targeting and to provide its service. Suppose a company offers an app with a personalised news service. The app analyses the data subject's viewing habits and recommends news videos based on the data subject's earlier media consumption. The processing of some personal data (the data subject's viewing habits tied to a unique identifier) is necessary for the performance of the contract, as the app can only offer its personalised news service by analysing the data subject's personal data. That processing can be based on the legal basis of contract, because the processing is necessary for the performance of the contract. But following the Working Party's reasoning, it is not necessary for the provision of the personalised news service to use the same personal data for targeted advertising. Hence, if the data controller (the company) wants to use the same data to target ads to the data subject, it must have a separate legal basis for behavioural targeting (typically the data subject's consent).[51]

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44) CJEU, C-131/12, *Google Spain v. AEPD*, 13 May 2014.
45) Article 4 of the Data Protection Directive.
46) Article 29 Working Party, "Opinion 1/2008 on data protection issues related to search engines" (WP 148), 4 April 2008, pp. 9-12.
47) See for instance: *Autoriteit Consument en Markt* (Dutch Authority for Consumers and Markets), "Frequently asked questions about the Dutch cookie act", 2014, available at: www.acm.nl/en/download/publication/?id=11917
48) On the extra-territorial reach of data protection law, see Moerel L., *Binding Corporate Rules: Corporate Self-regulation of Global Data Transfers (PhD thesis University of Tilburg)* (Academic version, 2011), chapters 1-4.
49) The legal bases are listed in Article 7 of the Data Protection Directive.
50) Article 29 Working Party, "Opinion 06/2014 on the notion of legitimate interests of the data controller under article 7 of Directive 95/46/EC" (WP 217), 9 April 2014, p. 17.
51) Article 29 Working Party, "Opinion 02/2013 on apps on smart devices" (WP 202) 27 February 2013, p. 13.

The balancing provision (Article 7(f) of the Data Protection Directive) allows data processing when it is necessary for the controller's legitimate interests, except where such interests are overridden by the data subject's interests or fundamental rights. When weighing the interests of the controller and the data subject, all circumstances have to be taken into account, such as the sensitivity of the data and the data subject's reasonable expectations. The balancing provision is the appropriate legal basis for innocuous standard business practices. For example, a firm can generally rely on the balancing provision for postal direct marketing of its own products to current or past customers. If a firm relies on the balancing provision for direct marketing, data protection law grants the data subject the right to stop the processing: to opt out.[52] The Data Protection Directive does not say explicitly whether behavioural targeting can be based on the balancing provision. But the most convincing view is that behavioural targeting cannot be based on this provision, in particular when it involves collecting detailed information about somebody or tracking somebody over multiple websites. In most cases the data subject's interests must prevail over the controller's interests, as behavioural targeting involves collecting and processing information about personal matters, such as people's media consumption or browsing behaviour. Indeed, the Working Party says controllers can almost never rely on the balancing provision to process personal data for behavioural targeting.[53] It is possible, however, that first party behavioural targeting, where a controller advertises its own services, could be based on the balancing provision in some circumstances.

If controllers want to process personal data and cannot base the processing on the balancing provision or another legal basis, they must ask the data subject for consent (Article 7(a) of the Data Protection Directive). With consent, the data subject can allow data processing that would otherwise be prohibited. The Working Party says the legal basis of consent is generally required for personal data processing for behavioural targeting.[54] It follows from the Data Protection Directive's definition of consent that consent requires a free, specific, informed indication of wishes.[55] People can express their will in any form, but mere silence or inactivity is not an expression of will. This is also the predominant view in general contract law.

A number of larger behavioural targeting firms offer people the chance to opt out of targeted advertising on a centralised website: youronlinechoices.com. However, participating firms merely promise to stop showing targeted ads, which means that they may continue to track people who have opted out. In short, the website offers the equivalent of "do not target", rather than "do not collect". But even if the firms stopped collecting data after somebody opts out, they would not be able to use the website's opt-out system to obtain valid consent.[56] Valid consent requires an expression of will, which generally calls for an opt-in procedure.

In line with the transparency principle, consent has to be specific and informed. Consent will not be valid if the request for consent does not include a specified processing purpose and other information that's necessary to guarantee fair processing. Furthermore, consent must be "free". In most circumstances, current data protection law allows controllers to offer take-it-or-leave-it choices. Hence, in principle, website publishers are allowed to install "tracking walls" that deny entrance to visitors that do not consent to being tracked for behavioural targeting.[57] But a tracking wall could make consent involuntary if people must use a website. For instance, suppose people are required to file their taxes online. If the tax website had a tracking wall that imposes third party tracking, people's consent to tracking wouldn't be voluntary.

According to the Dutch Data Protection Authority, the national public broadcasting organisation is not allowed to use a tracking wall, because the only way to access certain information online is through

52) Article 14 of the Data Protection Directive.
53) Article 29 Working Party, "Opinion 06/2014 on the notion of legitimate interests of the data controller under article 7 of Directive 95/46/EC" (WP 217) 9 April 2014, p. 45.
54) Article 29 Working Party, "Opinion 06/2014 on the notion of legitimate interests of the data controller under article 7 of Directive 95/46/EC" (WP 217) 9 April 2014, p. 45.
55) Article 2(h) of the Data Protection Directive.
56) See Article 29 Working Party, "Opinion 16/2011 on EASA/IAB Best Practice Recommendation on Online Behavioural Advertising" (WP 188) 8 December 2011.
57) See Helberger N., "Freedom of Expression and the Dutch Cookie-Wall", Institute for Information Law, 2013, available at: www.ivir nl/publications/helberger/Paper_Freedom_of_expression.pdf

the broadcaster's website.[58] The Council of Europe's Committee of Ministers says public service media should promote democratic values and should offer "universal access".[59] In many European countries public service broadcasters receive public funding. According to the Dutch Data Protection Authority, the universal access requirement implies that the broadcaster shouldn't make website visitors "pay" again with their personal data.[60] The Working Party emphasises that consent should be free, but does not say that tracking walls are prohibited in all circumstances.[61] The general principle of contractual freedom, while not absolute, suggests that commercial media organisations are probably allowed to offer take-it-or-leave-it-choices, where they make access to services dependent on acceptance of behavioural targeting.

5. The e-Privacy Directive and consent for tracking technologies

Since 2009, Article 5(3) of the e-Privacy Directive requires any party that stores or accesses information on a user's device to obtain the user's informed consent.[62] Article 5(3) applies regardless of whether personal data are processed and applies to many tracking technologies, such as tracking cookies. If a party reads information about somebody's viewing behaviour from a set-top box for digital television, Article 5(3) probably applies as well. After all, the party accesses information on a user's device.

There are exceptions to the consent requirement of Article 5(3), for example for cookies that are strictly necessary for a service requested by the user and for cookies that are necessary for the transmission of communication. Hence, no prior consent is needed for cookies that are used for a digital shopping cart or for log-in procedures.

In principle, it is the party operating the cookie that has to obtain consent. But the Working Party has said from the start that a website publisher that allows other firms to place tracking cookies through its website shares the responsibility for information and consent.[63] Likewise, a provider of smart TV services would share the responsibility for information and consent, if it allowed other firms to place tracking cookies on the user's TV.[64]

Recital 66 of the 2009 Citizen Rights Directive,[65] that amended the e-Privacy Directive, has caused much discussion: "In accordance with the relevant provisions of [the Data Protection Directive], the user's consent to processing may be expressed by using the appropriate settings of a browser or other application." Many marketers suggest that people that do not block tracking cookies in their browser give implied consent to behavioural targeting. For instance, the Interactive Advertising Bureau, a marketing trade organisation, says "default web browser settings can amount to 'consent'".[66] But this

58) *College bescherming persoonsgegevens* (Dutch Data Protection Authority), *"Brief aan de staatssecretaris van Onderwijs, Cultuur en Wetenschap, over beantwoording Kamervragen i.v.m. cookiebeleid"* (Letter to the State Secretary of Education, Culture and Science, on answers to parliamentary questions about cookie policy), 31 January 2013, available at: www.cbpweb.nl/downloads_med/med_20130205-cookies-npo.pdf

59) Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, 31 January 2007.

60) *College bescherming persoonsgegevens* (Dutch Data Protection Authority), *"Brief aan de staatssecretaris van Onderwijs, Cultuur en Wetenschap, over beantwoording Kamervragen i.v.m. cookiebeleid"* (Letter to the State Secretary of Education, Culture and Science, on answers to parliamentary questions about cookie policy), 31 January 2013, available at: www.cbpweb.nl/downloads_med/med_20130205-cookies-npo.pdf

61) Article 29 Working Party, "Working Document 02/2013 providing guidance on obtaining consent for cookies" (WP 208) 2 October 2013.

62) A user (Article 2(a) of the e-Privacy Directive) is not the same as a subscriber (Article 2(k) of the Framework Directive 2002/21). We will leave this complication aside for this contribution.

63) Article 29 Working Party, "Opinion 2/2010 on online behavioural advertising" (WP 171), 22 June 2010, p. 24.

64) See *College bescherming persoonsgegevens* (Dutch Data Protection Authority), *"Onderzoek naar de verwerking van persoonsgegevens met of door een Philips smart TV door TP Vision Netherlands B.V.Openbare versie Rapport definitieve bevindingen* (Investigation personal data processing through Philips smart TV by TP Vision Netherlands BV. Public version report definitive findings) (z2012-00605), July 2013, www.cbpweb.nl/downloads_pb/pb_20130822-persoonsgegevens-smart-tv.pdf

65) Directive 2009/136/EC.

66) Interactive Advertising Bureau United Kingdom, "Department for Business, Innovation & Skills consultation on implementing the revised EU electronic communications framework, IAB UK Response", 1 December 2012, available at: www.iabuk.net/sites/default/files/IABUKresponsetoBISconsultationonimplementingtherevisedEUElectronicCommunicationsFramework_7427_0.pdf

does not seem plausible. As the Working Party notes, the mere fact that somebody leaves his/her browser's default settings untouched does not mean s/he expresses his/her will to be tracked.

In sum, parties are required to obtain consent for most tracking technologies that are used for behavioural targeting. Therefore, parties must usually obtain the data subject's consent for behavioural targeting, regardless of the legal basis of ensuing personal data processing. Hence, even if, under rare circumstances, a party could rely on the balancing provision to process personal data for behavioural targeting, the firm would generally need consent for the use of the tracking technology.

Article 5(3) should have been implemented in national law in 2011, but many member states missed the deadline. Hence, the national implementation acts are rather new. The approaches in the member states vary. For example, the Netherlands, put briefly, requires opt-in consent for tracking cookies.[67] In contrast, the United Kingdom appears to allow parties to use opt-out systems to obtain "implied" consent.[68] However, the Working Party insists that the data subject's inactivity does not signify consent.[69]

IV. Proposals for a Data Protection Regulation

In January 2012, the European Commission presented its proposal for a Data Protection Regulation, after a two-year consultation period.[70] While based on the same principles as the Directive, the proposal would bring significant changes. For instance, unlike a directive, a regulation has direct effect and does not have to be implemented in the national laws of the member states, so it should lead to a more harmonised regime in the European Union. The proposal introduces new requirements for data controllers, such as the obligation to implement measures to ensure and demonstrate compliance. The proposal also aims to make it easier for people to delete their data from the web and to transfer their personal data from one service provider to another. Finally, it reaffirms that consent requires an expression of will.

Enforcement and the right to redress are strengthened in the European Commission's proposal. In some circumstances Data Protection Authorities can impose fines of up to EUR 1 million or, in case of an enterprise, up to 2% of its annual worldwide turnover.[71] The European Parliament has proposed fines of up to 5%.[72] Another novelty is that organisations that aim to protect the rights of data subjects can take a data controller to court if a data subject's rights are infringed.[73]

The 2012 proposal for a Data Protection Regulation stirred up the debate about the material scope of data protection law. There has been much lobbying to make the proposal less burdensome for businesses. Many firms say that pseudonymous data, such as nameless behavioural targeting profiles, should be outside the scope of data protection law or should be subject to a lighter regime. In March 2014, the European Parliament adopted a compromise text, which the Parliament's LIBE Committee prepared on the basis of 3,999 amendments by the members of parliament. The LIBE Compromise introduces a new category of personal data, pseudonymous data, for which the rules are less strict. Under certain conditions, the LIBE Compromise allows controllers to engage in behavioural targeting with pseudonymous data without the data subject's consent.[74]

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67) See Zuiderveen Borgesius F.J., "Behavioral Targeting. Legal Developments in Europe and the Netherlands" (position paper for W3C Workshop: Do Not Track and Beyond), 2012, available at: www.w3.org/2012/dnt-ws/position-papers/24.pdf

68) Information Commissioner's Office, "Changes to cookies on our website", 31 January 2013, available at: www.ico.org.uk/news/current_topics/changes-to-cookies-on-our-website

69) Article 29 Working Party, "Working Document 02/2013 providing guidance on obtaining consent for cookies" (WP 208), 2 October 2013.

70) European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), COM(2012) 11 final, 2012/0011 (COD), 25 January 2012.

71) Article 79 of the European Commission proposal for a Data Protection Regulation (2012).

72) Article 79 (2a)(c) of the proposed Data Protection Regulation, "Inofficial Consolidated Version after LIBE Committee Vote Provided by the Rapporteur", 22 October 2013, available at: www.janalbrecht.eu/fileadmin/material/Dokumente/DPR-Regulation-inofficial-consolidated-LIBE.pdf

73) Article 76(1) of the European Commission proposal for a Data Protection Regulation (2012).

74) See Article 2(a), Article 6(f), and Recitals 38 and 58a of the LIBE Compromise, proposal for a Data Protection Regulation (2013).

At the time of writing, the proposed Regulation is still being discussed in Brussels. It is unclear whether the proposal will be adopted. It does not seem plausible that the Regulation could be adopted in 2014.

V. Conclusion

New forms of commercial communication such as behavioural targeting often involve the monitoring of people's online behaviour to use the collected information to show people individually targeted advertisements.

The e-Privacy Directive requires parties to obtain consent for the use of most tracking technologies, such as tracking cookies. Moreover, European Data Protection Authorities say that data protection law applies to most behavioural targeting practices. The fact that data protection law applies does not imply that processing is prohibited. It means that the party engaging in behavioural targeting must comply with data protection law. Personal data must be processed fairly and lawfully. As targeting and personalisation become more relevant for the audiovisual media sector, so will data protection law.

A Future Policy Framework for Convergence: New Wine into New Bottles

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I. Introduction

Today, more than four decades after the first mainframes and more than two decades after the original expansion of personal computing, information and communication technologies have undergone increasingly rapid waves of innovation, impacting all sectors of the economy and society as a whole. Just over a decade ago, companies like Facebook and Twitter didn't exist. The smartphone, now an integral part of our daily lives, is less than 10 years old. And new innovations, ranging from tablets to cloud computing to "Big Data" techniques, are arriving ever faster.

As the digital revolution accelerates, it is also spreading to touch new sectors and industries, inexorably changing them: newspapers, music, television, computing, communications, industrial production and commerce itself. High-quality video is streamed over the Internet to TVs, while other major technology providers are now producers of content, supplanting the role of traditional network studio; digital advertising techniques and algorithms are increasingly enabling content broadcasts to be "overlaid" with new advertising in place of old; smart devices integrate and deliver seamless services in an Internet of Things; and new online and mobile methods of communication have all but replaced the telephone and text message.

This innovation offers enormous opportunities and rewards for consumers and enterprises in Europe and beyond.[2] But digitisation also raises new challenges for regulators seeking to strike the right balance between innovation, growth and other important cultural and societal goals. The expansion of digital technologies has fundamentally changed the way in which electronic communication services are delivered and accessed. Broadband networks, voice, data and content can now be offered on the same platform by the same company. This not only promotes competition between players who previously were in different markets, but it also spurs the invention of a wide variety of new services and applications that were not possible before. These dynamic and fluxing markets mean that regulators must constantly stay up-to-date with developments and must tackle (or refrain from tackling) issues previously managed in the separate and distinct domains of broadcasting, telecommunication and information technology.

Within this context of convergence, questions have been raised as to whether the regulatory frameworks for telecoms and other areas impacted by convergence, such as audiovisual media, should be reviewed and extended. It is therefore now timely to consider whether and how our policy and regulatory frameworks are suited to the telecom, e-commerce and audiovisual media sectors and will

1) LL.M. IT & Telecoms Laws and Digital Policy Director at EMEA, Microsoft.
2) By one count, digitisation increased world economic output by roughly EUR 150 billion and created 6 million jobs in 2011. See "How To Reap The Economic Rewards Of Digitization", *Forbes*, 19 July 2013, available at: www.forbes.com/sites/boozandcompany/2013/07/19/how-to-reap-the-economic-rewards-of-digitization/

maximise the socio-economic benefits of the fast-evolving structure and dynamics of their convergence. What are the essential goals for public policy and safety when it comes to the "converged" sectors in the 21st century? And how can policy and legislative initiatives develop to meet these goals and maximise the beneficial impact for Europe, its economy and its citizens?

This article will address these fundamental questions by suggesting how it might be best to adapt the policy and legislative framework in the era of convergence.

II. What should a future policy framework look like?

This article concludes that a future policy framework for convergence should be based upon the following six objectives, each of which will be considered in turn:

- To clearly distinguish between "networks" and "services" and match regulatory objectives to the appropriate area;
- To avoid the reflexive or inappropriate extension of existing regulations to new contexts;
- To create a favourable climate for investment in both network infrastructure and services and to encourage the deployment of innovative, lower-cost network solutions;
- To ensure regulators and regulatory processes are able to keep up with the rapid pace of technical and industry change;
- To pursue targeted solutions in areas that lack infrastructure because of market failure;
- To rethink and define public policy objectives anew with regard to services of societal relevance.

1. To clearly distinguish between "networks" and "services" and match regulatory objectives to the appropriate area

Traditionally, telecommunications and audiovisual content were usually provided by vertically integrated organisations, often state-owned, which built and owned the network and provided the service, whether broadcast TV or telephony, to the end-user.

Telecommunications and broadcasting regulation has evolved over a number of decades, while the service itself has remained more or less static. For example, fixed-line telephony today is barely different from that of fifty years ago, mobile telephony adds nomadicity but little else, television has merely added colour, and a few more channels, thanks to technological progress in cable and satellite delivery in particular.

As a result, consumer expectations around traditional services are also relatively static: the ability to call emergency services, the ability to call directory enquiries, the ability to port a number, the ability to choose between a given number of television channels and (at least for telecoms) hardware provided by the operator through a vertically integrated business model.

In this scenario a few large players exist within each Member State which are typically vertically integrated and have significant control over the value chain and the end user. As a result, there is limited competition amongst them and, partly as a consequence, traditional telecommunications companies and broadcasters are heavily regulated, all operating under regulatory agencies like Ofcom in the UK or the *Autorité de régulation des communications électroniques et des postes* (Postal and electronic communications authority – ARCEP) and the *Conseil supérieur de l'audiovisuel* (Audiovisual regulatory authority – CSA) in France. In many countries, telecom operators and broadcasters carry the regulatory vestiges of having once been state-owned enterprises or at least "public service broadcasters" with specific public missions.

The IP (Internet Protocol) environment is distinct from this. The vertical business model has been replaced by a horizontal model, with actors competing at, and sometimes across, infrastructure, access and services layers.

There is intense competition between the vast number of applications and services, which, in addition to the low barriers to entry, leads to new services emerging regularly. The introduction of new technologies and innovations has resulted in obvious and significant benefits for both (a) the consumer, in terms of price and choice, and (b) the market, in adding competition and globalisation.

The roles and business interests of telecom companies, broadcasters and online content and application providers are quickly converging. Increasingly nowadays, a variety of services are being delivered digitally in the form of data transported through the IP network. Further, as the International Telecommunication Union has stated:

> *OTT services are enabled by the de-layering of the industry. IP has separated carriage from content and allowed 'over-the-top' content and application providers to deal directly with end users over networks whose owners and operators are excluded from these transactions.*[3]

Telephony and broadcast TV are in the process of moving from their traditional, vertically integrated model of analogue transmission (for TV) and "public switched telephone network" (PSTN) to IP delivery. This is a move to an "IP world" which is structured more horizontally than vertically, where the layer or provision of "networks" (those that transport the data) is clearly distinct from the provision of services to end-users. Rather than vertically integrated providers producing and delivering all online content and services, numerous application and service providers exist, separately from the network transmission provider. With convergence, the providers of electronic communications, information services and audiovisual media services all rely on network transmissions that use IP networks: with that shift, telecom services (voice, SMS), audiovisual media services and information society services of all kinds will soon be dependent on IP networks. However, the network providers, which supply the physical infrastructure for IP delivery, and the application or service providers, which use such networks, have remained distinct and each should be regulated accordingly.

To take an example, one reason to distinguish between the regulation of network providers and the application or service providers is to protect the consumer experience with regard to second and third screens. Second and third screens receive their material across WiFi and 3G/4G services. It is therefore important to ensure that spectrum is made available to deliver second and third screen experiences. However, online ("over the top") video distributors do not use government or public spectrum like traditional over-the-air broadcasters and satellite providers do; nor do they use the public rights of way like cable operators do.

Although some cases do raise regulatory concerns, in general the fluidity of the content and application market provides clear benefits to the end-user, such as low switching costs between applications and the capacity to use competing applications simultaneously.

For these services, the E-Commerce Directive[4] (and consumer rights more generally), as well as data protection and competition law, already provide protection for users of online services and for the market.

What matters in the Internet era is that data of any kind, upon which our economies and societies rely so much, is transported in a way that is the most efficient, resilient and affordable for users. The telecoms regulation has to provide the regulatory framework for networks, rather than focus on the applications section of the value chain, where regulators are able to call upon transversal, *ex post* competition, data and consumer protection regimes.

3) The ICT Regulation Toolkit (jointly produced by infoDev and the International Telecommunications Union (ITU)) is available at: www.ictregulationtoolkit.org

4) 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') [2000] OJ L178/1.

In the context of convergence, the telecoms regulation will, amongst other things, need to guarantee that:

- there is a sufficient competitive dynamic between networks such that it creates the incentives for continued investment and innovation in data transport and connectivity across Europe and beyond;
- networks are of high quality and secure, so that data is transported efficiently; and
- end users (whether individuals or companies) will have unimpeded access to all the resources that the Internet has to offer.

In summary, a policy framework for convergence should account for the separation of network and application in a graduated regulatory framework, clearly distinguishing network regulation and the horizontal (*ex post* competition and consumer protection) or function-specific regulations that apply to applications and online services.

2. To avoid the reflexive or inappropriate extension of existing regulations to new contexts

Alongside the need to distinguish between the regulation of networks and that of services, regulators and policymakers should avoid merely extending existing regulations to cover new contexts and technologies which were unforeseen when such regulation was first introduced. As an example, this article will consider in detail the development of audiovisual media services in Europe.

2.1. Audiovisual Media Services (AVMS)

It is important to recognise that we are still at an early stage in the development of connected TV and platforms. These platforms are impressive, but do not provide a substitute for traditional video offerings; instead they can prove an excellent complement to traditional broadcast, cable and satellite services. The current legislative framework has facilitated and encouraged change. The speed of technology introduction and service innovation shows no sign of diminishing. As convergence takes hold and consumer patterns continue to evolve, regulation should not be extended into these developing markets unless both the need for extending regulation can be clearly identified and the new regulations are adapted to address a specifically identified problem, while minimising their negative impact.

In fact, the issue of online video should be approached as a *tabula rasa,* rather than through the lens of legacy regulatory frameworks. Broadcasting rules have been built around the industry and service structures of the 1980s-1990s or sometimes earlier. While some of these rules may still be relevant for uni-directional, traditional TV services using commercially valuable spectrum, media consumption nowadays increasingly consists of an application co-existing with on-demand services and rendered on an ever-increasing variety of devices for personal, family and group consumption. Online services, by their innovative and often international nature in particular and the level of control and interaction they give users, deserve a fresh approach. Extending legacy regulation would be inappropriate for many of the new services that have been made possible by convergence and would be practically, economically and politically difficult to enforce, given the global nature of the IP networks.

Many of the traditional regulations that were adopted decades ago were based on a telecom sector centred on a formerly state-owned monopoly and the core telephony services it provided, as well as the core broadcast television service in the audiovisual media sector. This framework intended to address, amongst other things, the scarcity of spectrum and high barriers to entry that resulted in limited choices in service providers. Today these rules are largely outdated. Further, regulation is not anticipatory, but reactive, slow and inflexible compared to the rapid pace of technological change.

Consumers no longer rely on vertically integrated providers of telephony and text messaging, which also provide the telecommunications network that these services run over. Today, a wide variety of online communications tools exist, from IM to tweeting and posts on social networks. Similarly to what is the case with audiovisual content, consumers online enjoy an abundance of providers, applications and services, which are available through any number of IP-enabled devices, such as connected TVs, game consoles, smartphones and tablets.

At a macro level, the most competitive ICT markets are those which enable innovation, competition and consumer choice. The least competitive markets are those which hinder such things and attempt to make legacy regulation fit the modern world.

A competitive ICT market and the advent of online content platforms has opened the door to unprecedented levels of creation, including a vast amount of user created content, enabled by the Internet, from film and music to blogs. But crucially, online platforms provide user-friendly devices and interfaces which facilitate and encourage consumer consumption of media and thus provide further avenues for monetising content. The same is true for the interactive abilities offered by Internet-connected media platforms, which can lead to monetisation (e.g. online games or extra content which is made available as part of a premium subscription or as a supplement to a TV programme).

There are also increasingly numerous examples of online platforms, such as Xbox or Netflix, which have expanded into content production, thus adding to diversity and to the sources of content financing. The first Netflix own production was filmed partially in Norway. Xbox has local studios in the UK and is commissioning local content and events.

2.2. The Audiovisual Media Services Directive (AVMS Directive)[5]

The gradual approach to regulation adopted in the AVMS Directive, which enables the growth and innovation of online, non-linear offerings, thanks to a more lightly regulated regime, was an important factor in enabling these positive developments. This approach is in large part due to the fact that consumers have much more choice and control in the online, non-linear environment than they did over traditional linear offerings.

The overall success of the AVMS Directive stems largely from the strategic policy and gradual regulatory approach on which it was based. According to this approach, "[t]o support the development of new business opportunities without jeopardizing important public interests such as the protection of minors and human dignity, the rules for audiovisual media services have to be as concise as necessary and as flexible as possible. In addition to its graduated approach to regulation, the Directive achieves this by promoting Member State use of self- and/or co-regulatory measures while eschewing new licensing schemes. National legislators can thus choose more flexible regulatory arrangements where these enjoy stakeholder support, align with their national legal systems and promise effective enforcement. In this way, the Directive extends pertinent standards to on-demand services with a minimum of additional administrative procedures."[6] This approach was correct at the time and is still very much valid.

In respect of concerns around the cross-border interoperability of connected TVs, what creates the type of fragmentation which is most stifling to consumers is not their potential interoperability across Member State borders, but the presence of individual national regulations and requirements. Consequently, the best solution when it comes to interoperability is for standards bodies to handle any genuine need on a case-by-case basis, rather than the adoption of a prescriptive, inflexible regulatory approach. The industry has demonstrated the validity of the paradigm of favouring voluntary and market-driven standards, as we move towards a converged audiovisual world. The basic standards enablers are in place today. There will be a continuous need to improve and update them, to further improve harmonisation of those standards across the EU and to enable improved and richer services over time. This is an evolution for which voluntary market-driven standardisation will likely continue to best cater.

5) 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) [2010] OJ L95/1.

6) European Commission, "TV, online, on-demand – Modern Rules for Audiovisual Europe", General fact sheet 68, October 2008, available at: ec.europa.eu/archives/information_society/avpolicy/docs/reg/avmsd/fact_sheet_en.pdf

Unnecessary regulatory intervention which imposes one or more technical standards should be avoided where this is not supported by all industry players. Any attempt to impose a "one size fits all" solution risks distorting competition and stifling the innovation and creation which remains essential to the sustained growth of media in Europe. For instance, any genuine technical interoperability questions can already be addressed by the Forum for Advanced Media in Europe (FAME), which provides a multi-stakeholder platform for discussing and resolving these issues.[7]

This example of AVMS shows that today's innovations in online media and communications have largely been driven by the industry's response to consumer demand. Indeed, very much because regulators in Europe and other regions decided to largely refrain from applying regulations to the new services, the sector has been able to deliver value to consumers in new and inventive ways. Many of the traditional regulations that were adopted decades ago were intended to address, amongst other things, the scarcity of spectrum and high barriers to entry that resulted in limited choices in service providers and content. Regulations intended to address the limited number of mass-market broadcasting platforms are not as relevant in an online environment in which consumers can seek a variety of content from many different sources.

3. To create a favourable climate for investment in both network infrastructure and services and to encourage the deployment of innovative, lower-cost network solutions.

Certain online markets, particularly the online video services market, although not yet matured, are flourishing, because, so far, regulators have largely left it to the market to respond to consumer demand, while determining a fair and appropriate overall market framework for all players involved. Today's fast-evolving technological landscape reflects sustained innovation and investment, which resulted in a decade of unprecedented expansion of consumer choice. With it, there has been considerable expansion in how and the extent to which people consume content, as well as the accessibility of news and information, both local and international, that is tailored to the user's interests and needs in ways which were not possible before the mainstream adoption of the Internet.

It is important to recall that smartphones were introduced to consumers only eight years ago and tablets and connected TVs only about three years ago. Thus, the speed of innovative products being brought to market has accelerated, by means of sustained financial investment, to meet high consumer demand. This is also at least partly due to the fact that there is a high degree of competition in the provision of online content generally, with mostly little lock-in, low switching costs and the potential for multi-homing (i.e. the ability to use different platforms and services concurrently). These factors encourage innovation, investment and increased consumer choice. The changes which have taken place tend to demonstrate that the current framework is able to deliver substantial benefits.

An important component of success for the ICT sector, as well as for consumers, is good Internet connectivity. Policymakers at an EU and national level should ensure there are sufficient incentives for investment in network upgrades, so that connectivity evolves and improves along with devices and services. Deploying broadband Internet access throughout the EU is necessary, if users are going to be able to make the most extensive and efficient use of online media offerings. In other words, a precondition for an active online content marketplace is more broadband Internet. The any-to-any connectivity provided by the Internet is key to achieving benefits from broadband and broadband without Internet access will not ensure that consumer demand is met, with consequent damage to the take-up of broadband and to further investment.

7) More details about the Forum for Advanced Media in Europe (FAME) are available at: www.difgroup.eu/uploads/DocsAndMediaManager/documents/FAMETORs.pdf

Indeed, the ambitious Digital Agenda broadband targets[8] of the European Union remain very relevant today. In the absence of the public funding of networks, this investment should be made primarily by a private sector confident of a stable economic and regulatory environment and with incentives to invest. There needs to be a telecommunications framework that is fit for the digital age and unencumbered by unnecessary regulatory burdens. Yet it needs to be robust enough to foster a dynamic, competitive and innovative market, notably through wholesale and retail open access safeguards that will ensure genuinely dynamic competition in the telecommunications sector. This in turn is necessary to provide sufficient incentives for market players to invest and deliver fast broadband throughout Europe.

Other ways in which regulators and policymakers could encourage innovation in the ICT sector is by permitting and incentivising companies to take advantage of existing technologies, for instance by considering the structural separation of all fixed line infrastructure-owning telecommunication companies, mandating mobile networks to provide wholesale data access for mobile virtual network operators (MVNOs), enabling licence-exempt wireless use of TV white spaces and generally encouraging efficient, dynamic spectrum access (which is described in more detail further down in this article).

4. To ensure regulators and regulatory processes are able to keep up with the rapid pace of technical and industry change.

As broadband Internet penetration continues to grow, more and more people will be able to access the Internet anywhere, anytime, anyplace. Users have come to rely on Internet access to facilitate basic, everyday needs and aspirations. The Internet, and in particular applications built upon Voice over Internet Protocol (VoIP), has truly revolutionised the way people and businesses interact.

The Internet has become an engine for innovation, growth and advances in productivity. User-created and distributed applications and services are seen as crucial to the development of the broadband economy, increasing the utility and power of networked computing, in particular the Internet.

The Internet has proved to be an engine for the promotion of cultural and linguistic diversity and of information and knowledge sharing. It has provided a platform for all segments of society to air their views, share their ideas, opinions and creative content and learn more about the views and cultures of others. Commercial and non-commercial content, as well as the individual user's own content, are made equally accessible to all and can be added to by anyone.

As these fundamental shifts take place, so the role and skills of the regulator need to evolve. Regulation should be fit for the digital age and regulators should aim to support overall socio-economic development, not just that of any one particular sector. Regulators and policymakers should primarily focus on innovation and end-users, in order for the entire ICT value chain and wider economy to benefit.

Within this context, regulatory processes should be dictated by developments in the ICT sector. For example, in respect of mobile termination rights, instead of rate regulation, regulators could use arbitration-style backstops for interconnection disputes as a way of future-proofing regulation. The distinction between fixed and mobile telecommunications and the rise in VoIP technologies means that interconnection charging regimes and rate regulation are increasingly out of date.

Certain technical areas, such as spectrum allocation, could be determined by applying techniques like Dynamic Spectrum Access (DSA),[9] rather than by the regulator. By taking advantage of the increase of processing power in devices and geolocation database technology, such techniques are able to know where the unused frequencies are and allocate them to services in a matter of milliseconds. The current process of spectrum allocation is much more time-consuming in comparison.

8) For more details, see the European Commission's dedicated webpage, available at: http://ec.europa.eu/digital-agenda/en/broadband-0

9) Dynamic Spectrum Access (DSA) is "an umbrella term used to describe a set of technologies and techniques enabling radio communications devices to opportunistically transmit on available radio spectrum". See FAQs on Dynamic Spectrum and TV White Spaces, Microsoft research website, available at: http://research.microsoft.com/en-us/projects/spectrum/faq.aspx

In considering policies to address the convergence of legacy services on the one hand and emerging online business models on the other, the online content market itself, and not regulation, should dictate the direction it will take.

To ensure that the regulatory framework remains appropriate, regulators should continually review existing regulations to determine whether they are still needed to deliver fundamental policy objectives. In doing so, regulators and policymakers would facilitate a levelling of the regulatory playing field for the benefit of both traditional broadcasters and new online content services. The rules in the future should indeed enshrine fundamental principles which can stand the test of time, rather than "micro-managing" regulations that have been added on an occasional basis to cope with technological advances. The details of how to meet the goals of these fundamental policy and legal principles should be left largely to stakeholders, through self-regulation and standardisation efforts.

5. To pursue targeted solutions in areas that lack infrastructure because of market failure.

Given the ever-increasing use of IP networks across the ICT sector, it is critical that network infrastructure is developed and maintained to ensure that all online and communication services are available and accessible to every end-user, wherever they may be located. Regulators and policymakers should focus on targeted solutions which will provide broadband services to as many people as possible. One example of a targeted solution (particularly for rural and remote areas) would be the support of universal service funding specifically targeted at network development in areas lacking connectivity. Rather than solely focusing on "fixed line" telephone services, universal service funding could also be targeted at supporting ICT/broadband programmes that give under-served businesses and people access to broadband Internet. Another way in which policy could support areas which lack network infrastructure is by regulators permitting (and actively supporting) non-commercial entities, such as municipalities, in the provision of both fixed and mobile local Internet access to end-users.

6. To rethink and define public policy objectives anew with regard to services of societal relevance

The European Union's goals are about protecting citizens' rights, but they are also about the creation of a single market and a system of undistorted competition that is intended to innovate and drive growth. This is a system which seeks balance between those largely economic objectives, while observing fundamental rights and cultural values, a system which is designed to support economic progress, not to prevent change or protect entrenched industry sectors. This balance is now more clearly enshrined in the Treaty of Lisbon.

European regulators will often be encouraged to extend existing rules in order to "level the playing field"; this request is generally made by industry incumbents seeking to preserve their existing market positions. In contrast, incumbents rarely see fit to "level the playing field" in terms of improving their own service provision or innovative new services and features to keep up with new entrants. At the same time, sector specific regulators are increasingly dealing with public interest matters that affect the economy more generally. This is partly because technological innovation is the engine of the economy and is critical for many other types of business. Given its importance, innovation should be a priority policy goal and all government policy should be examined against its support for innovation.

The European Union's media policy has traditionally focused on protecting consumers in a commercial environment over which they are able to exert limited control and supporting a pluralistic media landscape. As online service providers commission original high quality episodic content and as the Internet, smartphones, tablets, search functions and apps continue to proliferate and the audiovisual "media and content" worlds collide with ICT, a rethink of public policy objectives with regard to services and devices of societal relevance is needed.[10]

10) For example, the accessibility or confidentiality of communications.

For example, TV advertising is now changing drastically to incorporate "smart" features. With these developments, the reasons for restrictions are becoming less clear, while new areas of concern remain unexamined.

In a data-driven economy with increasingly sophisticated "big data" technologies, it becomes increasingly important to think about the protection of the privacy of the next generation of TV viewers. Modern TVs now include unprecedented data collection and tracking functionalities; and in the future, this data will be used to deliver personalised TV advertising, among other functionalities. A user's media content history is sensitive however and can provide a great deal of information about the characteristics of a given individual.

By the same token, it will be increasingly important to reconsider how to maintain media plurality for the next generation. Today's media pluralism regimes primarily target traditional platforms: TV, printed press and radio, to some degree. But what does it mean to ensure media plurality when so many consumers access news online and when "news" itself encompasses a much broader universe of information? The bias built into automated computer programmes raises additional concerns in view of aggregated and personalised news. These decision-making criteria may be objective, but does that make them unbiased? At one end of the scale it may lead to homogeneity and at the other end of the scale reduce the visibility of different viewpoints or fail to promote a non-partisan outcome.

Professor Lessig raised the policy challenge in a particularly graphic way when he said:

> *We have been as welcoming and joyous about the Net as the earthlings were about the aliens in Independence Day; we have accepted its growth in our lives without questioning its final effect. But at some point, we too will come to see a potential threat. We will see that cyberspace does not guarantee its own freedom but instead carries an extraordinary potential for control. And then we will ask: How should we respond?*[11]

III. Conclusion: new wine deserves new bottles

Electronic communications, information services and audiovisual media services now all rely on network transmissions that use the Internet. This structural change has significantly altered market dynamics and has a consequential socio-economic impact. It is new and different. This innovation needs to be accompanied with a fundamental rethink of policy in the digital age and what the implications are for legislation. A stable single European market requires a future-proof regulatory framework. This can only be achieved if regulators and policymakers move away from relying on the old rules and practices, which were voice-driven for telecoms and "analogue TV" driven for audiovisual content: many of these rules are already (or fast becoming) unnecessary or unjustified in the current data growth, IP-based, Internet-centric era. Because the app market is competitive, innovative and thriving, there is little apparent need for further regulation. More trust should be placed in the market to resolve issues if they arise, provided that the tenets of competition and consumer protection law remain respected.

The potential of convergence can be fully realised by the market, if regulators and policymakers follow the five objectives set out above, by, for instance: (i) respecting neutrality principles across the value chain; (ii) promoting industry-led solutions in regulation; or (iii) fostering a light-touch, future-looking and "digitally-fit" regulatory regime which provides the industry with a genuine competitive dynamic, the flexibility and freedom to innovate and the confidence to invest. At the same time, we need to carefully consider and address the societal implications of innovation in a data-driven economy.

These are the priorities and the approach which regulators should adopt. The regulation of networks and the regulation of so-called "apps" in this digital age simply cannot be based on legacy regimes. Regulation needs to evolve fundamentally towards a completely new, "next generation" policy and legislative framework for the convergence industries. Regulators should not put new wine into old bottles.

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11) Lessig L., *Code and Other Laws of Cyberspace*, Basic Books, New York, 1999.

Convergence and Divergence: How Self-Regulation and Statutory Regimes Interact in the UK

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Discussion of the role self-regulation can play in developing standards for audiovisual commercial communications has sometimes seemed to proceed as though convergence presented a challenge for which no actually existing framework had an answer. The UK self-regulatory system has been dealing with media convergence for the past 50 years: cross-media policy is already in place and being practised. The concern I have is that attempts to further elaborate the statutory framework for audiovisual commercial communications may actually complicate efforts to deal with converged media and not advance them.

This is not the plea of a self-regulator against statutory regulation per se: in the UK we are approaching ten years of co-regulation of broadcast media and it seems to be working very well. But the ways in which self- and statutory regulation interact can be both productive and counter-productive, even within the space of one legislative measure. In this article I would like to provide some information about the current regulatory situation in the UK and test the assumption that there is some imminent crisis of convergence. I will finish by suggesting that we already have the tools we need to deal with what we might safely anticipate from developments in audiovisual media. The key is to concentrate on such predictable developments and trust to the self-regulatory system to adapt swiftly when the consumer intelligence it receives through its enforcement activity reveals what we might not have been in a position to expect.

I. The regulatory landscape in the UK

I will begin with a little introduction to the UK self-regulatory system. The Committee of Advertising Practice (CAP) was set up in 1961 and established the first UK self-regulatory advertising code with universal coverage in the same year. The Committee was made up of representatives from all parts of the advertising industry – advertisers, agencies, media owners – who came together to articulate the industry's common, enlightened interest in good self-regulatory practice.

The Advertising Standards Authority (ASA) was then established in 1962 as the independent enforcement body for that code. The two sides of the system celebrated their fiftieth anniversaries in 2011 and 2012 respectively. Since the beginning, the CAP Code has applied across non-broadcast media: CAP places great value on media neutrality and has sought to apply consistent standards across all the media addressed by its Code, while allowing the ASA the discretion to take the individual characteristics of media into account in its enforcement decisions. The system has the additional advantage that it offers pre-publication advice and training to advertisers in how to develop compliant advertising.

In 2004, the ASA took on responsibility for advertising in TV and radio services licensed by Ofcom. For the first time in the UK, advertising across all media became subject to the same dedicated enforcement regime. CAP developed a sister body, the Broadcast Committee of Advertising Practice (BCAP), to take charge of the separate codes for TV and radio. We inherited four: one for TV, one for radio, one for TV

scheduling and one for TV text. Together, CAP and BCAP began a Code Review process that was equally historic – the first ever concurrent review of all five advertising codes. This process concluded in 2010[1] with the launch of just two codes: the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code)[2] and the UK Code of Broadcast Advertising (BCAP Code).[3] Also in 2010, CAP extended the remit of its non-broadcast code to include marketing communications on marketers' own websites and in other space under their control – like Facebook and Twitter. Convergence, then, has been something of a theme for us for some time: in the space of the last ten years, we have been able to evolve common standards that may apply to a highly significant range of media previously outside the scope of the system.

Importantly, the ASA is recognised by the courts and by statutory agencies with responsibility for commercial regulation as being the established means of providing consumer protection when it comes to advertising. That means that ASA enforcement decisions and CAP decisions to set standards are subject to judicial review. That in turn means that, where relevant, we are obliged to enforce in line with maximum harmonisation measures, like the Unfair Commercial Practices Directive[4] (UCPD). I shall return to that subject later in this article.

II. Common standards across media

Since that extension of remit in 2010, the ASA has received more than 30,000 complaints each year. Given the scope of the Codes and the fact that one complaint can be sufficient to launch an investigation, I would argue this makes the ASA one of the most experienced enforcers of standards derived from the UCPD and the Audiovisual Media Services Directive[5] (AVMSD) in Europe.

Advertising across media is subject to ASA enforcement, but the legal context behind the scenes in the UK does involve a plurality of approaches. In relation to TV, BCAP and the ASA regulate advertising under a contract with Ofcom. Ofcom delegates some – though not all – of its statutory duties relating to advertising to us. In the case of video-on-demand (VOD), the situation is slightly different. There is no standard-setting function as such, only enforcement, for which purpose Ofcom designates the ASA to apply AVMSD-derived rules on advertising in non-linear services. But of course there is a wider market for audiovisual commercial communications, appearing as pre-roll display advertising in online press website video content for example, and that category of content is subject to the CAP Code. Importantly, not only for the purposes of this article, but to the public and industry, no matter what device you use to view audiovisual commercial communications – internet-connected TV, computer, tablet, or smartphone – it will be covered by the ASA system and CAP or BCAP rules.

When people talk about convergence, they increasingly talk about the "second screen". But this term arguably only makes sense if one is accustomed to viewing media regulation with exclusive or primary reference to television. For a converged regulator, no particular screen will take precedence. There will simply be a plurality of screens. Of course, at present what people mostly have in mind when they talk about the second screen is the capacity for real-time, dynamic digital communications to support and complement programme content offered in linear services. In that sense, TV still retains its primacy. As long as we hear talk about the second screen, perhaps we may assume that the crisis of convergence has not yet arrived.

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1) The two major public consultation documents published by CAP and BCAP, together with the full evaluation of responses that followed and the communication of the final decision on both codes, may be accessed in the "Closed consultations" section of CAP's website, available at: www.cap.org.uk/News-reports/Consultations/Closed-consultations.aspx
2) The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code), Edition 12, available at: www.cap.org.uk/Advertising-Codes/Non-Broadcast.aspx
3) UK Code of Broadcast Advertising (the BCAP Code), Edition 1, available at: www.cap.org.uk/Advertising-Codes/Broadcast-HTML.aspx
4) 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.
5) 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 L 95, 15 April 2010, p. 1.

III. Changing media, enduring standards

Intelligence in regulation is vital and our richest source of intelligence remains complaints to the ASA. What those complaints tend to suggest is that consumers do not have strong concerns about video-on-demand advertising or indeed audiovisual commercial communications beyond TV at the time of writing. TV advertising attracted 13,179 complaints in 2013. Complaints about VOD advertising amounted to 193.[6]

The concerns consumers do raise about VOD advertising relate mostly to offence, either through the content of the ad or the inappropriateness of its placement around programming. This means that VOD is currently less like other digital forms of commercial communication and more like television. In 2013, CAP reviewed the results of its decision to extend the remit of its code to cover marketers' own websites and the conclusion, which many within the organisation would have predicted, was that consumers care overwhelmingly about misleading advertising online. But, TV has always had a much more mixed profile in terms of consumer concerns. Between March 2011 and February 2013, 90% of cases considered about advertising on marketers' own websites raised issues of misleading advertising; in the same period, between 46 and 50% of broadcast cases raised issues of misleading advertising; between 28 and 31% raised issues of offence; and between 12 and 17% raised issues of harm.[7]

The profile of VOD appears similar to TV, based on the rather limited information available to us through complaints, but the ASA has not needed to apply the high level protections provided for in the AVMSD when regulating VOD ads. Its own tried and tested principles relating to offence have been sufficient to the task. The demand for redress through self-regulation remains centred on established media and established standards. Interestingly, even where more innovative digital media are concerned, the importance of established standards is further reaffirmed: so, in social media and online "native advertising", the issue to which the ASA and CAP have returned time and again has been that of disclosure of commercial intent in editorial space.[8]

The exception to this is online behavioural advertising (OBA),[9] which did require the introduction of new standards, as well as an extension of scope for the CAP Code (and again, difference in regulation, since those with primary responsibility for compliance are ad networks and other third parties rather than marketers). Even in that case, the standards in question address the familiar topic of disclosure of commercial intent, as well as the more novel question of how consumers might choose to opt out of the collection and use of browser behaviour information. The end result is a set of standards capable of being enforced by the same body that already regulates across all other media, the Advertising Standards Authority.

6) Figures taken from Advertising Standards Authority and Committee of Advertising Practice, "ASA and CAP Annual Report 2013: Making ads clear", 29 May 2014,p.21,available at: www.asa.org.uk/News-resources/Media-Centre/2014/~/media/Files/ASA/Annual%20reports/AR%202013%20Online%20version_v3_FINAL.ashx

7) Internal figures.

8) For example, see the Q&A that CAP held with bloggers in the UK in March 2014, Committee of Advertising Practice, "New words on the blog", press release, 19 March 2014, available at: www.cap.org.uk/News-reports/Media-Centre/2014/New-words-on-the-blog.aspx

9) The CAP Code defines OBA as follows: 'OBA' means: the collection by a third party over a period of time of web viewing behaviour data from a particular computer which takes place across multiple web domains not under common control, and which is used by the third party to deliver advertising to that particular computer based on the preferences or interests inferred from the data by the third party's technology. (These preferences or interests are often categorised into "interest segments" which are then used to target multiple web users with a specific preference or interest.)" Appendix 3 of the CAP Code on Online Behavioural Advertising, available at: www.cap.org.uk/Advertising-Codes/Non-broadcast-HTML/Appendix-3-Online-Behavioural-Advertising.aspx

IV. The interaction of self-regulation and statutory measures

ASA complaints figures might tend to suggest that the AVMSD has had little impact on CAP and the ASA in terms of regulation of audiovisual commercial communications beyond linear television. But there is already a detectable impact at the level of principle, at least. CAP reflects the AVMSD provisions for video-on-demand advertising in an annex to its Code[10]. The reason for this is that the UK transposition of the AVMSD places primary responsibility for compliance on VOD media service providers. However CAP's code is an advertising code and it's the advertisers that have primary responsibility for complying with it. VOD-specific rules are the exception.

Therefore one can say that the AVMSD, as it has been transposed in the UK, has entailed a measure of divergence in regulation, since it obliges us to enforce standards against media service providers rather than advertisers in one new and evolving medium. How sustainable is this? As technology for the delivery of ads becomes ever smarter, media service providers are less and less involved in choosing what ads appear around the content they provide. We would argue that a system based on marketer responsibility achieves compliance with greater efficiency – and that's what CAP and the ASA provide.

The broader impact on UK advertising regulation of maximum harmonisation measures like UCPD is too large a subject to be addressed here. Maximum harmonisation sounds, in the abstract, like something to which it might be difficult to object. But in reality maximum harmonisation measures have complex effects, not all of which are desirable. In the UK a recent consultation by the Trading Standards Institute, a statutory enforcement body, asked whether old, pre-UCPD guidance on pricing practices should recover the statutory force that it previously enjoyed, surely an impossibility while the annex to UCPD remains the exhaustive list of the practices that Member States may safely deem always to be unfair.

CAP and BCAP have also been obliged to embark on a long and difficult process of interrogating their rules to test whether they impose a greater level of restriction than UCPD allows, mindful of Annex 1.[11] I have heard it suggested that the European Commission dismissed concerns about this effect on the grounds that a self-regulatory code amounted only to guidance and could therefore exceed UCPD, since it lacked the force of statute. As I have already explained, that simply does not hold for the UK: CAP's actions in setting standards are subject to judicial review and to the same tests as any other regulatory move by a Member State. Standards set at European level need to be set with more regard for their impact on the ability of self-regulation to put its talents to good effect, by adapting and responding to the practices that self-regulators encounter through enforcement and dialogue with industry practitioners.

10) Appendix 2 of the CAP Code on Advertising rules for on demand services regulated by statute, available at: www.cap.org.uk/Advertising-Codes/Non-broadcast-HTML/Appendix-2-Advertising-rules-for-on-demand-services-regulated-by-statute.aspx

11) Annex I of the Unfair Commercial Practices Directive, "Commercial Practices Which Are in All Circumstances Considered Unfair", available at: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32005L0029

V. Conclusion

If the intelligence we receive through consumer complaint suggests that VOD and other new forms of audiovisual commercial communication are yet to achieve the prominence and engagement that television still commands and if the standards in place are adequate to address the calls to action that consumers make to the advertising regulator, what kind of crisis is this? Perhaps a little more confidence is called for. Self-regulation has much to offer to Europe as we look forward to a more diverse range of audiovisual commercial communications. In the last ten years the UK self-regulatory system has expanded to cover television, radio, marketers' own websites, online behavioural advertising, video-on-demand services and marketing in social media: consumer demand for that enormous extension in scope is reflected in the level of complaints to the UK regulator, which has gone from 14,508 in 2004 to 31,136 in 2013.[12]

If the narrative of the last ten years has been one of adaptation to new media and evolution of common standards, why should that not continue? I would argue that standards are best set when intelligence-led, in partnership with enforcement. The ASA system allows this to happen quickly and continually in the face of new developments in media. Perhaps a new dialogue is called for to determine what kind of harmony might allow us to continue to converge, and not diverge, in regulation.

12) Figure for 2004 reflects non-broadcast complaints received (12,711) combined with the broadcast complaints received in November and December 2004 (1,797) after the ASA took over responsibility for broadcast advertising from Ofcom. See, Advertising Standards Authority and Committee of Advertising Practice, "Annual Report 2004 – Open for business: the one-stop shop for advertising standards", available at: www.asa.org.uk/News-resources/~/media/Files/ASA/Annual%20reports/Countdown%20to%2050/ASA_Annual_Report_2004.ashx. Figure for 2013 taken from Advertising Standards Authority and Committee of Advertising Practice, "ASA and CAP Annual Report 2013: Making ads clear",p.21, available at: www.asa.org.uk/News-resources/Media-Centre/2014/~/media/Files/ASA/Annual%20reports/AR%202013%20Online%20version_v3_FINAL.ashx

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

European Audiovisual Observatory

Set up in December 1992, the European Audiovisual Observatory's mission is to gather and distribute information on the audiovisual industry in Europe.
The Observatory is a European public service body comprised of 40 member states and the European Union, represented by the European Commission. It operates within the legal framework of the Council of Europe and works alongside a number of partners and professional organisations from within the industry and with a network of correspondents.

Major activities of the Observatory are

- the publication of a yearbook, newsletters and reports
  http://www.obs.coe.int/publications

- the provision of information through the Observatory's Internet site
  http://www.obs.coe.int

- and contributions to conferences
  http://www.obs.coe.int/events

The Observatory also makes available free-access databases, including:

IRIS Merlin
Database on legal information relevant to the audiovisual sector in Europe
http://merlin.obs.coe.int/

LUMIERE
Database on admissions to films released in Europe
http://lumiere.obs.coe.int

MAVISE
Database on TV and on-demand audiovisual services and companies in Europe
http://mavise.obs.coe.int

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IRIS *Special*

New Forms of Commercial Communications in a Converged Audiovisual Sector

Who's afraid of the big bad data? The face of advertising has changed forever. "Commercial communications" (as they are now known) now exist in an increasingly converged media universe. As a result, the lines between real content and advertising are increasingly unclear. Furthermore, "big data" giving precise details about our needs and behaviour as consumers is stored and exchanged as currency so that advertisers can target us ever more precisely with their message. This IRIS *Special* publication focuses on new forms of commercial communications in a converged audiovisual sector.

IRIS *Special* opens with a chapter by Conor Murray of the Association of television and radio sales houses (EGTA). Murray delivers a very useful overview of emerging advertising techniques and the resulting new funding models open to television broadcasters. He underlines the importance of second screen applications watched on mobile devices during television viewing. Such multi-screen behaviour creates new advertising business models and the accompanying need for efficient regulation.

The Observatory's Analyst, Christian Grece, then provides an introduction to the "Ecosystem" of European online display advertising, or the competition in the advertising world for the "eyeballs" of customers watching content on line. He underlines the importance of big data in mapping advertising as precisely as possible onto known consumer behaviour with the resulting privacy concerns which call out for efficient legislation.

Mark Cole of the University of Luxembourg then walks us through the various different European legal texts which have a bearing on or regulate in some way this increasingly complex advertising landscape. His analysis of the various EU directives (AVMSD, e-commerce, data protection or e-privacy to name but a few) reveals that the legal framework for commercial communication in Europe is currently so fragmented that grey areas appear and it is very difficult to get an overall view of the legal context.

Having described the new challenges raised for legislators by the new forms of commercial communication in his chapter, Ross Biggam of ACT argues in favour of future-oriented regulation (whether a revised AVMSD or a wider reaching directive) based on principles such as editorial responsibility, the protection of minor or indeed ethical standards.

The thorny issue of data protection for convergent media is evoked by Heiko Zysk of ProSiebenSat. 1 Media AG. Companies, users and legislators are all faced with the challenge of using big data responsibly with full respect of individual privacy. He evokes the possible solutions of a quality label of responsibility for companies making use of consumers' big data. Zysk also pleads the case for adapted legislative provisions but also co- and self-regulatory standards to make data and its use more transparent.

A very in depth analysis of the e-privacy directive (current regulation on the tracking and processing of personal data) is provided by Frederik Zuiderveen Borgesius of the IViR.

The final part of this report looks at whether or not the current legal framework is ready for an increasingly converged advertising market. Anne Deltour of the European Commission, Cornelia Kutterer of Microsoft and Malcolm Philips of the Committee of Advertising Practice also look at the possible role of both industry and self and co-regulatory initiatives.

A more than timely report given that the European Commission has announced a review of the AVMSD in 2015. Furthermore, Data Protection Regulation in Europe is still in a state of flux as proposed regulation is still being discussed in Brussels and it seems clear that a solution will not be reached in 2015.

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