Graduated regulation of ‘regulatable’ content and the European Audiovisual Media Services Directive
One small step for the industry and one giant leap for the legislator?

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Abstract

The aim of this article is to contribute to the ongoing discussions relating to the modernisation of the EU regulatory framework for the broadcasting sector. This revision would entail the extension of existing content regulations in the Television without Frontiers Directive to new platforms, including next generation broadband. In a first chapter (theoretical framework), the article will test the validity of the arguments traditionally invoked to justify content regulation (are they still valid in the converging info-communications sector and if so, can they justify the expansion of content regulation beyond traditional broadcasting?). Second, it will critically analyse the Commission’s legislative proposal for a new Audiovisual Media Services Directive and assess its impact on new content providers, such as mobile operators and ISP’s. It ends with some critical and sometimes provocative thoughts that intend to stimulate the debate on Europe’s current strategy for a convergent content regulation.

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Keywords: Content regulation; Audiovisual media; Technology

1. Introduction

Next generation broadband (or networks, NGN) – an umbrella term for a certain kind of emerging computer network architectures and technologies, generally describing networks running over the IP protocol that natively encompass data and voice communications, as well as additional media such as video – is expected to boost the convergence trend in networks and services. Even though today’s regulatory frameworks have already been shaped considerably by recent technological and economic evolutions – such as digitisation, liberalisation and convergence of the telecommunications, broadcasting and IT sectors – it seems unlikely that they are sufficiently future-proof to meet the challenges of NGN.

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0736-5853/$ - see front matter © 2007 Published by Elsevier Ltd.
doi:10.1016/j.tele.2007.01.004
In December 2005, the European Commission published its long-awaited proposal for an “Audiovisual Media Services Directive” (hereinafter: AVMS Directive) that will modernise the current Television without Frontiers Directive (hereinafter: TVWF Directive). If this proposal is adopted in its current form, it may have substantial implications for fixed and mobile telecommunications operators and broadband providers. It would introduce a ‘horizontal’ and ‘technology-neutral’ approach to content regulation, imposing obligations on all audiovisual media services, irrespective of the underlying platform or distribution means. This implies that telco’s and ISP’s, offering media services over their networks and platforms (including next generation broadband), will be equally subject to (a basic tier of) content requirements.

The Commission refers to the technological and market developments to justify its new policy. It points to the fact that traditional broadcasters have to compete increasingly with other linear services on other platforms and non-linear (on-demand) services that offer the same or similar audiovisual media content, while being subject to a different regulatory environment (the latter usually enjoying “regulatory holidays” in that regard). According to the Commission, this creates an un-level playing field in the way content is delivered.

In its legislative proposal, the Commission puts forward notions such as “horizontal approach”, “technology-neutrality”, “graduated regulation of ‘regulatable’ content” and “co- and self-regulation” as ‘the magic potion’ for a consistent and future-proof regulatory framework for audiovisual content services. This view, however, is not shared by all of the Member States, nor is it supported by an important part of the industry itself. The proposed AVMS Directive is highly contested by the new media players – in the online, broadband and mobile sectors – who fear that the extension of the scope of the TVWF Directive to cover not just television services but also new media (including the Internet and mobile telephone networks) could dampen the growth of these important and rapidly developing areas. This view is especially endorsed by the UK, taking the position that the proposed directive will lead to ‘over-regulation’, pose a threat to the take-up of broadband services and hamper the EU’s competitiveness. Some media scholars have also expressed concerns that the “extension of the scope of some rather burdensome part of the Television Directive to the Internet – as the draft new directive of the European Commission suggests in far too vague terms that would leave content providers and users uncertain about whether or not their various activities are regulated by this new directive – would be an unjustifiable restriction on freedom of speech and freedom of information” (Budapest Declaration, 2006).

This article will focus on this ongoing modernisation of the EU regulatory framework for audiovisual broadcasting, hence on the content perspective of NGN.¹

In a first chapter, it will test the validity of the arguments traditionally invoked to justify content regulation (are they still valid in the converging info-communications sector and if so, can they justify the expansion of content regulation beyond traditional broadcasting?). Second, it will analyse the Commission’s proposal of December 2005 for an “Audiovisual Media Services Directive” and assess its impact on new content providers, such as mobile operators and ISP’s. Finally, it will add some critical notes in order to stimulate the debate on Europe’s current strategy for a convergent content regulation.

2. Theoretical framework²

2.1. Validity of policy goals in the converging media environment: why regulate?

2.1.1. Overall impact of convergence on legal frameworks

It has been mentioned in the introduction that the convergence trend already led to a profound revision of existing legal frameworks: the ‘old’ vertical and technology-specific regulatory order, based on the distinction

¹ Please note that, in parallel, a revision is taking place at the level of the Council of Europe of the European Convention on Transfrontier Television (ECTT, 5 May 1989, ETS No. 132, amended by Protocol ETS No. 171; http://conventions.coe.int/treaty/en/Treaties/Html/132.htm). The modernisation of this instrument is likely to follow the outcome of the revision process at EU level. In the context of the ECTT, however, reference should be made of the interesting Discussion document prepared by the Delegate of Poland (Council of Europe, 2005); see also Arino (2005).

² This chapter is based on past and ongoing Ph.D. research in ICRI in the area of legal implications of convergence in the info-communications sector, e.g. Uyttendaele (2002), Valcke (2004); Lievens, Legal instruments for content regulation in the digital media (ongoing).
between two initially separated sectors ‘telecommunications’ and ‘broadcasting’, was gradually rendered obso-
lete and ineffective by the technological and market evolutions of the last two decades. On the basis of the
communications value chain, scholars developed a ‘horizontal’ or ‘layered’ model that could serve as a starting
point for future regulation of the info-communications sectors (Squire, Sanders & Dempsey, 1998). This ‘hor-
izontal’ model implies that legal rules are no longer separated along the lines of the different sectors (broad-
casting versus telecommunications regulation), but on the basis of the distinction between content and
transmission (see Fig. 1).

This shift from a vertical to a horizontal approach can be illustrated by the 2002 directives on electronic
communications networks and services.3 These directives apply to all kinds of networks – fixed and mobile
telecommunications networks, terrestrial or cable or satellite broadcasting networks, IP networks, even
electricity networks – that are used for the transmission of electronic communications signals, irrespective
of their technical structure or predominant use. Hence, the scope of application of these directives can be
described as the ‘transmission layer’. As a counterpart of this transmission regulation in the electronic
communications directives, the EU legislator is currently drafting (in the context of the revision of the
TVWF Directive) new content rules applying to all electronic media, hence, covering the whole ‘content
layer’.

The call for a horizontal, technologically-neutral approach to content regulation invoked the fundamen-
tal question whether this would bring about a deregulation of the traditional broadcasting sector or rather
the inverse, an extension of the scope of traditional content rules to the new media services. The answer to
this question (which remains valid today4) requires a legal analysis of the fundamental policy goals under-
pinning traditional broadcasting legislation and their remaining validity in the converging media
environment.

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4 In our view, the option of deregulation was insufficiently explored in the context of the revision of the TVWF Directive (resulting in the
following meagre justification in recital 3 of the proposed AVMS Directive: “The importance of audiovisual media services for societies,
democracy and culture justifies that specific rules apply to these services.”).
2.1.2. Traditional justification of broadcasting regulation

Traditionally, broadcasting rules have aimed at achieving a variety of policy goals, the most important of which can be summarised as follows:

- On the cultural level: protection of free speech, involving three elements:
  - creation of the necessary conditions for effective realisation of free speech,
  - combating illegal and harmful speech,
  - guaranteeing diversity and pluralism (public’s right to information to a wide diversity of information originating from a plurality of sources).
- In the social sphere: preservation and promotion of democracy (which is closely linked to the previous goal);
- On the economic level: remedying market failures (for instance, ensuring the offer of content that would not be produced under normal market conditions) and prevention of competition distortion (for instance, access obligations, media concentration rules).

Several reasons have been invoked to explain why these policy goals called for special action in the broadcasting sphere and why it was justified to subject television and radio broadcasting to extensive, both negative and positive (and largely market-overruling) sector-specific regulation:

- "Spectrum scarcity": the need to create a system guaranteeing a well-organised use of a rare public resource (i.e., frequencies), in the general interest, and avoiding monopolistic or oligopolistic control over the airwaves by private broadcasting corporations;
- "Special impact on the formation of opinion", as well as on lifestyles, world outlooks, behaviour and consumption patterns, etc.;
- "Spread effect" or "multiplication effect" that is achieved by no other (traditional) media: television is addressed to and received by an undefined number of viewers, reaching literally millions of viewers at a time (Grünwald, 2003, pp. 4–5);
- "Simultaneity of impact": not only the scale of impact was a decisive factor, but also the fact that content impacted on (and influenced) large numbers of people at the same time (potentially with great effectiveness);
- "Suggestive power": the intrusiveness and persuasiveness of the purposefully designed continuous programming of moving images and sound, having a more intense and authentic effect on the viewer than written or oral information sources;
- "Unilateral control": the decision about what to see and when to see it is vested with the broadcaster; content is received in real time, as it is being disseminated; the viewers’ role is limited to be a passive consumer of the information he is offered;
- "Particular immediacy in the provision of content", especially in the case of live broadcasts.

2.1.3. Policy goals and core values: unchallenged by technology?

Some of these reasons either lost relevance over time, or lost their specific link with radio and television broadcasting. For instance:

- Scale of impact: “Reaching literally millions of viewers at a time” is not always the case, given the different audience and market shares of nation-wide, regional, local or even community stations (which may have minuscule audiences). A television programme service subject to traditional content regulation could easily have a much smaller audience than the same service delivered via webcasting on the Internet.
- Simultaneity of impact: With the introduction of time-shifting technologies (like PVR’s), making asynchronous communication possible, the impact even of traditional radio and television programmes is now more extended over time.
- Multiplication of sources of information, entertainment and other content: Compared to the days of (the public) broadcasting monopoly, the impact of any one programme item, however suggestive and powerful, must necessarily be much less, given that audiences have access to many more sources of information and representations of reality.
Logically, one would expect this to result in (a certain degree of) deregulation of the broadcasting sector. Still, there has not been a commensurate change of the broadcasting regulatory regime. To the contrary, the trend is more towards expansion of the scope of content rules to new, interactive media services. This can be explained as follows:

- The core principles, public policy objectives and general interest considerations which have underpinned the traditional regulatory order have lost none of their validity. Indeed, the role of free speech does not change because it is applied to different media. Free speech objectives are carrier-independent, and therefore, should be fully applicable to the new media services as well (Uyttendaele, 2002, Chapter II; Uyttendaele and Dumortier, 1998, pp. 906).

- With the advent of the Internet, it was expected to expand the freedom of speech worldwide. Indeed, users could become their own editors, disseminate information and give their opinions on a global scale. Free expression, distribution and reception of information never seemed so complete. However, reality turned out to be slightly different. Unequal access to the new info-communication highways, traditional media tycoons regaining control over the new media (or the creation of new media giants) and the increasing amount of illegal and harmful content flourishing on the internet call for continuous action to protect the fundamental goals outlined before (Uyttendaele, 1997).

But even if the underlying policy goals remain valid in the converging media environment, this does not automatically bring us to the conclusion that existing rules can be left unaltered – to the contrary, new technologies and developments ask for the deployment of new regulatory tools. The objectives may remain valid; the means to achieve them have to be adapted to the new media environment, as will be briefly explained in the next paragraphs.

2.2. Alternative regulatory instruments: regulate how?

The traditional way of achieving policy goals in audiovisual media was through state regulations that were characterized by:

- their limited geographical scope (national);
- their focus on regulating one-way mass communication (broadcaster to public);
- their intrinsic link with the underlying technology;
- their unilateral enactment (by the legislator) and enforcement (by the media regulator) – in contrast with methods as self- or co-regulation (infra).

Their enforcement on global info-communications networks (such as the Internet) can at least be called problematic. At the same time, due to its highly intrusive nature, traditional state regulation does not seem the most appropriate type of intervention for new media services allowing more user-control and – participation.

Hence, the reasons why alternative regulatory instruments started to attract the attention of researchers and policymakers are (at least) two-fold:

- First, modern ICTs and new communication services often do not – for a variety of reasons (including for example jurisdiction) – lend themselves to traditional regulation enforced by a state body or regulatory authority; thus, combating illegal and harmful content requires the co-operation and involvement of all stakeholders.
- Second, changes in society and the decreasing role played by the State have to be taken into account. Enforcing regulation by state law to support objectives which are in the public interest has become more and more ineffective. For one thing, it is becoming more and more difficult to attain these goals and, for another, the undesirable side-effects of regulation (i.e., stopping the progress of the specific branch of industry) are able to cancel out the benefits of regulation.
Self- and co-regulation are often referred to as such alternative regulatory instruments. In recent years, awareness has also grown of the possibilities offered by technology itself to implement regulatory policies (following Lessig’s adage “code is law”; Lessig, 1999). It falls outside the scope of this article to discuss these techniques in-depth. We will only briefly come back to the topic when analysing the proposed AVMS Directive (putting more emphasis on co-regulation), but interested readers can be referred to the contribution of Eva Lievens in this issue of Telematics and Informatics on “Protecting children in the new media environment: Rising to the regulatory challenge?”.

2.3. Scope of future content regulation: regulate what?

2.3.1. Horizontal and technology-neutral content regulation

Applying the same logic of the current ‘horizontal’ and ‘technology-neutral’ framework (supra) for electronic communications networks and services (transmission regulation) to the content layer, this would – at first sight – have to result in a single framework for content services covering not just traditional broadcasting, but all electronic media (perhaps also the print media), regardless of the precise nature of the technology used to distribute content.

As to whether this should imply a deregulation of the traditionally heavily regulated broadcasting sector or rather an expansion of the audiovisual regulation to the previously ‘untouched’ (or slightly touched) online and print media, there are as many opinions as stakeholders. In either case, it would mean revolution to change dramatically the widely diverging ‘legacy’ frameworks for broadcasting and print media.

Moreover, it is still generally perceived that regulating all content in a similar way would not be justified (infringing the proportionality principle underlying free speech protection). An often preferred (at least by the EU legislator, as we will see in the next chapter) ‘compromise’ solution is found in adding some ‘shades’ to the regulation, resulting in a ‘graduated’ regulation of ‘regulatable’ content.

2.3.2. Criteria for ‘regulatable’ content

In legal definitions, case law and literature, several criteria have been put forward to distinguish ‘regulatable’ from ‘non-regulatable’ content, such as:

• provision by a ‘medium’, i.e., in most cases by an organisation devoted to providing on a professional basis audiovisual and information content or service(s),

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5 Simplifying for the ease of understanding, the notion ‘self-regulation’ can be described as follows: different players agree to rules regulating their activities and they define and enact codes of conduct. We confine it to initiatives without any state involvement (for instance voluntary agreements between industry partners), whereas the concept ‘co-regulation’ (also known as “regulated self-regulation” or “audited self-regulation”) will be reserved for schemes entailing (a degree of) state involvement (for instance, referring to situations where self-regulation is supported by traditional regulatory instruments: either the state structures the legal framework to enable self-regulation, or intervenes if the objectives are not met by self-regulation or if there are undesirable side-effects). Please note that the exact scope of these notions can differ widely throughout the EU. For an overview of definitions see: Hans-Bredow-Institut für Medienforschung & EMR (2006) and Dumortier et al. (2006).

6 Think about Digital Rights Management (DRM) systems in the area of copyright, or the so-called “privacy enhancing technologies” (PETs) in the area of personal data protection.

7 As technological developments and convergence are progressively calling into question the distinction made between broadcasting and new interactive audiovisual services founded on a technical criterion (i.e., “transmission” as a justification for traditional content regulation; cf. Discussion Document for the revision of the European Convention on Transfrontier Television (T-TT(2005)003)).

8 “Regulatable content” is a neologism, used for want of a better term (cf. “licensable service”); see Discussion Document concerning the scope of the ECTT, pp. 4.

9 Such as the definition of ‘television broadcasting’ in Art. 1, lit. a TVWF Directive (infra).


11 This section is a short summary of the corresponding part in the original paper we presented at the 2nd International CICT Conference ‘Next Generation Broadband – Content and user perspectives’, 1–2 December 2005, Copenhagen; for more details, see the full paper on www.icri.be.
• the ‘publicness’ of the service, which is usually determined by the intention of the sender, not by the actual amount of viewers or listeners; or in other words: its (potential for a) broad effect,
• its public relevance (i.e., it purports to represent reality and/or raises issues of importance for society) and/or its influence on public opinion,
• the simultaneity of reception (not provided at individual request),
• the editorial design/structural sequence of content (delivery in linear mode), preventing the receiver from exercising control over it (e.g., by influencing the sequence and structure of the content being received, selecting elements of content, etc., viewer is a passive receiver),
• the presentation’s suggestive power/closeness to reality.

Although convergent digital communication changes many features of traditional mass communication, availability to the general public, the existence of journalistic/editorial content capable of influencing the public, and the degree of viewer choice and control have been described as remaining important triggers for content regulation.\footnote{At the same time, we have to acknowledge that these criteria are subject to variation, depending on the particular method of distributing content; cf. Grünwald (2003), 13–15. This suggests the need for further research on how to quantify the extent to which certain criteria need to be present, in order to trigger the application of only a basic tier of rules or of the full set.}

Hence, efforts to substantiate the regulation of the new services go in the direction of proposing forms of graduated regulation based on such criteria (as is the case under the proposed AVMS Directive, infra).

2.3.3. Graduated regulation

Distinguishing ‘regulatable’ from ‘non-regulatable’ content is only a first step in drawing a blueprint for a consistent and future-proof regulatory framework for content services. It remains to be decided which rules should be applied to all or only to some services (or which rules could be abandoned). Expanding the scope of existing broadcasting legislations as such to all audiovisual services entails the risk of ‘overregulation’, subjecting emerging sectors to a regulatory burden that is presumed disproportionate (as long as the new services do not display the same key features as traditional broadcasting services justifying the imposition of the ‘full set’ of content rules). It is in this context that the notion of ‘graduated regulation of regulatable content’ comes in.

‘Graduated regulation’ means that different levels of regulation, and levels of detail in regulatory requirements, will apply to different electronic media. According to this view (which has to a certain extent been implemented in Germany, see Fig. 2), there could be a graduated approach to content regulation, providing
a very broad spectrum of content control from an extremely light touch for most services to a more rigorous approach for mainstream free-to-air TV networks (see Fig. 3 for an example).

In the next chapter, we will further explore these concepts of “horizontal approach”, “graduated regulation of regulatable content”, “co- and self-regulation”, introduced by the Commission in its legislative AVMS proposal as ‘the magic potion’ for a consistent and future-proof regulatory framework for audiovisual content services.

3. EU proposals for convergent content regulation

3.1. Background: current television without frontiers directive

The current TVWF Directive provides the main instrument for regulating audiovisual content in the EU. It was enacted in October 1989 and amended in 1997. Designed to remove barriers to interstate trade in TV services, it established a minimum set of rules for TV programmes broadcast within the EU (leaving room for Member states to apply stricter rules to broadcasters under their own jurisdiction). It harmonises national legislations in the following areas (Aubry, 2000):

- Jurisdiction: the TVWF Directive implements the country of origin-principle, implying that the transmitting Member State must control broadcasters falling under its jurisdiction, receiving Member States cannot exercise a second control (Art. 2 and 2a);
- Events of major importance: access of the public to designated events of national importance on free television may be mandated by Member States (Art. 3a);
- Cultural quota/promotion of production and distribution of European works: excluding news, special events, games, advertising and teletext, broadcasters should transmit more than 50% of EU works and more than 10% of works coming from independent producers (Art. 4 and 5);
- Rules on television advertising, teleshopping and sponsorship; including:
  - advertising and teleshopping should be separately identified; surreptitious or subliminal advertising is banned (Art. 10),
  - limits on when and how frequently advertisements and teleshopping spots can be inserted in programmes with a minimum of 20 minutes between advertisements (Art. 11),
  - advertisements and teleshopping spots should not exceed 15% of daily transmission time or 20% of transmission time in any 1 h (Art. 18),
  - the duration and frequency of teleshopping windows is restricted to 15 min and eight windows respectively (Art. 18a),
  - advertising and teleshopping must not prejudice respect for human dignity; discriminate on grounds of race, sex, or nationality; or encourage behaviour prejudicial to health, safety or the protection of the environment (Art. 12),
  - advertisements and teleshopping spots for tobacco products and prescription drugs are banned (Art. 13 and 14),
- restrictions on advertising and teleshopping for alcoholic beverages (Art. 15) and to protect children (Art. 16),

![Figure 3. Example of graduated regulation. Source: BBC Response to the EU Green Paper “The Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications for Regulation”, 1998.](image-url)
o restrictions on sponsorship with a ban on sponsorship by tobacco or drug companies, and a ban on sponsorship of news and current affairs programmes; prohibition of influencing of the content of sponsored television programmes by the sponsor; clear identification of sponsored programmes (Art. 17).

- Protection of minors: broadcasters should not transmit programmes which might seriously affect the well being of children (in absolute terms if the programmes contain pornography or gratuitous violence; in all other cases, they cannot transmit harmful programmes, except where it is ensured, through the time of the broadcast (the so-called “watershed”) or through any technical measure, that minors in the transmission area will not normally hear or see such broadcasts; Art. 22);
- Respect for human dignity: broadcasts should not contain any incitement to hatred on grounds of race, sex, religion or nationality (Art. 22a);
- Right of reply: anyone defamed by a TV programme should have a right to reply (Art. 23).

The directive applies to “television broadcasting”, defined by Art. 1, lit. (a) as “the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services; [emphasis added by authors].

In its “Mediakabel”-judgment of 2 June 2005, the European Court of Justice (ECJ) ruled that “television broadcasting […] consists of the initial transmission of television programmes intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously. The manner in which the images are transmitted is not a determining element in that assessment.” [emphasis added by authors].

Consequently, even though the legal definition and the case law both recognise that television broadcasting can come over various platforms and that the underlying medium is not a decisive factor in the legal qualification of a service, uncertainty remains about the extent to which the existing TVWF Directive covers new audiovisual content services (AVC) or even conventional TV services offered via new channels (such as mobile platforms, IPTV, NGN, etc.). In some countries the directive is interpreted in a way which excludes IPTV services; in others it is interpreted in a manner which includes them and, under certain interpretations, includes other new AVC services as well. Such uncertainties are not good for investment and market development.

In any case, the current notion of television broadcasting does not cover many of the new media services that have interactive features, like video-on-demand, pod- and vodcasting and all other content services offered at individual request or where the same images are not transmitted simultaneously to the public. They are considered to be “information society services”, enjoying a light touch regime harmonised by the E-Commerce Directive of 2000.

This may result in an unfair situation, since traditional and on-demand services are increasingly competing for the same media consumer and are fishing in the same ‘advertising pool’. According to the Commission, the current ‘regulatory gap’ between these two types of AVC creates an un-level playing field in the way content is delivered, necessitating a profound modification of the EU legal framework for broadcasting (Rossnagel, 2005, pp. 35–52).

3.2. Audiovisual media services directive

Following a lengthy preparatory process, involving consultations with stakeholders, Member States and national experts, the Commission published its legislative proposal for a modernised TVWF Directive (to be renamed “Audiovisual Media Services Directive”) on 13 December 2005 (supra). This proposal is analysed in the remainder of this chapter. It should be noted that, at the time of finalising this article, the text of the Commission was still intensely debated in Council working groups and Parliamentary committees. We would like

to draw the reader’s attention to the fact that, as a result of these discussions, definitions might still be changed, provisions altered/withdrawn/added, etc.

The main changes proposed, though, have become quite clear by now, and involve a relaxation of advertising rules and the extension of the scope of application of the directive to TV-like services. The concepts discussed in the previous chapter will act as a starting point for our analysis of the proposed AVMS Directive:

- “horizontal approach”,
- “technology/platform neutrality”,
- “graduated regulation”,
- “co-regulation”.

3.2.1. Horizontal approach

The AVMS Directive would cover all “audiovisual media services”, described as:

“services as defined by Articles 49 and 50 of the Treaty the principal purpose of which is the provision 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 [Framework Directive]”

Hence, in terms of the so-called horizontal layered model of communications (supra), the proposed directive intends to regulate the whole layer of content services (in contrast with the electronic communications directives that regulate the transmission layer).

The new concept of “audiovisual media services” would include non-linear, i.e., on demand, audiovisual services, such as video-on-demand or TV news reports on demand (see Fig. 4). It follows from the definition, though, that some activities or areas will still fall outside the scope of the directive, for example:

- although the proposed directive would cover all audiovisual mass-media services, whether scheduled or on-demand, its scope would remain limited to services as defined by the Treaty and therefore cover only

<table>
<thead>
<tr>
<th>Which services does the proposal cover and which not?</th>
<th>Audiovisual media service</th>
<th>Other services not covered by the proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Film, telefilms, serials on demand</td>
<td>X</td>
<td></td>
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<tr>
<td>Sport events on demand</td>
<td>X</td>
<td></td>
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<tr>
<td>Entertainment shows on demand</td>
<td>X</td>
<td></td>
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<tr>
<td>Reality shows on demand</td>
<td>X</td>
<td></td>
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<tr>
<td>Video reports of concerts and live arts performances on demand</td>
<td>X</td>
<td></td>
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<tr>
<td>TV news reports on demand</td>
<td>X</td>
<td></td>
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<tr>
<td>Advertising - other than text and still images - delivered in connection with on demand services mentioned above</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Advertising – pop-up clips other than text and still images – not delivered in connection with on demand services mentioned above</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Video clips inserted in web-sites when the main purpose is not the delivery of audiovisual content but to deliver information on the activities (commercial and non commercial) of the site owner</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Animated images inserted on press (newspapers, periodicals, agencies) web-sites – if of ancillary nature</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Blogs for non-commercial purposes</td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

economic activities (including those of public service enterprises); hence non-economic activities, such as personal websites or non-commercial blogs would be excluded;

- it would cover mass media in their function to inform, entertain and educate, but exclude any form of private correspondence, like chat services or e-mails sent to a limited number of recipients;
- the definition also excludes all services the principal purpose of which is not to distribute audiovisual content; even where such services contain some audiovisual content – in an ancillary manner and provided that the audiovisual content is merely incidental to the service – they will fall outside the scope of the proposed directive (examples would be websites of travel agents or car manufacturers containing animated graphical elements, small advertising spots or information related to a product or non-audiovisual service);
- online editions of newspapers or magazines, radio services are not the target of the proposal (recital 13);
- the notion of audiovisual comprises moving images with or without sound, therefore it includes silent films, but does not comprise audio transmission or radio.\(^\text{14}\)

3.2.2. Technology neutrality

Common minimum rules would apply to all audiovisual media services, irrespective of the transmission platform or the technology used. To be qualified as audiovisual media service, it is irrelevant whether the service is delivered via satellite, mobile networks, CATV, ADSL or VDSL platforms, FTTH, Internet, NGN, etc. In that sense, the directive is “technology or platform neutral”.

3.2.3. Graduated regulation

Although the new directive would cover both TV and TV-like services, this does not imply that identical rules will govern the various types of services. The proposal distinguishes between “linear” services and “non-linear” ones. The first are services providing a linear schedule of programmes the order of which the viewer cannot change, hence pushing content to viewers; examples are conventional television services (whatever the mode of delivery), near video-on-demand, but also web casting and streaming, or linear programmes offered via mobile phones. The latter are defined as “audiovisual media services where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider”. This category covers on-demand services where users/viewers are able to choose the content they wish at any time; it includes examples such as video-on-demand, web based news services, downloads of TV programmes, or other content services which the viewer pulls from a network (again, whatever the delivery platform).\(^\text{15}\)

Non-linear services would only be subject to a basic set of minimum principles, e.g., to protect minors, prevent incitement to racial hatred and outlaw surreptitious advertising (infra). An additional tier of rules, derived from those in the current TVWF Directive, but modernised and relaxed, would apply to the former category of linear services, still referred to as “television broadcasting” and defined as “linear audiovisual media services where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule”.

The Commission justifies (in recital 28 of the proposed directive) this “two-tiered approach” or “graduated regulation” by relying on the different degree of choice and control of users (larger in the case of on-demand services) and of the service’s impact on society (considered larger in the case of linear services).

3.2.4. Co-regulation

Art. 3, al. 3 of the proposed directive explicitly refers to co-regulation as an appropriate regulatory approach for Member States when implementing the rules at national level:

\(^{14}\) Although the European Commission takes the position that radio should not be covered by the extension, it is possible that the European Parliament will argue that radio services, and especially those provided over TV sets, DAB receivers and mobile handsets where radio is linked to visual images, should be included within the scope of the new Directive.

\(^{15}\) Discussions during the Liverpool conference demonstrated that there is no agreement around the detail of the possible linear/non-linear split; cf. Final report of the working group 1: Rules applicable to audio-visual content services, http://europa.eu.int/comm/avpolicy/revision-tvfw2005/docs/liverpool-wg1-en.pdf. It is unlikely that the clarification given in the considerations of the proposal is sufficient to exclude future discussions.
“Member States shall encourage co-regulatory regimes in the fields coordinated by this Directive. These regimes shall be such that they are broadly accepted by the main stakeholders and provide for effective enforcement.” (See also recital 25)

As mentioned before, awareness has grown in recent years of the advantages of co-regulation (with the State endorsing and enforcing rules created bottom up by the sector) as an alternative instrument to traditional state legislation (in terms of flexibility, effective adoption, etc.).

4. Impact on traditional and new media service providers

Having analysed what type of media services are envisaged by the proposed AVMS Directive, we will now turn to the providers themselves: what is the decisive factor in determining who has to comply with the rules? The answer is relatively simple: as is the case under the current TVWF Directive, it will be the actor’s editorial responsibility that triggers its responsibility under the new rules. The proposal introduces the notion of “media service provider”, i.e., “the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.” In other words, whether your roots lie in the telecommunications area or broadcasting sector, whether you are a fixed network provider, a mobile operator or an ISP, from the moment you are responsible for the selection of the content and its presentation and organisation, you will be considered as media service provider.

According to the Commission’s impact assessment,\textsuperscript{16} the proposed new framework will only bring about positive or neutral effects for new media service providers, such as ISP’s, mobile operators and telco’s. In contrast herewith, the impact assessment prepared by Indepen, Ovum and fathom at Ofcom’s request\textsuperscript{17} predicts that the costs of extending content regulations to emerging markets – such as VOD, mobile content services, video blogs and online services – are likely to outweigh the net benefits. The latter study also points to the risk of greater concentration of market power in the hands of already large market players, since smaller ones (SMEs and sole traders) may not be able to absorb very high regulatory costs (which, in their view, would imply losing one of the key benefits of the new digital economy). Indirect costs arising from regulatory uncertainty could also have a chilling effect on the online gaming, content hosting and online news services, leading to foregone or delayed investment (slowing down broadband roll out), reducing competitiveness and encouraging relocation to third countries.\textsuperscript{18}

It falls outside the scope of this article to provide a detailed analysis of pros and cons of the new rules for new media service providers. Taking an objective look at the various rules that will apply to them might already provide a first indication of the impact of the new directive. As mentioned before, providers of non-linear services will only be subject to a basic tier of rules, which contains the following obligations:

- Transparency and information obligation (Art. 3c): media service providers should render easily, directly and permanently accessible the necessary information on the media service provider who has the editorial responsibility for the content (its name, geographic address, contact details such as electronic mail address or website and where applicable, the competent regulatory authority);
- Protection of minors and prohibition of incitement to hatred (Art. 3d and e): Members States should take ‘appropriate measures’ to ensure that audiovisual media services do not prejudice these basic objectives of general interest, but the recitals clarify that these measures must be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union and that these provisions do not require prior control (recital 33);

\textsuperscript{17} Available from: www.ofcom.gov.uk.
\textsuperscript{18} Not surprisingly, the UK is (one of the few Member States) heavily opposed to extending the scope of the TVWF Directive (see, e.g., Espiner, 2006).
• Cultural diversity (Art. 3f): Member States should ensure that media service providers promote, “where practicable and by appropriate means”, access to European works (as non-linear audiovisual media services have the potential to partially substitute linear services; they should in that respect continuously and efficiently promote the distribution and production of European works);

• Commercial communications (Art. 3g): audiovisual commercial communications should be clearly identifiable as such and respect minimum qualitative rules (such as prohibition of discrimination or of being offensive to religious or political beliefs, protection of minors, etc.).

Not only are the aforementioned provisions rules that already apply to non-linear media services in the large majority of the Member States – either by virtue of general criminal, advertising and consumer protection laws, or by virtue of specific regulations applying to on-demand services\(^\text{19}\) – it is also hard to believe that it would be very difficult or costly to comply with these obligations. The new directive does not intend to introduce “red tape” nor to “regulate the Internet”, but to protect essential values that are commonly accepted throughout the EU, such as the prevention of child-pornography, racial hatred and clandestine advertising on the new media (Reding, 2005). Harmonising such essential rules EU-wide will ensure that audiovisual media service suppliers need only comply with the rules of the Member State in which they are established (country of origin-principle), and not with the disparate rules of all the Member States receiving their services. In our view, this represents a major advantage for online and other new media providers.\(^\text{20}\)

For providers of scheduled or linear media services (‘broadcasters’), the new directive intends to make existing rules more flexible for new forms of advertising, such as split-screen, virtual and interactive advertising. Product placement would, for the first time, be explicitly defined and provided with a clear legal framework.

5. Critical comments

5.1. Nil nove sub sole?

We can wonder whether there is really something new in the proposed “Audiovisual Media Services Directive”. Or does it merely regulate what was already regulated?

Of course, the extension of the scope of application seems revolutionary at first sight. A closer look, though, at the ‘basic rules’ to which non-conventional broadcasting services will be made subject, learns us that they merely involve rules that – in our view – were already applicable in most (if not all) EU countries. What is often disregarded in the debate, are the ‘content’ rules contained in general civil and criminal law. Some examples.

Rendering certain information public to your customers is often part of general consumer protection law. Protection of minors and respect for human dignity are rules which belong to the core of public decency rules, the infringement of which is usually criminalised (hence, these rules can be found in national criminal law). “Promoting, where practicable and by appropriate means, access to European works” seems no more than a symbolic provision, difficult to enforce in practice (in Belgium “better regulation” means getting rid of such provisions).

Therefore, we consider the following statement made by Commissioner Reding in her closing speech somehow misleading.

“But let me ask you some questions: who in this room is in favour of child-pornography on the new media? Who stands for the freedom to spread incitement to racial hatred on the new media?”

\(^19\) Impact Assessment of Commission, pp. 15–16.
\(^20\) Note that today non-linear (on-demand) service providers may have to comply with different – and often diverging – national rules applying to the new services. This derives from the fact that the E-Commerce Directive does not deal with measures relating to cultural and linguistic diversity and pluralism and allows the Member States to derogate from the country of origin-principle in view of other public policy objectives. As a result, on-demand audiovisual media services can be subject to different rules on contents delivered in different Member States (e.g., in the context of public decency).
If the intention of the new directive does not go any further than preventing child-pornography and hate speech on the new media, it is our impression that it adds nothing new to the content rules already existing in general civil and criminal law.

Our conclusion: the rules of the game will not (drastically) change for non-traditional broadcasting services. The new directive might seem like a giant leap for the European legislator, in our view it is not more than a small (symbolic) step for the industry.

5.2. Principal purpose?

Second, further guidance may be needed on the exact meaning of “principal purpose” in the definition of audiovisual media service (supra). Undoubtedly, this is a concept that leaves room for interpretation and that will give rise to discussions in practice (look at the example of www.zoomin.tv: is the audiovisual content the principal purpose or merely incidental?). Market actors in the press sector have expressed their concern about their future legal status, as they are increasingly involved in distributing audiovisual content via their websites, mobile phones, etc. Which criteria will be used to determine the point at which their online services have become sufficiently “multimedia” to fall under the scope of the new directive?

5.3. Still waiting for the real convergence, the real technological neutrality . . . ?

Although the legislative proposal pretends to install a comprehensive framework for content regulation at the European level, taking technological neutrality as its leitmotiv, its scope remains limited to electronic audiovisual services. We should ask ourselves whether genuine technological neutrality does not necessarily imply a complete level playing field for online and offline media, for electronic and printed media (supra). Recent studies have indicated a trend (especially among youngsters) towards the substitution of traditional media (including printed media and linear broadcasting services) by their on-demand, interactive counterparts. Technology is looking for converged solutions that will enable the seamless provision of content and information services, detaching these services from the underlying medium. The consumer will subscribe to a certain (for instance) news service and consult that service via the network and/or the device that is most suited for the time of the day or the type of activity performed at that time (consulting the news headlines on his mobile phone when waiting for the bus, watching the news flashes on his PDA in the train, looking at high resolution video streams on his PC at work and enjoying the news service in brilliant colours and surround effect on the LCD screen in the living room during the evening). In the future, newspapers and/or magazines might predominantly be distributed via electronic networks, with consumers downloading their journal every morning and reading it on a flexible screen. New trends and technologies, such as “e-paper”, result in blurring boundaries between electronic and print media, undermining the justification for a different legal treatment of these media. Hence, a comprehensive legal framework, covering all types of media services seems the only logic answer to the continuing convergence of electronic and print media, at least in the long run (as we have mentioned before, it seems highly unlikely that this option is politically feasible in the short term, due the wide divergences in the legacy frameworks for electronic and print media).

Such framework could be based on a comprehensive definition of “media”, regardless of the distribution technology (including paper, DVD’s, etc.) applied in a particular case. For example, Recommendation Rec. (2004) 16 of the Committee of Ministers of the Council of Europe to member States on the right of reply in the new media environment defines the term “medium” as referring “to any means of communication for the periodic dissemination to the public of edited information, whether online or offline, such as newspapers, periodicals, radio, television and web-based news services” (cf. Gibbons (2005), 54).21

21 “In considering how far the scope of the Directive should extent, a crucial implication of digital convergence is that the mode of delivery should become irrelevant to content regulation. If content is to be regulated, it must be justified without reference to the nature of the service that delivers it. Furthermore, since digital content can be highly differentiated, the logic is that any regulation should also be justified without reference to any service in which it is packaged.”
5.4. The citizen in a participatory media culture?

Moreover, Member States should be aware of the rapid growth of “non-professional” media. Citizens themselves are increasingly participating in the dissemination of media contents (towards the public at large or within virtual communities), becoming content creators themselves and aggregating their own music or television channels, spreading news and opinions via weblogs, etc. Collaborative interactivity becomes a key feature of new and emerging audiovisual applications (participatory media), where users become active participants in two- or multi-way tele-presence sessions instead of just being passive consumers. In a genuine iDTV (interactive digital television) setting, the user is no longer a mere ‘receiver’ of audiovisual contents, but also a ‘sender’ (we can think of the “MyTV” and “MythTV” products that by now have passed their status of ‘myth’). He/she uploads pictures, images, sounds, text messages, in order to share this content with people belonging to the same ‘virtual community’ (which can be as narrow as his/her own family, but also as broad as all people – from all over the world – having expressed their interest in the same type of music or books, the same hobby, the same tourist place, the same environmental organisation, etc.). In short, people become their own content creator on virtual individual networks, aggregating their own music or television channels whether or not with the fruits of their own creativity and either for free, or to make a living.

As the EU’s powers based on internal market rules are confined to regulating economic activities, it is up to the Member States to take the occasion of implementing the new directive and reflect on the legal implications of citizen journalism and other forms of collaborative interactivity. They will – sooner or later – be confronted with questions such as whether limiting content rules to professional media is sustainable in the long run, how to cope with political parties launching their own TV channel, etc. Careful and profound analysis is needed, though, as intervention should always be tested against the core principle underlying any form of content regulation: freedom of expression (dictating the golden rule ‘freedom if possible, restrictions if necessary’).

5.5. Content distributors: the forgotten generation?

Finally, we regret the fact that the legislative proposal remains silent about a third category of actors in the communications value chain (i.e., besides the media service editors, who will fall under the new regulatory framework for audiovisual content, on the one hand, and the network operators providing technical transmission services, including conditional access services, who are regulated by the electronic communications directives of 2002, on the other hand): the “content distributors” that deliver the audiovisual media services (usually edited by third parties) to the end-users.

To illustrate the legal relevance of this third category, we can refer to the 2003 Broadcasting Act of the French Community in Belgium, where this type of actors follow a specific regime, including the obligation of a prior notification to the CSA (Conseil Supérieur de l’Audiovisuel, i.e., the media regulator of the French Community; Valcke et al., 2005).

A typical example would be the operator of a digital TV platform or of a PCTV platform, offering packages of channels and services edited by broadcasters, production houses or other media companies. But we can also think of new actors, such as YouTube, MySpace or Google Video, which fulfil the role of a portal, providing a forum for citizens to make personal audiovisual content publicly available and guiding people with a specific profile to content of possible interest. Due to a lack of harmonisation at EU level, discrep-

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22 The legal implications of these and other forms of collaborative interactivity and the phenomenon of ‘prosumers’ (consumers evolving into content producers) are currently being studied by ICRI in the context of the IBBT-project “Virtual Individual Networks” (2006–2009) and the IWT-project “FLEET” (FLEMish E-publishing Trends; 2006–2009); http://www.icri.be.

23 To cite a recent example from the Belgian context: in its judgment of 7 June 2006, the Belgian constitutional court (“Arbitragehof”) ruled that limiting the protection of journalistic sources to professional journalists constitutes an infringement of free speech provisions in the Belgian Constitution and the European Convention on Human Rights (hence, it partially annulled the Belgian Act of 7 April 2005 on the protection of journalistic sources; http://www.ofcomwatch.co.uk/2005/03/belgium-finally-adopts-law-on); Werkers et al. (2006).
ancies exist between liability regimes for this type of actors in the various Member States. Unfortunately, the proposed AVMS Directive does not aim to remedy this situation, as it does not deal with (secondary) liability for illegal or harmful contents (or exemption thereof) in the case of content distributors, nor does it contain any clarification of their obligations with regard to audiovisual contents that is not edited by them but to which they provide access. In our view, this can be perceived as a serious gap in the EU regulatory framework.

Moreover, it cannot be denied that this intermediate category of distributors is crucial to manage problems that might arise from the intrinsic links existing between transmission and content, rendering a complete separation of transmission and content regulation infeasible (and undesired; cf. Helberger (2005), 10–19, in the context of conditional access systems). How will the new European frameworks cope with players that are “in between” these frameworks? Think about search engines, EPG’s, Internet portals or other navigational tools, opening the gate to contents edited by others. The service they are offering is neither an electronic communications service, nor a service “the purpose of which is the delivery of moving images with or without sound to the general public by electronic communications networks”. Nevertheless, they determine to a growing extent which information will reach the end-user, which explains the increasing attention of scholars for this type of services (we can, for instance, think about the growing concern for the hidden manipulation exercised by certain search engines; van Eijk, 2005, 2006).

6. Closing remark

We have passed the times in which traditional radio and television broadcasting services were seen as ‘the usual suspects’ for specific content rules. The current European trend is going in the direction of an expansion of the scope of (some of) these rules (‘a basic tier’) to all electronic audiovisual media services, thereby installing a graduated approach of content regulation.

Designing the regulatory architecture to create such a system of horizontal, technologically-neutral, graduated regulation, however, requires considerable further work, concentrating on:

1. Refining technology-neutral methods of specifying which content delivered by the new technologies should be subject to content regulation;
2. Refining the scope and methods of graduated regulation;
3. Identifying new market players and their involvement in the process of “broadcast-like” communication, to refine the regulatory regime and apply it to the right players;
4. Determining the regulatory architecture capable of extending the scope of existing legal instruments to the new technologies;
5. More extensive introduction of self-regulation and co-regulation into the regulatory regime.

Sufficient material for many more challenging projects, interesting conferences and academic debate, etc. We certainly welcome any comments to this article, in which we deliberately included some provocative thoughts in order to stimulate discussions about “convergent content regulation” in a digital, interactive media environment.

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