

33<sup>rd</sup> EPRA meeting**Plenary session – Content Regulation and new Media:  
Exploring Regulatory Boundaries between Traditional and new Media**

Ohrid, 26-27 May 2011

*Background document by Emmanuelle Machet, EPRA Secretariat<sup>1</sup>***FINAL REVISED PUBLIC VERSION****Introduction**

The extension of the scope from broadcasting services in the Television without Frontiers Directive to 'audiovisual media services' in the AVMS Directive has featured prominently in the agenda of EPRA meetings for several years. At first, papers and presentations aimed at unraveling the complex provisions of the AVMS Directive dealing with scope (EPRA meetings in Dubrovnik and Sofia). Then, the paradigm of EPRA discussions shifted to a more concrete problem-oriented approach. In Dublin, in October 2008, EPRA members were asked, as a kind of practical simulation, to try and classify different types of media services, first under their current framework and second under the new AVMS Directive<sup>2</sup>. The idea was to help identifying services which may challenge the application of existing or emerging legal concepts in practice. At the 30th EPRA Meeting in Dresden in October 2009, on the eve of the deadline for transposing the AVMS, a session looked at how regulators were preparing for the implementation in practice and especially on any practical arrangements that were envisaged by RAs to deal with the widened substantive scope<sup>3</sup>. However, at that time, the snapshot provided was still rather blurry as only a few Member States had transposed the Directive.

Almost two years have now elapsed, and the transposition process is drawing to a close, with the last two EU Member States (Poland and Slovenia) currently finalising the incorporation of the AVMS Directive into their national legal framework.

The plenary session in Ohrid will explore regulatory boundaries between traditional and new media, while the plenary session at the next meeting in October 2011 in Brussels will address content regulation of new media services – featuring prominently protection of minors aspects - and issues of jurisdiction.

This paper will explore the boundaries of audiovisual media services with a specific focus on on-demand media services, and will revolve around three issues.

Firstly, it will look at how RAs follow the market of on-demand media services (ODS), by examining whether notification systems have been put in place or whether RAs conduct monitoring or market surveys of on-demand media services and if tools have been developed for that purpose. Secondly, it will examine whether RAs have produced guidance to ease the practical application of the seven cumulative criteria which underpin the definition of an audiovisual media service as set in Art. 1 (a) of the AVMSD. Thirdly, it will look at issues of implementation and the first experiences of RAs with assessing whether specific services fall within the scope.

This document is based on the responses to a questionnaire prepared and circulated by the EPRA Secretariat. It compiles answers from 27 regulatory authorities: KommAustria (AT), The Communications Regulatory Agency (BA), The Flemish Council for the Media (BE), the CSA of the French Community of Belgium (BE), The Council for Electronic Media (BG), OFCOM/BAKOM (CH), the CRTA (CY), the Council for Radio and TV Broadcasting (CZ), The Director's Conference of the Länder Media Authorities (DE), The Radio and Television Board (DK), The Catalan Audiovisual Council (ES), The FICORA (FI), The Conseil supérieur de l'audiovisuel - CSA (FR), The Ofcom (GB), The National Council for Radio and Television (GR), The Agency for Broadcasting (HR), The Broadcasting Authority of Ireland (IE), The Autorità per le Garanzie nelle Comunicazioni - AGCOM (IT), The Radio and Television Commission of Lithuania (LT), The Conseil National des Programmes (LU), the Commissariaat voor de Media (NL), the Norwegian Media Authority (NO), the National Broadcasting Council - KRRiT (PL), the National Audiovisual Council (RO), The Swedish Broadcasting Authority (SE), The Post and Electronic Communication Agency of the Republic of Slovenia - APEK (SI) and The Council for Broadcasting and Retransmission (SK)<sup>4</sup>.

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<sup>1</sup> **Disclaimer:** *This document has been produced by the EPRA, an informal network of 52 regulatory authorities in the field of broadcasting. It is a background information document aimed to facilitate and stimulate debate at EPRA meetings. It is not a comprehensive overview of the issues, nor does it purport to represent the views or the official position of the EPRA or of any member within the EPRA network.*

<sup>2</sup> EPRA/2008/09, 28th EPRA meeting, Scope of the AVMS Directive: Towards a Common Interpretation of Audiovisual Media Services? [http://www.epra.org/content/english/press/papers/Dublin/AVMS\\_Dublin\\_Plenary\\_paper\\_final.pdf](http://www.epra.org/content/english/press/papers/Dublin/AVMS_Dublin_Plenary_paper_final.pdf)

<sup>3</sup> EPRA/2009/13, 30th EPRA Meeting, AVMS Implementation: Mission Accomplished or Mission Impossible?

[http://www.epra.org/content/english/press/papers/Dresden/Overview\\_transpositionAVMS\\_Dresden\\_final\\_final.pdf](http://www.epra.org/content/english/press/papers/Dresden/Overview_transpositionAVMS_Dresden_final_final.pdf)

<sup>4</sup> The Secretary would like to thank EPRA members for taking the time to answer this complex questionnaire, and Susanne Nikoltchev and Maja Cappello for their very useful comments on a first draft of the questionnaire.

**FIRST PART: Knowing who you deal with**  
***Or how regulators follow the market of on-demand media services (ODS)***

**1.1. ODS: getting to know them – registration/notification requirement?**

While many on-demand media services will be provided by “legacy broadcasters”, some will be offered by new players, especially for services offered on the Internet.

Even if it was not included in the questionnaire, it appears that as a rule non-linear audiovisual media services will not be subject to licensing in the vast majority of countries as they do not use a scarce resource - unless media service providers wish to use terrestrial frequencies (e.g. France). Romania appears to be an exception as it is envisaged that non-linear services would be subject to licensing. In Italy, non-linear services are also subject to an authorisation procedure. However, non-linear media service providers are automatically authorised on the same day of the notification to AGCOM of the start of their activity, while linear media services may only start their activity after the elapse of 30 days from the application. In practice, the system applicable to non-linear services is thus close to a registration procedure.

In keeping with the principle of freedom of expression, a less stringent requirement than licensing, such as a notification or a registration, may be favoured. Such a notification system may help identifying the services subject to regulation, especially if they are offered by new players in the value chain who are not the usual contact persons of regulators. It may help communicating on legal requirements, ease future monitoring of the compliance with legal requirements and it may also ensure the transparency of basic information on media service providers towards the public as required by Art. 3a of the AVMS Directive. Most countries have therefore introduced a system of registration or notification of on-demand media services when transposing the Directive into national law.

*Table 1: registration/notification requirement for on-demand services*

**NO :** CH, DE, DK, FI, FR, GR, NO, PL (**8**)  
**YES:** AT, BA\*, BE (CSA), BE (VRM), BG, CY, CZ, ES (CAC)\*, GB, HR, IE, IT, LT, LU, NL, RO, SE, SI\*, SK (**19**)

\*BA, SI: planning to introduce registration requirement by the end of 2011

\*ES (CAC): currently working on a draft Instruction developing the provisions of the Catalan Broadcasting Act regarding the prior communication regime.

As illustrated from table 1, countries who do not have introduced such a registration system include:

- Non-EU countries whose legal framework is not yet dealing with on-demand media services: Norway (the AVMS directive is still not included in the EEA Agreement) and Switzerland (non-linear services are not regulated under the current legal framework),
- EU countries which do not have fully transposed the Directive (Poland),
- Several EU countries having transposed the AVMSD. In Denmark, Finland, France, and Greece, media services providers appear to be exonerated from this formality.

In Germany, while ODS do not require a licence or a registration, to achieve legal certainty the provider of a so-called telemedia service is entitled to apply for confirmation by the competent state media authority that a service would not raise objections under broadcasting law (article 20 para 2 Interstate Treaty).

**1.2. Notification for which kind of services and for which kind of delivery?**

From the responses to the questionnaire, it appears that the registration or notification mostly covers on-demand services and catch-up services. Notification seems to only cover VOD services in the Czech Republic, Croatia, Lithuania and Slovenia (yet not in force). It is however not clear from the responses whether or not catch-up services are considered as VOD (see infra, paragraph 2.3).

In all countries having introduced a notification system, it will apply to all on-demand services across all means of delivery. In Cyprus, however, the registration requirement will not apply to on-demand services delivered via the Internet. At this point, the registration requirement will most likely not apply to on-demand services delivered via the Internet in Bosnia and Herzegovina.

**1.3. Where do (will) ODS need to register?**

The vast majority of respondents state that the non-linear services, which fall under their jurisdiction, will be under obligation to register with their regulatory authority.

*Table 2: Registration of ODS with RAs*

**Registration with RA:**  
AT, BA\*, BE (CSA), BE (VRM), BG, CY, CZ, ES (CAC), HR, IT, LT, NL, RO, SE, SI\*, SK (**16**)

\*Planning to introduce registration requirement by the end of 2011

In the Netherlands and Cyprus, in addition to RAs, other authorities are also involved in the notification process. **In Cyprus**, while providers are required to register with the RA, a cooperation procedure with the Commissioner for Electronic Communication and postal Regulation has been established.

**In the Netherlands**, where service providers are required to register with the Commissariaat voor de Media (RA), commercial service providers wishing to offer advertisements in their service are also required to become members of the Netherlands Advertising Code Foundation. Potential complaints regarding the content of advertising will be handled by the Advertising Code Committee.

**Luxembourg** appears to be the only country in which the delivery of registrations falls within the remit of the Ministry of Communication.

**In Ireland**, however, the Ministry may also play a role, together with a self-regulatory body, even if the repartition of tasks seems very unclear at present. A voluntary Code of conduct on on-demand media services<sup>5</sup> was drafted at the beginning of May by ODAS (On-Demand Audiovisual Services), a self-regulatory body, and approved by the Broadcasting Authority of Ireland (BAI). The code, which reflects the statutory instrument, stipulates that "Audiovisual Media Service providers of on-demand audiovisual media services shall notify the Minister or the relevant regulatory body of their intention to provide or continue to provide such services (...)".

**In the UK**, a co-regulatory system has been established and providers are required to notify the ATVOD (the co-regulatory body) if they are operating (or intend to operate) a VOD service that falls within scope. The ATVOD is responsible for timescale of notification, receipt of notification and extent and management of notification while Ofcom retains responsibility for decision-making on borderline scope decisions and the enforcement of decisions surrounding notification and scope.

#### 1.4. How many ODS have notified so far?

Table 3: Number of ODS notified (status May 2011)

AT	35	<a href="http://www.rtr.at/de/m/Abrufdienste">http://www.rtr.at/de/m/Abrufdienste</a>
BE (VRM)	14	
BE (CSA)	4	<a href="http://www.csa.be/pluralisme/offre/par_secteur?sector=4">http://www.csa.be/pluralisme/offre/par_secteur?sector=4</a>
BG	11	
CY	2	-
CZ	79	<a href="http://tinyurl.com/3tc6z9p">http://tinyurl.com/3tc6z9p</a>
ES (CAC)	not counted yet	
GB	119	<a href="http://www.atvod.co.uk/regulated-services/directory-of-notified-services">http://www.atvod.co.uk/regulated-services/directory-of-notified-services</a>
HR	3	
IE	?	-
IT	None*	
LT	4	
LU	1	
NL	23 services, 17 parties	
RO	?	
SE	8	
SI	- (not in force)	-
SK	32	<a href="http://tinyurl.com/3klnrsc">http://tinyurl.com/3klnrsc</a>

IT: None, because to fall within the scope of the AVMSD, Agcom has established an economic threshold of 100.000 EUR to be verified with reference to the 1st year of application of the regulations implementing the AVMSD.

IE: not known, information not provided to BAI

#### 1.5. To pay or not to pay? - notification and payment of a fee

Out of the 19 countries where a notification requirement for on-demand media services providers has been introduced, only seven have foreseen the payment of a fee.

##### Notification fee:

CY, ES (CAC), HR, IT, LT, NL\*, SI\*(7)

<sup>5</sup> [http://www.ibec.ie/IBEC/Press/PressPublicationsdoclib3.nsf/vPages/Newsroom~industry-launches-code-of-conduct-for-on-demand-services-04-05-2011/\\$file/On+Demand+Audiovisual+Media+Services+Code+Final.pdf](http://www.ibec.ie/IBEC/Press/PressPublicationsdoclib3.nsf/vPages/Newsroom~industry-launches-code-of-conduct-for-on-demand-services-04-05-2011/$file/On+Demand+Audiovisual+Media+Services+Code+Final.pdf)

(Envisaged but no figure yet)

The reported fees vary greatly, some appearing to be administrative fees (IT, ES-CAC), while others seem to have rather the nature of yearly operating fees aimed at covering the costs of supervision (UK).

Table 4: Amount of fee for ODS

<b>ES:</b> from €25 to €100 depending on the type of registration
<b>GB:</b> For the period 1 April 2010 - 31 March 2011 the fee is a flat-rate fee of £2,900 per ODPS, but ATVOD has the power to grant discretionary concessionary fees in cases where, in ATVOD's opinion, the ODPS can demonstrate that they would have genuine difficulties in paying the £2,900 fee. ATVOD and Ofcom are currently consulting on regulatory fees for the period 1 April 2011 - 31 March 2012. The options being consulted on are: a) a menu of concessionary fees of between £150 to £500 for ODPS providers who are small scale (i.e. under £100K annual turnover) or are registered charities/community interest companies/not for profit; and b) two main options on fees for other ODPS providers to which concessionary fees would not apply: either the continuation of a flat-rate fee or the introduction of a more proportional fee structure linked to annual turnover of the ODPS provider.
<b>IT:</b> 500 EUR for the 12 years period of validity of the general authorisation subsequent to the notification process.
<b>NL:</b> While for the time being the fee is set on 0, it is likely that in near future it will be around €200. This issue has to be addressed in new Regulation Costs charged for supervision that will need to be adopted by Ministry of Education, Culture and Science.

In Germany, applying for confirmation that the service would not raise legal objections will be charged with an administrative fee of 500 EUR.

In Austria, while there is no fee for the registration of the service, providers have to contribute to the financing of the NRA. The contribution depends on the overall revenue from audiovisual services and broadcasting. A similar system of contribution applicable to all service providers appears to exist in other countries such as Italy (0,5 % of AVMS based revenue annual fee to be paid for the previous year) or Croatia. There is neither application fee nor annual fee for non-linear AVMS services in Greece. However, indirectly VOD services offered by satellite TV operators contribute to the compensative fee (a percentage of annual operator revenue) which operators have to pay back to the State.

#### **1.6. Has your RA powers to enforce the notification requirement?**

Of the 19 countries where a notification requirement for on-demand media services providers has been introduced, only two state that they do not have any powers to enforce the notification requirement: Belgium – CSA, which seems to rely only on encouragement to register, and Bulgaria.

Other RAs (BE-VRM, CZ, HR, IT, NL, SE, SK) have the possibility to impose sanctions in case of non-compliance with the notification requirement if the monitoring activity verifies that there are operators falling within the scope of the regulations implementing AVMSD.

Sanctions may include warnings, financial penalties (GB, NL, SK, SE), suspension or restriction of the ODS (HR, GB).

**In the UK**, one of ATVOD's functions is to determine whether service providers have complied with the statutory duty to notify on-demand programme services (ODPS) to the regulator. If ATVOD determines that a service should be notified, and ATVOD has issued a related Enforcement Notification to the service provider, and the service provider fails to notify the service, ATVOD can then refer the matter to Ofcom for consideration of imposition of a statutory sanction.

#### **1.7. Census/monitoring on-demand media services conducted by RAs**

While the wording of "census" in the questionnaire may have been ill chosen and led to confusion among some respondents, it appears that several authorities have been conducting market surveys or targeted monitoring of the on-demand services under their jurisdiction.

**In the UK**, ATVOD has investigated over 1,100 services to date, and approximately 325 of these investigations remains open.

**In the Netherlands**, around 100 services have been identified by the research and monitoring department of the CvdM.

In **Belgium (French speaking Community)** around 20 catch-up and VOD services have been identified by the CSA.

**In Austria**, some 80 existing services have been traced through research conducted by the legal department of the RTR. In other countries, the number of reported services corresponds to the number of registered services (Lithuania: 4, Bulgaria: 11).

**In Norway**, the Media Authority has carried out an internal market survey of the services that are likely to fall under the scope of the AVMSD. This survey has however not been made public. Several other authorities appear to have conducted similar market surveys without publishing the outcome so far.

**In France**, the CSA commissioned from a consultant a market survey of VOD services, catch-up TV services and UGC platforms in 2009. It counted about 175 services, pornographic content excluded.

**In Germany**, there exists no global monitoring system. Infringements are brought to the media regulatory authorities' attention either by citizens' complaints or by spot tests carried out by the media regulatory authorities themselves.

It is interesting to note that some countries (such as Denmark or Finland) which have not introduced any registration requirement do not seem to conduct surveys or monitor closely the market on on-demand services. It is to be assumed that the regulators will rely on complaints from the public. Alternative arrangements (i.e. not linked to the notification procedure) may have been put in place in order to ensure the transparency of basic information on media service providers towards the public as required by Art. 3a of the AVMS Directive.

### **1.8. Tracing & identifying ODS: RAs' toolkit**

Only three RAs report having used specific tools to trace and identify ODS.

**The Czech Council RRTV** has used a web crawler using indexes of Google and Bing.

**The Dutch CvdM** has used a web crawler/spider in order to trace potential VOD services. The spider searched on specific features like video, language, catalogue, identified services and collected them in a database.

**In the UK**, ATVOD's targeted monitoring has attempted to identify potential ODPS through the following methods:

- a) Using web analytics (using key search terms) on web crawlers e.g. [www.findinternettv.com](http://www.findinternettv.com); [www.wordltypc.com](http://www.wordltypc.com); and [www.alexa.com](http://www.alexa.com)
- b) Analysing delivery platforms, e.g. Youtube 'Channels';
- c) Analysing any possible ODPS provided by Ofcom linear broadcast licensees; and
- d) Analysing certain industry areas, e.g. online services provided by professional football and rugby clubs.

**The Belgian CSA** has not used any specific technical tool but relies on a system of regular observation of Belgian websites based on an evaluation related to the AVMS criteria (services able to compete, services which have public impact,...), articles in the press, services linked to providers who have already registered for other (linear for ex.) services, etc.

## **SECOND PART: GUIDANCE ON ISSUE OF SCOPE PROVIDED BY REGULATORS Or guiding providers through the complexities of the AVMSD<sup>6</sup>**

The complexity of the definition of audiovisual media services as set by Art. 1 (a) of the Directive and of the distinction between linear and on-demand services has often been emphasised at EPRA meetings. Legal certainty on some of the open issues will be eventually provided by the case-law of the European Court of Justice but this will require quite a bit of time. In the meantime, however, legal provisions need to be applied in practice. Many regulators have therefore undertaken to draft some guidelines or recommendations for media service providers on the issue of scope to help assess who is

<sup>6</sup> Internal requests of information circulating within the EPRA network have been used as additional material to enrich this section. Special thanks to Marie Coomans from CSA (BE) for producing an excellent overview of the responses to a request on the interpretation of some of the key AVMS criteria.

likely to be the provider of a relevant service, to ease the understanding of and the compliance with legal provisions.

As regulators are not legislators, nor the judiciary, such guidance is not legally enforceable, and only provides interpretative guidance as to how RAs are likely to apply the notion of AVMS and its seven underpinning criteria in practice. The main idea is to provide some predictability regarding the new legal framework, and to guarantee equitable treatment between the stakeholders.

As was mentioned in previous EPRA papers, the three sets of questions that regulators will need to address to adjudicate a concrete service are:

1. Does this service fall under the Directive, in other words: is it an audiovisual media service?
2. If it does, which of the two different sets of rules apply, in other words: is it a linear or non-linear service?
3. And finally, who is responsible for the compliance with the rules: in other words who is the media service provider?

This final question, which will be addressed at the next EPRA meeting in October 2011 and will not be developed further in this paper, is of key importance in order to determine which Member State has jurisdiction over the service.

In order to have a positive answer to the first question, the service in question needs to comply with all seven cumulative criteria set by Art. 1 (a):

1. It must be a service, thus requiring an economic activity;
2. A service under the editorial responsibility of a media service provider;
3. A service with mass media character;
4. A service whose function is to inform, entertain and educate the general public or constitute audiovisual commercial communication;
5. The principal purpose should be the provision of programmes;
6. A service with audiovisual character;
7. A service provided by electronic communications networks.

## **2.1. Guidance on the scope of AVMS**

### **RAs that have produced some guidance documents: AT, BE (CSA), BG, GB, HR, IT, LT, SE, SK**

The extent of the guidance provided varies greatly. While some regulators only provided basic information on their website about the legal framework applicable to audiovisual Media services, some basic explanation of the Directive criteria, and the formalities of the registration process (Bulgaria, Denmark, Sweden<sup>7</sup>, Slovakia), some RAs (Italy, Croatia) have developed bylaws focusing on specific areas. Three regulatory authorities have produced (or are about to) comprehensive guidance documents on how they are likely to apply the notion of AVMS and its seven underpinning criteria in practice (UK, Belgium CSA, Netherlands - pending).

**In Croatia**, the Council published a number of bylaws that relate to AVMS provisions on, among others, minimal conditions that have to be met when registering an on-demand service, the means of meeting EU Works and independent producers quotas, and the protection of minors.

**In Italy**, in addition to two regulations for the licensing of linear audiovisual and radio services provided on the Internet and of non-linear audiovisual media services provided on any electronic communications network (<http://www.agcom.it/default.aspx?DocID=5416> and <http://www.agcom.it/default.aspx?DocID=5417>), specific FAQ have been published on Agcom' website, addressing issues such as: "What are audiovisual media services?", "Who is an audiovisual media service provider?" and "Who is excluded from the scope of the regulations?"

**In the Netherlands**, further to a consultation conducted at the end of 2010, the CvdM is about to finalise its policy guidelines on the '*Classification of commercial media services on demand*'. The guidelines will elaborate on the criteria determining the qualification of a VOD service, further to the AVMSD and the Dutch Media Act of 2008.

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<sup>7</sup> Note however that the SBA is currently working on a report and doing a thorough investigation of VOD-services where all the questions mentioned below will be investigated.

**In the French speaking Community of Belgium**, the CSA has adopted a draft recommendation on the scope of regulation for audiovisual media services in May as a basis for a public consultation. This document gives comprehensive guidance on whether a service falls within Belgian (French speaking) jurisdiction, provides a detailed overview of the legal requirements applicable to AV media services, whether linear or on-demand, and provides a detailed analysis of the seven criteria underpinning the definition of audiovisual media services.

**In the UK**, ATVOD published comprehensive guidance in the document entitled 'Guidance on who needs to notify'. This document provides guidance on whether a service is an ODPS; what services would or would not be considered ODPS; who has 'editorial responsibility' for a service; whether separate versions of an ODPS be notified as a single service or multiple services; and whether a service fall within UK jurisdiction.

#### **RAs planning to develop guidance on scope: BA, NO, PL, SI**

- The Norwegian Media Authority intends to develop guidance on the scope, even if they have not yet decided how and in which form, as they consider such guidance to be of essential importance.
- The CRA of Bosnia and Herzegovina is planning to include most of the provisions raised by the questionnaire in a by-law (and guidelines for its interpretation) on licencing of audiovisual media services.
- The National Broadcasting Council of Poland is currently preparing regulations on this topic.
- The Slovenian regulator deems it necessary to develop such guidance in the future, once the revised legislation has been adopted.

**In Greece**, while the provision of guidelines on the scope was not reported, a specific working group within the NCRTV was recently established to deal with legal issues occurring during the implementation of AVMS Directive.

**In Austria**, the RTR provides an information bulletin on its website which addresses the basic questions regarding the notification requirements for media services and the duties of providers, ([http://www.rtr.at/de/m/InfoMDA/Merkblatt\\_Abrufdienste\\_10-2010.pdf](http://www.rtr.at/de/m/InfoMDA/Merkblatt_Abrufdienste_10-2010.pdf)).

Table 5: An overview of the main guidance documents produced by RAs

SE: Att ansvara för en beställ-tv-tjänst (being in charge of an on demand tv service) <a href="http://radioochtv.se/Documents/Publikationer/Att%20ansvara%20f%c3%b6r%20en%20best%c3%a4ll%20tv%20tj%c3%a4nst.pdf?epslanguage=sv">http://radioochtv.se/Documents/Publikationer/Att%20ansvara%20f%c3%b6r%20en%20best%c3%a4ll%20tv%20tj%c3%a4nst.pdf?epslanguage=sv</a>
IT: Web-radio and web-TV: <a href="http://www.agcom.it/default.aspx?DocID=5417">http://www.agcom.it/default.aspx?DocID=5417</a>
F.A.Q. <a href="http://www.agcom.it/default.aspx?message=contenuto&amp;DCId=495">http://www.agcom.it/default.aspx?message=contenuto&amp;DCId=495</a>
BE: Consultation publique sur le périmètre de la régulation des services de medias audiovisuels <a href="http://csa.be/system/documents_consultations_files/123/original/CAC_20110505_competence_materielle_consultation_publique.pdf?1305008786">http://csa.be/system/documents_consultations_files/123/original/CAC_20110505_competence_materielle_consultation_publique.pdf?1305008786</a>
DK: <a href="http://www.bibliotekogmedier.dk/medieomraadet/tv/internet-mv/on-">http://www.bibliotekogmedier.dk/medieomraadet/tv/internet-mv/on-</a>
GB: <a href="http://www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed3.1_Mar_2011.pdf">http://www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed3.1_Mar_2011.pdf</a>
BG: <a href="http://cem.bg/cat.php?id=128&amp;p=0">http://cem.bg/cat.php?id=128&amp;p=0</a> <a href="http://www.cem.bg/download.php?id=1007">http://www.cem.bg/download.php?id=1007</a> (registration form)
Rozsah pôsobnosti zákona č. 308/2000 Z. z. v súvislosti so zmenami zákona účinnými od 15. decembra 2009 SK: <a href="http://tinyurl.com/3egura2">http://tinyurl.com/3egura2</a>

## **2.2. Guidance on the distinction ODS vs. linear services**

There does not seem to be much guidance on the distinction between ODS and linear services, the most common practice is to have two sets of guidelines for on-demand and linear services.

For example, **in the UK**, there is no single document which outlines the distinction between on-demand and linear AVMS. While Ofcom provides published Guidance applicable to linear services (e.g. for example for cable and satellite television channels – Television Licensable Content Services - [http://licensing.ofcom.org.uk/binaries/tv/tlcs\\_guidance.pdf](http://licensing.ofcom.org.uk/binaries/tv/tlcs_guidance.pdf)), ATVOD, in its "Guidance on who needs to notify" provides guidance on what service is an on-demand programme service.

**In Italy**, there is a brief paragraph part of the FAQ devoted to the differences in the licensing process between linear and non linear services (already highlighted in paragraph 1.1.)

Several regulators have however provided guidelines on what constitutes an on-demand service (UK, see also next paragraph) or key notions constitutive of on-demand services (Netherlands, pending).

## **2.3 Guidance on Video on demand services**

The ATVOD guidance on VOD includes a - non-exhaustive - list of types of service which are likely to be considered to be „on-demand programme services“, a - non-exhaustive - list of types of service NOT likely to be considered „on-demand programme services“ as well as a - non-exhaustive - list of types of video content which may not be considered to be „on-demand programme services“ (depending on the particular circumstances).

The pending Dutch guidelines will also include definitions on key concepts for on-demand services, such as “moving image content”, “catalogue” and “video”.

It is interesting to note that most RAs do not make any legal distinction between catch-up TV and VOD services, and as a rule consider a catch-up service always as a VOD service likely to be qualified as an on-demand audiovisual media service provided it falls under their jurisdiction (e.g. Belgium (VRM), Slovakia, Netherlands, Ireland, UK).

**In Italy**, however, on-demand (catch-up) catalogues composed only of programmes already offered on a linear basis and catalogues that are not independently accessible by the general public, such as those in a catalogue accessible only from a bouquet offered by a different provider are not considered as a distinct service and therefore do not need any separate notification.

**In Germany**, catch-up TV is considered as a VOD service, if the user can decide at what time to see a precise programme. Whereas time-shifted TV which is broadcast along a schedule is still considered a broadcasting service in the meaning of a linear service.

**In France**, it is necessary to determine whether an ODS is made of a catch-up service or/and of a VOD service. Each category has specific obligations relating to the promotion of European and French-speaking audiovisual and cinematographic works. Catch-up services are defined by a Decree and their definition will be detailed in the legal agreements that TV service providers sign with the CSA. Further to the rules, the catch-up service is linked to the TV service(s) from which it derives from and its annual turnover is added to the annual turnover of the TV service(s) to calculate the contribution of the entire group of audiovisual services.

In order to assess the rules set on the promotion of European and French-speaking audiovisual and cinematographic works, catch-up services are considered as such when they are edited on a dedicated on-demand service by the same service provider or by a subsidiary (but not on another platform).

#### **2.4. Guidance on the criterion of “principal purpose”**

The criterion of principal purpose is of key importance especially with regard to services composed of different types of content (text, video, etc) and is of particular relevance in the context of audiovisual services offered by electronic/online versions of newspapers or magazines (see also section 3.5). Several regulators have worked on criteria to establish if the audiovisual content displayed in a service could be considered as principal and on the question of whether *a part* of a service could, by itself, be regarded as a distinct AVMS.

Basically three approaches can be considered: a quantitative approach for instance based on the proportion of audiovisual content, a qualitative approach based on the purpose of the service, or the contents attracting most users on the service, or a mix of the two approaches.

**In the UK**, the ATVOD’s guidance states that programmes forming part of a broader consumer offering may be considered as an AVMS in its own right when the programmes are grouped together in a distinct area and presented as a catalogue of viewing options which could exist as a coherent consumer offering if removed from the broader service. On the contrary, the guidance says it won’t be so if « *the relevant on-demand programmes are included as an integral and ancillary element of the broader offering, for example, where video is used to provide additional material relevant to a text-based news story, or where video forms part of a content service predominantly featuring a range of non-video material* ». (Par. 2.10 to 2.15)

**In the Netherlands**, the CvdM currently deems the quantitative approach as difficult to implement in practice, e.g. by comparing the amount of written information with the number or duration of videos, because these are very different concepts. As in the UK, they consider that an online video service could qualify as an AVMS even if this service doesn’t have a distinct website but is offered as a component of a larger offer. For this purpose, the video service has to be organised in a catalogue in which the videos are searchable and can be consumed as “stand alone” without being purely supplementary to other content such as articles. Other criteria for assessing whether the video catalogue is “stand alone” could be how the service is promoted in the service marketing strategy and how it is perceived by the audience. The fact that an online service is provided by a company historically involved in broadcasting or, on the contrary, in written press, should not be a criterion and



only the content of the service (and not of the whole website or further activities) should be relevant in assessing whether or not it constitutes an AVMS or not.

**In Belgium** (French Community), the CSA's recommendation, in the presence of "hybrid content", i.e. a mix of audiovisual and other contents, the service needs to constitute a coherent consumer offering in its own right. Two possibilities: either audiovisual content can be isolated as a coherent "stand alone" catalogue; in that case, the service may be qualified as an AVMS provided that it fulfils the other six criteria. If the audiovisual content cannot be isolated as a coherent stand alone catalogue, then it is necessary to determine the principal purpose. In the CSA's view, a purely quantitative criterion is not sufficient. The CSA therefore envisages a case-by-case approach, incorporating inter alia the following criteria: first the proportion (volume) of audiovisual content compared to other content (only if there is a blatant prominence of a type of content), secondly, the manner in which some content are particularly highlighted, thirdly, the purpose of the service, its economic model or core business whereby the profile of the service will be given prominence as opposed to the profile of the service provider.

## 2.5. Guidance on the criterion of "economic service"

Several RAs have also produced guidance on the criterion of service as defined by articles 56 and 57 of the Treaty on the Functioning of the European Union. One key question is how the notion of economic activity is to be assessed in practice.

**In the UK**, para. 3.2(a) and 3.3(a) of the ATVOD's guidance exclude from the scope services that are "primarily non-economic, and which are therefore not in competition with television broadcasting. „Economic" is interpreted in the widest sense to encompass all forms of economic activity, however funded, and may include public service material, free to view content, as well as advertising-funded, subscription, pay per view and other transactional business models."

**In the Netherlands**, the draft policy guidelines exclusively address VOD services of commercial media service providers. According to the Dutch CvdM, a service is potentially economic when it contains ads, sponsoring or promotes a brand, product or service or is offered in return for payment. Activities aimed at self-promotion, even in case of non-profit organisations, may also be regarded as an economic service. Services offered by private persons or public enterprises will not be considered as an economic service unless they are offered for payment or are of a clearly commercial nature.

**In Italy**, the AGCOM has introduced a monetary threshold as presumption for economic activity able to compete with broadcasting activities. This condition is considered to be satisfied for providers who collect yearly revenues above 100.000 EUR - a threshold based on average revenues of local broadcasters and top websites. The threshold is to be verified with reference to the first year of application of the regulations implementing the AVMSD. The calculation only includes revenues deriving from typical television activities such as advertising, sponsorship, contracts and conventions with public and private subjects, public funding and pay-TV offers. Revenues from services other than television-like services, such as hosting services, should not be considered.

**In Belgium** (French speaking Community), the CSA, in order to guide its future interpretation, will look at two questions: whether the service is offered in exchange for remuneration or similar consideration and whether the service has an economic purpose, i.e. aims at competing with other audiovisual media. The notion of consideration requires a direct relationship between the service and its remuneration. Consideration does not necessarily come from the beneficiary of the service and does not require any financial remuneration. The public, advertisers, donators and public authorities may be considered on a case-by-case basis as providing consideration for a service. In some cases, however, consideration will be difficult to establish or will be absent. In such a case, the service may still be qualified as service if it aims at competing with audiovisual media services. This will be assessed on a case-by-case basis and based on a dynamic interpretation.

## 2.6 Guidance on "TV-like character"

Several RAs have also provided guidance on the notion of TV-like character which is mentioned in recital 17 of the AVMS Directive.

**In the Netherlands**, the Dutch CvdM considers the criterion of "TV-like" very hard to apply in practice. Through the definition of "video", they intend to exclude non-professional video offer. Raw audiovisual material which lacks a professional editing process (this is usually demonstrated by additional features like introduction, subtitling, voice over et cetera) will not qualify as a video.

**In the UK**, paragraphs 2.3 to 2.7 of ATVOD's Guidance state that an on-demand programme service will only be deemed in scope to the extent that it provides access to programmes that compete for the same audience as television broadcasts, and are comparable to the form and content of programmes included in broadcast television services. ATVOD emphasises however that it is necessary to interpret the meaning of "programme" in a dynamic way, taking into consideration developments in television broadcasting and the also very wide variety of TV programmes. ATVOD mentions examples of programmes that may not be TV-like informational videos directed at a particular group of people, such as an undertaking's employee training videos available online and short extracts from longer programmes under certain conditions. To be considered **not** "TV-like", a programme must be clearly distinguishable from those which are "normally included in television programme services". Ofcom also carried out qualitative research on what consumers consider to be 'television-like' material and what their expectations are in terms of the key characteristics of such material<sup>8</sup>.

**In Belgium**, (French speaking Community), a very similar approach has been adopted. Programmes must be comparable with programmes included in TV broadcasts, must be targeted to the same audience and compete for the same audience as traditional programmes. Here again, an extensive and dynamic interpretation of the notion of programme is envisaged.

## **2.7 Guidance on the provision of programmes "to the general public"**

Several RAs have also issued guidance on the criterion of the provision of programmes to the general public. An issue of particular relevance in that context is that of services that may reach a virtually unlimited audience but are actually only used by a very small number of users.

**In the UK**, paragraph 2.22 of ATVOD Guidance considers that the criterion is satisfied if the service is made available to the general public, and includes subscription services, provided that the subscription is open to members of the public, as well as services that are made available only to the general public located in a particular geographic area.

**In the Netherlands**, a commercial VOD service is deemed to have a mass media character when the service focuses primarily on information, education or entertainment of the public or parts of it. This also means that the service can be received with standard consumer equipment. As soon as a service is potentially available to everybody on the Internet, it should be considered as a mass media. It is thus considered that even if a service is effectively used by very few people, it complies with the criterion of being provided "to the general public". However, for media with a very small audience and provided by non commercial institutions (churches, town halls, hospitals), the CvdM believes that they could be excluded on the ground of another criterion: that of the economic service. If they don't carry advertisements and are purely focused on the needs of the local community, the regulator thinks this approach would comply with recital 21 of the directive ("*services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest*"), although this exception was originally made for private persons. If a "small" service cannot be excluded on this ground, the regulator envisages considering it as an AVMS but not to focus on it. In other words, the service should register as an AVMS but would only be monitored in case of complaints.

Several countries have introduced "de minimis" rules, such as references to a threshold of potential simultaneous users.

In **Germany**, the Interstate Treaty sets a threshold under which a service is excluded from the scope of regulation. This happens when a service cannot be simultaneously used by more than 500 persons.

**In Switzerland**, (even if non-linear media services are not yet regulated), a similar threshold applies whereby it is set at 1.000 persons.

**In Italy**, even if at the moment there is no additional clarification for ODS, linear services provided on the Internet (WebTV, IPTV and mobile TV) *with a schedule of less than 24 weekly hours and services not intended for the wide public*, such as company TV services, and cable TV services in restricted areas, such as railway stations, airports etc, are excluded from the scope of the regulations. The calculation concerns the schedules identified by the same logo for at least 24 hours during the same week, excluding the time devoted to the repetition of programmes or fixed images such as written messages.

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<sup>8</sup> <http://stakeholders.ofcom.org.uk/market-data-research/tv-research/vodresearch>

**In Belgium (French speaking Community)**, the CSA emphasises that the number of potential users is what matters rather than the actual size of the audience. The CSA also refers to a criterion proposed by the Commission's Contact Committee<sup>9</sup>, i.e. whether the recipients are individually identified or identifiable; if this is the case, the service will be deemed out of scope. The CSA is currently consulting on whether including services effectively used by a very small proportion of the audience within the scope or whether introducing a threshold of a minimum number of simultaneous users or of a minimum number of clicks for services provided on the Internet.

### **2.8. Guidance on "editorial responsibility"**

Several RAs have provided guidance on the criterion of editorial responsibility. This criterion is decisive especially for the determination of services provided on user-generated content platforms (see also point 3.7.) and aggregated services (see also point 3.2.). The concepts of effective control, as highlighted in recital 25 of the AVMS, and the issue of the selection of items and catalogue are of particular relevance in this context.

**In the Netherlands**, the name of the AVMS media provider must always be mentioned. If multiple providers carry out effective control over the choice of video content and its organisation, the CvdM considers that the selection of the programmes is the most decisive criterion to identify who exercises the editorial responsibility.

**In Croatia**, on-demand media service providers have to register the name of the editor in chief of the service and they are responsible for the catalogue particularly in terms of meeting EU works and EU independent producer's quotas and the protection of minors' provisions.

**In Romania**, the NAC believes that the person considered as editorially responsible is the person who has notified the activities.

**In the Czech Republic**, the RRTV has issued a statement explaining what is understood under the term "catalogue" of the VOD services: "Catalogue of the VOD services is understood as a structuring of the programmes within categories according to the content criteria, e.g. according to the genre. A mere database of the programmes (e.g. listed only by the date of the premiere of the programme or by alphabetical order) does not fulfill the criteria for catalogue." [http://www.rrtv.cz/cz/static/cim-se-ridime/pravni-stanoviska/STANOVISKO\\_KATALOG.pdf](http://www.rrtv.cz/cz/static/cim-se-ridime/pravni-stanoviska/STANOVISKO_KATALOG.pdf)

**In Belgium (French speaking Community)**, the CSA provides guidance on the notion of effective control, selection of programmes and organisation of programmes. Effective control does not require that such a control may be exercised at any moment, but that there is no general renunciation to the exercise of the control. The selection of programme implies a decision making process as to whether to insert or not some programmes in the service. It requires making decisions as to the profile of the service and making some value judgments. The organisation of programmes supposes decisions on how programmes are integrated within the service either in a schedule or in a catalogue. The organisation requires the making of value judgments. The CSA also mentions a non-exhaustive list of services with no editorial responsibility, including user-generated content platforms (such as YouTube or Dailymotion), on-demand video databases based on a search engine (Google Videos) or services consisting in the simultaneous retransmission of images without any editorial intervention (cameras on ski slopes or road traffic).

**In the UK**, para. 4.1 to 4.15 of ATVOD's provide very comprehensive guidance on editorial responsibility. It also emphasises the focus on decision-making about which individual programmes are included in the service, and not on the choice of whole "channels" of content. In the context of on-demand programme services, a person has "editorial responsibility" for a service if he has general control over what programmes are included in the range of programmes offered and over the manner in which the programmes are organised. As the provider of the service, that person's role is comparable to that of the broadcaster in relation to linear channels.

### **2.9. Guidance on any other issue of relevance (with regard to scope)**

Guidance on other issues of relevance related to scope has also been produced as to:

- whether a service falls within a RA's jurisdiction: e.g. UK, BE (CSA).
- guidance for public service media providers, whereby more and more detailed/stricter rules apply: e.g. Netherlands.
- Internet portals that have media character. In Croatia, the Electronic Media Act brought under the Council's jurisdiction not only "television like" services but also internet portals that have media character (edited websites and/or portals containing electronic versions of printed press and/or media information thus being available to the general public regardless of their volume).

<sup>9</sup> [http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact\\_comm/27\\_minutes\\_en.pdf](http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/27_minutes_en.pdf)

## THIRD PART: IMPLEMENTATION AND FIRST CASES: Who's in, who's out?

### 3.1. Which service(s) seems most challenging to assess as an AVMS?

The following services have been reported as the most challenging with regards to scope:

- *Services provided by newspapers and magazines* (UK, NO, SK, SE)

**In the UK**, these providers dispute the notion that they fall into scope due to Recital 28 AVMSD. Appeals to Ofcom are currently pending.

Based on their advisory work for the Ministry in the AVMS implementation process, the **Norwegian Media Authority** considers audiovisual content services provided by electronic newspapers particularly difficult to assess. Many services are highly sophisticated, with programme catalogues consisting of audiovisual news clips and self-produced series of short programmes in the field of entertainment, sports, documentaries etc. (e.g. [www.vgtv.no](http://www.vgtv.no))

**The Slovak RA** reported facing problems with assessing in practice the notion of principal purpose, especially with regard to e-versions of newspapers or magazines.

**In Sweden**, the question of on-demand services connected to online newspapers and web pages offering a mix between self produced and simply linked external TV- and film material is a current concern.

More generally, **in France**, the regulation of "hybrid" ODS (i.e. offering different types of content such as text, video etc.) seems very challenging because the CSA only has jurisdiction over the part of the service which is considered as an on-demand audiovisual media service.

- *Small-scale and micro-scale services*, both commercial and non-commercial (UK, BE, AT, SK, NL)

In the UK, such providers consider that the intention of the AVMSD is not to regulate small-scale/micro-scale web-based services that provide AV content.

**The Slovak RA** reported facing problems with assessing in practice the criteria of economic services in the context of services provided by universities but accessible to anybody with an internet connection and which only consist of programmes created by students and featuring students (students news, entertainment programmes etc.)

**The Dutch RA** reported difficulties with the assessment in practice of VOD services on the Internet offered by local, often non-commercial, institutions like schools, libraries, churches, non-professional sports clubs and associations, whereby the main challenge is to assess whether they fulfil the criterion of being a mass medium.

They also report difficulties with assessing VOD services which are used as a marketing tool of commercial companies like banks and insurance companies, whereby the main challenge is whether they fulfil the criterion of editorial independence.

**The Austrian RTR** also mentions university VOD services as challenging with regard to the assessment as to whether they are intended for the general public, and whether they have a TV-like character.

The assessment of video content provided by NGOs which rely on donations is also challenging with regard to the qualification as economic service.

The assessment of political video blogs is also considered as challenging with regard to the qualification as to whether they constitute an economic service, and fulfil the TV-like character requirement.

The **Swiss OFCOM/BAKOM** reports about the challenges to implement their "de minimis rule" in practice, i.e. the threshold of 1000 potential users applicable for linear services. Services which cannot be received by more than 1000 devices simultaneously in a quality corresponding to the state of the art are deemed as being of "minor editorial importance" and fall out of scope. The assessment as to whether the threshold has been reached can only be made if there are technical barriers or a registration requirement. The assessment of the "state-of-the-art-quality"-condition is also proving challenging in practice – especially with regard to IPTV broadcasters.

- *Services provided over the Internet*, whether non-linear or not (IE, CZ, SK, HR, SE)

- *Non linear services* (GR, SI)

The Slovenian RA points out that there are a number of services on the market which could fit the definition, but it depends very much on the interpretation of the criteria, which services should be treated as non-linear AVMS and should therefore be subject to regulation.

- *Services provided by providers who are not already registered for other traditional services*, such as linear services on cable or IPTV for example (BE – CSA).

- *Aggregated services and services targeted to large, but strictly defined groups*, e.g. a large number of people who have the same hobby (FI).

- *Multiple services or versions of an On-demand service (UK)*

Several trans-national ODPS providers have disputed ATVOD's interpretation as to what constitutes a 'multiple service'.

- *Services using UGC platforms (BA, SK)*

The Slovak RA reported facing challenges with assessing in practice the criteria of editorial responsibility in the case of services of UGC platforms.

### **3.2 Does your RA have any experience with assessing aggregated services?**

Only Netherlands and the UK report concrete experience with assessing aggregated services, whereby the determining criterion here is that of editorial responsibility.

**In the UK**, the ATVOD has had discussions with some content providers and service platforms to ascertain which entity has editorial responsibility. However, this is not reported as a particularly problematic area of debate.

**In the Netherlands**, the qualification of aggregated services does not seem to raise particular problems either so far. As a rule, aggregator sites collect and offer catch-up services of different channels, mostly by using embedding techniques. When a video is removed from an original catch-up service the video is also deleted from the aggregator site, thus evidencing the lack of 'full' editorial over selection of content.

### **3.3. Does your RA have any experience with assessing multiple services?**

The issue at stake is whether RAs had any experience in assessing multiple services, i.e. services which are substantially the same but offered either on the same or on different platforms. Indeed, a service provider may package its on-demand service in different ways and as separate services. This raises the issue of the criteria used by RAs to assess whether services are to be considered as single or different services and also as to how RAs deal with on-demand services offering material already broadcast on a linear platform, e.g. does a catch-up service edited by a provider of a linear service constitute a distinct service?

This issue is addressed by recital 27 of the AVMSD which stipulates that: "*in general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfillment of the requirements applicable to the television broadcast, i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned*".

Different approaches seem to have been adopted according to the countries considered:

**In Italy**, the simulcast of services already provided on a different platform does not need a separate authorisation, provided that they are identical. The concept of "substantially the same" would not apply. Catch-up services are considered to be ancillary to linear services and do not need a separate authorisation, but only to be flagged in the request of authorisation for linear services (if already known) or to be updated separately (if delivered later).

**In Austria**, on-demand services are always subject to a notification procedure which is completely independent of the licensing of the linear service. This seems to be also the line of conduct in Slovakia and Belgium (French-speaking Community).

**The Belgian CSA** expressly addressed the issue of multiple services in its ongoing consultation (question 4). Contrary to the Italian approach, in the CSA's view, catch-up services edited by providers of linear services constitute necessarily a distinct service owing to their non-linear character. In the case of distinct services, the provider of the services has to comply with the legal obligations for each service separately. This implies inter alia a separate registration for each service. The RA underlines however that it may sometimes be challenging to assess whether two versions of a same media constitute a distinct service, for instance in the case of different versions of a media created for mobile TV or electronic pads. The RA is therefore asking for views on this specific issue.

**In the UK**, the issue of multiple services is addressed by para. 5.1 to 5.3 of ATVOD's guidance. Whether several versions of a service are to be treated as a single service, or as separate services, will depend on whether they are *substantially the same*, i.e. there should be no significant differences in substance between them when looking at the totality of the programmes available on each version. Generally, the greater the overlap of programmes between different versions, the more likely they are

to be treated as a single service. The guidelines also raise the issue of different linguistic versions of a same service which should not in itself lead to those offerings being treated as separate on-demand services. There is no specific guidance on the regulation of on-demand material already broadcast on a linear platform – although the assumption would be that any material already broadcast on a UK linear platform which conforms to Ofcom’s Broadcasting Code would not breach the on-demand regulations set out in the Act.

#### **3.4. Experience in assessing electronic programme guides**

While many regulators report experience in *regulating or licensing* electronic programme guides (e.g. Austria, Croatia, Ireland, Germany), only a few addressed the issue of whether EPGs could potentially qualify as an audiovisual media service, whether linear or non-linear.

In the Broadcasting Authority of Ireland’s view, as EPGs can include moving images with or without sound, and scheduled television programme material, it could be argued that they are linear services.

On the occasion of meetings of the Contact Committee<sup>10</sup> and the Group of regulators organised by the EU Commission in September 2010, discussions took place as to whether EPGs could be qualified as audiovisual media services. A representative of the UPC group made a presentation about their EPG service arguing that it is an audiovisual media service in itself as UPC makes proper editorial choices. Their EPG is under jurisdiction of the Netherlands and subject to a special section in the Media Act which regulates information channels of cable network operators. The current version of UPC’s EPG is not considered to be an AVMS as it does not fulfil the “principal purpose” criterion of providing programmes.

#### **3.5. Experience in assessing AV services offered by electronic/online versions of newspapers or magazines**

Several RAs have had experiences in assessing or are currently assessing AV services offered by electronic/online versions of newspapers and magazines. As mentioned previously in the section about the criteria of principal purpose, this is a hotly debated issue among RAs, not the least owing to Recital (28) of the Directive which states that: “*the scope of this Directive should not cover electronic versions of newspapers and magazines.*”

**In the UK**, ATVOD has reached a number of determinations that services provided by a number of national newspapers and magazines are on-demand programme services and therefore within the scope of the regulatory framework. Although Ofcom has designated ATVOD as the co-regulator of VOD editorial content, Ofcom has retained the ultimate power to determine issues relating to scope. Therefore, Ofcom is currently considering appeals from these ATVOD determinations made by four newspapers and one magazine (News Group Newspapers Ltd Sun Video; News Group Newspapers Ltd News of the World Video, Times Newspaper Ltd, Sunday Times Video Library, Hachette Filipacchi (UK) Ltd Elle TV<sup>11</sup>).

**In Croatia**, there are several online versions of newspapers where significant amount of video content is offered to the audience. Such versions are viewed as electronic publications and need to be registered with the Council’s Register of electronic publications providers. A similar case is a linear RSS channel offered by a newspaper over a cable TV network. This service has been identified as AVMS and needs to be registered with the Council.

**In Slovenia**, no concrete assessment has yet been made, owing to the delayed transposition of the AVMS Directive. The RA however considers that a different approach should be taken according to whether a distinct video section is available on the website of the newspaper or magazine.

**In Lithuania**, the RA would tend to consider a video section offered within an internet portal with various purposes such as chat, text articles, Internet dating, e-mail as a separate ODS (assuming that all other elements of the definition are fulfilled).

**In Norway**, even though the country hasn’t aligned its law to the AVMS directive yet, the RA tends to consider that a newspaper’s website essentially dedicated to audiovisual content, could be deemed to fall into the scope of regulation.

**In Slovakia**, as a rule, the general view of the Council for Broadcasting and Retransmission is that online versions of newspapers do not constitute audiovisual media services since their principal purpose is clearly different from providing TV-like programmes and competing with traditional broadcasters. However, the Slovak Council experienced some borderline cases where online

<sup>10</sup> [http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact\\_comm/32\\_minutes\\_en.pdf](http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/32_minutes_en.pdf)

<sup>11</sup> <http://www.atvod.co.uk/regulated-services/scope-determinations>

newspapers developed separate sections (or services) which go beyond the usual practice of having short videos to illustrate the journalistic text. These services offer audiovisual content specifically produced by the newspapers, content produced by other entities and even acquired TV programmes (usually foreign). It is therefore problematic to determine when this type of section already constitutes a separate service and when it is still only a part of a bigger service. So far the RA tends to act in these cases in accordance with the rule *in dubio pro libertate* especially as there are very few experiences from other countries or any ECJ case-law in this matter

A different approach has been adopted with regard to services which provide "electronic magazines" or "video" sections on an Internet portal, but do not have any off-line version (e.g. an internet portal offering a number of sections with different purposes such as chat, text articles, internet dating, e-mail and also a "video" section). The Slovak RA is of the view that Recital 28 does not apply in such a case. "Video" sections of these services constitute more often a separate ODS (provided that the audiovisual content prevails over e.g. text content and assuming that all other elements of definition are fulfilled) because usually there is no common principal purpose of the "bigger" service compared to the case of an online version of newspapers.

**In Italy**, the Constitution expressly states that press is free and cannot be subject to a prior authorisation. The AGCOM currently considers that electronic versions (off line) or on-line versions of newspapers or magazines would fall out of the scope, provided that the AV service is not autonomous (e.g. <http://www.repubblica.it/> for the on-line version and <http://tv.repubblica.it/home/?ref=HRHM2-1> for the separate AV service which is authorised on terrestrial frequencies and streamed in simulcast on the web). In addition, the recitals of the Directive (including Recital 28) have been incorporated in the Italian law transposing the AVMSD.

### **3.7. Experience with assessing services on UGC platforms?**

A few RAs have already had concrete experience with assessing services on UGC platforms, whereby it is important to distinguish between content created by users and professional content offered on UGC platforms. Even though only few responses have been given on this precise issue, it seems that there is a consensus on the fact that content created by users would not be considered as an AVMS, as it would fall under the exemption stated by the Directive, especially with regard to the criteria of editorial responsibility.

**In the UK**, par 3.3(a) of the ATVOD Guidance states that "video content posted by private individuals onto video sharing sites (where the content has been self-generated and is not posted as part of an "economic" purpose on the part of the individual may not be considered to be an on-demand programme service, depending on the circumstances). ATVOD has encountered a number of UGC services on Youtube, but no such service has been found to be in scope.

**In Slovakia**, so far the RA deems it as a sufficient proof for the service to escape the regulation when it has a "built in" system for adding the content by the users, this service "looks like" the UGC service and the provider of this service claims that content of this service is being added solely by its users. However, several RAs state that *professional content services* shown on UGC platforms may potentially qualify as being within the scope.

**In the Dutch CvdM view**, separate channels of professional parties within YouTube (or similar sites) could qualify as a VOD since they will have effective control on both selection and organisation of video offer in a catalogue.

**In the UK**, several commercial on-demand programme services have been notified to ATVOD that are delivered on UGC platforms, such as Channel 4's '4oD' service on YouTube.

### **3.8. Experience with assessing services offered by Connected TV?**

None of the respondents has had any experience so with assessing services offered by Connected TV sets so far.

## **Summary and Conclusions**

### *On the role played by RAs in following the market of ODS:*

There is a widespread requirement in Europe for providers of on-demand media service to notify or register their services, even though there are several exceptions as in Denmark, Finland, France or Greece where such a formality is not foreseen.

As a rule, on-demand services are notified to broadcasting regulators, even if other organisations, such as the Ministry (Luxembourg) or a co-regulator (UK) may be the addressees of notifications in a few countries.

As a rule, RAs were granted powers to enforce the registration requirement where necessary.

There appears to be great discrepancies among RAs on how closely they monitor the market and follow the development of on-demand services. This is probably related to the great diversity in the respective national markets, the varying number of on-demand services offered in the different countries, but also a matter connected to available resources and regulatory culture.

### *On guidance on scope provided by RAs*

Many RAs have developed some form of interpretative guidance (or are about to do so). Most of the guidance provided so far is rather basic, focusing mostly on formalities for the registration process and on a succinct explanation of the main rules which are applicable to the services. Some RAs (Italy, Croatia) have developed bylaws focusing on specific areas, such as licensing. UK, Netherlands (pending), Belgium (French Community) have however developed comprehensive, though non-enforceable, interpretative guidance on the scope in order to indicate how they intend to apply in practice the seven cumulative criteria underpinning the definition of an audiovisual media service.

There seems to be some consensus on the fact that the criteria of editorial responsibility and principal purpose seem decisive when it comes to qualifying AVMS in practice. The criterion of economic service appears to have been interpreted in quite a varying manner and seems to raise challenges for the practical implementation.

### *On issues of implementation and first cases encountered by RAs*

Even if the AVMS transposition is about to reach its final stage, 2011 will still be a year of transition in most of the countries. Many RAs will use this transition period to work on raising awareness, understanding and support among the audience and the industry. So far, only a few RAs have undertaken some practical assessment of the services to find out whether they fall within the scope. However, some first practical cases will be presented during the plenary session, such as the outcome of Ofcom's first appeals on determinations reached by ATVOD for concrete services.

Electronic versions of newspapers and magazines, micro-scale services, including services offered by associations, NGOs and governments are currently considered as the most challenging to assess in practice. In addition, assessing whether two versions of a same service – for instance in the case of different versions of a service created for mobile TV or electronic pads – constitute a single or distinct services is likely to prove no easy task for RAs in the near future.



## **Annex: Definitions & acronyms for notions used in the questionnaire and paper**

**Aggregated services:** *some video-on-demand services offered by "content aggregators" may be comprised of a number of on-demand programme services originating from different providers.*

**AVMS:** Audiovisual Media Service as defined by Art. 1. 1(a) of the AVMS Directive:  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

**Catch-up TV:** *(or Replay TV) a type of Internet TV in which TV shows are available through the Internet for a period of days after the original broadcast. The shows are made available by the broadcasters themselves, and also by aggregator sites. [http://en.wikipedia.org/wiki/Catch\\_up\\_TV](http://en.wikipedia.org/wiki/Catch_up_TV)*

**Connected TV:** [http://en.wikipedia.org/wiki/Connected\\_TV](http://en.wikipedia.org/wiki/Connected_TV)

**IPTV:** *Internet Protocol television. A system through which Internet television services are delivered using the architecture and networking methods of the Internet Protocol Suite over a packet-switched network infrastructure.*

*IPTV services may be classified into three main groups:*

- \* live television, with or without interactivity related to the current TV show;*
- \* time-shifted programming: catch-up TV, start-over TV);*
- \* video on demand (VOD): browse a catalog of videos, not related to TV programming.*

**Multiple services:** *On-demand media services may be packaged by a service provider in different ways and as separate services. The main issue at stake is whether several versions of a service present on different platforms are to be treated as a single or as separate services.*

**ODS:** *as defined by Art. 1.1 (g) of the AVMS Directive: on-demand audiovisual media service' (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;*

**ODPS :** *stands for on Demand Programme Service, the legal concept used in the UK in the Statutory instrument transposing the AVMSD and equivalent to the Directive wording of on-demand audiovisual media service (Section 368A Communication Act 2003, as modified by The Audiovisual Media Services Regulations 2009)*

**UGC:** *User-Generated content: <http://en.wikipedia.org/wiki/UGC> YouTube or Daily Motion are well-known examples of websites based on user generated content.*

**VOD:** *video on demand: systems which allow users to select and watch/listen to video or audio content on demand.*  
[http://en.wikipedia.org/wiki/Video\\_on\\_demand](http://en.wikipedia.org/wiki/Video_on_demand)

**Web crawlers:** *(also called Spiders, bots) computer programmes that browse the World Wide Web in a methodical, automated manner or in an orderly fashion: [http://en.wikipedia.org/wiki/Web\\_crawler](http://en.wikipedia.org/wiki/Web_crawler)*