

**The Draft Audiovisual Media Services Directive:
Future Challenges for Regulators**

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Five challenges for a debate

1. Challenges raised by the Extension of Scope of the AVMS Directive

One of the main innovations of the draft AVMS Directive is the extension of its scope from broadcasting services to "audiovisual media services", which can be of two types: TV broadcasting (i.e., linear) and on-demand services (i.e., non-linear) together with the introduction of a two-tier regulatory regime for linear and non-linear media services.

The two key questions that regulators will have to face once the Directive is transposed at the national level are as follows:

- What constitutes an audiovisual media service?
- How to make a distinction between linear and non-linear audiovisual services.

The first question raises the issue of the **practical applicability of the cumulative criteria** to determine whether it is an audiovisual media service or another type of service.

The definition of "audiovisual media service" set by Art. 1 (a)² is composed of six cumulative criteria:

- It must be a *service* thus requiring an *economic activity* (hence excluding private websites, services consisting of the provision or distribution of user generated audiovisual content for the purposes of sharing and exchange within communities of interest)
- *mass media character* (i.e. intended for reception by, and which could have a clear impact on, a significant proportion of the general public)
- The function of the services is to *inform, entertain and educate* the general public. It presupposes an "*impact of these services on the way people form their opinions*" as emphasized by recital 43.

¹ Many thanks to Monica Arino from Ofcom for her helpful comments on a preliminary draft of this paper.

² Art. 1 (a):

"audiovisual media service" means:

- A service as defined by Articles 49 and 50 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council. Such audiovisual media services are either television broadcasts as defined in paragraph (c) of this Article or on-demand services as defined in paragraph (e) of this Article.

and/or

- audiovisual commercial communication

- *The principal purpose* should be the provision of programmes, (as opposed to cases where audiovisual content is merely incidental), as emphasized by recital 18
- *A service with audiovisual character* (does not cover audio transmission or radio services or electronic versions of newspapers or magazines)
- a service provided by *electronic communications networks* (e.g. excluding cinema, DVD)

For further clarification, the Hieronymi report first suggested adding to this set of criteria that of “editorial responsibility” and a definition of “programme”. These suggestions were taken into account by the political agreement on 24 May.

One issue of paramount importance, as was emphasized by several commentators³, will be how to assess in practice whether the **principal purpose** of the provider is to distribute audiovisual content, or whether it is incidental or ancillary.

Will elements such as turnover or repartition of revenues of the provider be considered? Is there a common approach among regulators on how to establish the principal purpose? Will it inevitably require a degree of discretion by the regulator and how will that discretion be exercised?

The second question as to the **distinction between linear** (such as analogue and digital TV, live streaming, webcasting and near-video-on-demand) **and non-linear services** (such as video on demand) is not of a theoretical nature as linear services will be subject to a significantly more restrictive regime.

Some questions which had been raised with regard to previous versions of the draft Directive concerned the case of the very same content made available in the two modes (linear and non-linear), either simultaneously or consecutively or different kinds of services offered in parallel. In the meantime, Recital 20 seems to bring clear answers to these interrogations⁴

It remains however to be seen whether the lighter touch approach for the non-linear environment will ultimately act as an incentive to migrate traditional TV content to the on-demand environment.

Moreover, the notion of *editorial responsibility* has been considered as essential for defining the role of the media service provider as emphasized by Article 1(d) and Recitals 23 and 43. But what does *editorial responsibility* mean? What does *effective control* mean? Can the notion of editorial responsibility be applied differently in a linear and a non-linear environment?

Last but not least, the main challenge may consist in the change of regulatory paradigm implied by the extension of scope and the necessary increasing reliance on *co-and self-regulation* in addition to more traditional regulatory solutions.

³ See for instance the keynote address of Alexander Scheuer on Content Regulation in the New Media Environment at the 24th EPRA meeting, available under: http://www.epra.org/content/english/press/papers/Plenary_EMER_word.pdf

⁴ “*In general, for television broadcasting or television programmes which are also offered as on demand audiovisual media service by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.*”

Quoting from a document compiled from the responses to an EPRA questionnaire⁵ circulated in October 2006, "it appears that cooperation with self-regulatory bodies (hereafter SRBs) and co-regulatory bodies (hereafter CRBs) currently ranges from none, to information exchange, to consultation on policy, to formal agreements concerning decision-making, to the development of co-regulatory approaches, and even moral and intellectual support in the development of SRBs. Examples of co-regulation reveal two approaches: RA authorities establishing (and running) co-regulatory regimes as in Germany, Italy and Norway on protection of minors; and RAs developing co-regulatory regimes with existing SRBs as in the UK (advertising) and the Netherlands (protection of minors).

The EPRA working group in Dubrovnik last year concluded that "a precondition for successful co- and self-regulatory regimes is the involvement of all stakeholders. Emphasis should also be laid on transparency, independence and accountability. The issue of effective sanctions and the development of media literacy were generally considered crucial".

2. Challenges raised by Jurisdiction Issues

- *Derogation of country of origin principle (Article 2a.4): what will be the concrete impact of the wide-reaching derogations in respect of on-demand services?*

Article 2(a)2, which constitutes a derogation to the principle of freedom of reception, allows Member States under specific conditions and further to a specific procedure with the European Commission to restrict retransmissions on their territory originating from other Member States was not substantially modified in respect of television broadcasting⁶. The suggestion to extend the scope of the article to cover other considerations of overriding public interest other than the ones already included at present (i.e. serious harm to minors, broadcasts containing incitement to hatred on grounds of race, sex religion or nationality) which was put forward during the consultation meetings⁷, was not followed upon.

However, new far-reaching derogations have been introduced in respect of *on-demand services* in order to align the new Directive with Art. 3(4) of the Directive on Electronic Commerce⁸. They stipulate that Member States may derogate from the principle of freedom of reception for reasons including public policy, public health, public security and the protection of consumers. In case of urgency, these new provisions even allow the Member State to take concrete measures and thus derogate from the requirements of first taking contact with the country having jurisdiction over the service provider and of prior notification with the European Commission.

- *Criteria for assessing establishment: What will be the practical impact of the change of hierarchy between ancillary criteria? (Article 2(4))*

The criterion of the use of a frequency was deleted and the order of the technical criteria was reversed to place the use of uplink before the satellite capacity. The

⁵ See EPRA/2006/10, WG 1 Relationships with co and self-regulatory bodies, Information paper by Deirdre Kevin for the EPRA Secretariat, 24th EPRA meeting, Dubrovnik October 5-6 2006.

⁶ Note that the references to disability or age have disappeared from the Common position.

⁷ See p.6 Issues paper for the Liverpool Audiovisual Conference, Rules applicable to Audiovisual Content Services, July 2005.

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

OJ L 178, 17.7.2000, p. 1-16

main idea behind this change is to divide the responsibility more equitably between Member States involved. Currently, this burden lays heavily on France and Luxemburg because of the location of the satellite operators Eutelsat and Astra.

- *Circumvention - "Abusive" delocalization or "relocation": what will be the impact of the new cooperation procedure as well as the formalisation of the circumvention clause and mechanism?*

While the TVWF Directive only mentioned circumvention in recital 14, the draft AVMS Directive includes a series of specific provisions dealing with that matter in Article 3(1) (a) to (d). Additionally, recitals 32, 33, 34 and 66 provide guidance on the new provisions and refer to the case-law of the ECJ. As a solution against the circumvention of stricter national rules, the Commission proposes a codification of the case law of the Court of justice combined with a new procedure to deal with circumvention complaints. However, prior to the recourse to the circumvention procedure, the receiving Member State is expected to settle the matter amicably with the country of origin through a voluntary cooperation procedure. The Commission will now have the right to decide on the measures notified. Under Art. 3.1c., the receiving Member State may only take action against a broadcaster when given the formal go-ahead by the Commission (ex-ante control).

The controversial notion of *abuse or fraudulent conduct* has disappeared from the text of the Common Position and the option of amicable settlement between the receiving and targeted Member States is explored in more depth as a first non-binding cooperation phase. It may be worth mentioning at this point that the cooperation procedure applies only in relation to TV broadcasts, but not to on-demand services.

Some interrogations may however remain about the "substantiated request" made by the receiving State and the criteria on which the Member State having jurisdiction is to base its assessment.

Moreover, the assessment made by the first Member State that the broadcaster has established itself in the Member State having jurisdiction in order to circumvent the stricter rules may also prove difficult to substantiate towards the Commission.

3. Challenges raised by the increased Level of Co-operation between Regulators

The issue of the increased level of co-operation between regulatory authorities both at the national and the European level is probably one of the major challenges that regulatory authorities will have to face, once the Directive is adopted and transposed at the national level.

First of all, the widening of scope will have a direct impact on co-ordination and co-operation issues because audiovisual media services will pose even more challenges concerning voluntary co-operation between regulatory authorities while the number of regulatory authorities involved will automatically increase.

Secondly, as mentioned before, the modified provisions on jurisdiction and especially with regard to circumvention will require a closer co-operation between regulatory authorities in Europe.

In addition, Article 23b of the new Directive introduces a kind of "information duty" between member States and the Commission, "notably through their competent authorities".

- On what should the co-operation focus?
- Which forms should this co-operation concretely take?
- Are there any legal barriers against a widening of co-operation practices?
- How far can co-operation go? Should co-operation eventually evolve towards co-ordination? Would broadcasting regulatory authorities, in the middle or long term, go as far as to accept some kind of supranational co-ordinating body as envisaged in the Telecommunications sector?
- Are the existing fora appropriate?
- Last but not least, which role should the European Commission play?
At the Commission level, the *Contact Committee* of the Directive Television without Frontiers consists of representatives of Member States, even though some regulators may occasionally participate further to an agreement with their national authorities. This forum has recently been supplemented by the *High Level Group of Regulatory Authorities*, which brings together the Member States' regulatory bodies and the European Commission at regular intervals. Is there a need for a further body?

4. Challenges raised by Advertising Issues

Possible challenges for regulators in the wake of the modified provisions of the Directive concerning advertising may include the following:

- While it is left to member States to decide if they wish to have stricter rules, what impact will the increased possibilities for liberalisation of advertising rules, (e.g. on product placement) ultimately have at the national level? Are the fears of a downward spiral towards deregulation really founded?
- What will be the practical consequences of the abolition of daily advertising limits (formerly three hours per day)? The issue of the impact on thematic channels and telepromotions has for instance been mentioned in this context.
- How will product placement be implemented in practice? Which Member State is currently considering the possibility of using the derogation from Art.3g (1) to allow product placement under specific conditions?
- Pursuant to the recent deletion of the second part of Recital 54 which stated that the Commission's Interpretative Communication on Advertising remained "*valid to the extent that it refers to provisions of the directive that are unaffected by the amending Directive*". What is the legal value of the Interpretative Communication on Advertising?

5. ECTT vs. AVMS: Challenges raised by the Divergence between Council of Europe and EU Instruments

The final challenge mentioned in this paper emerges from the regulatory divergence between the European Convention for Transfrontier Television (ECTT) and the Audiovisual Media Services Directive, once the latter is adopted and transposed at the national level.

The first interrogation is as to whether - and to what extent - the ECTT will undergo a mirror-like revision. The latest conclusions made by the Standing Committee on Transfrontier Television (T-TT) at the occasion of the 5th meeting of the Steering Committee on the Media and new Communication services (CDMC) on 12 to 15 June 2007⁹ seem to indicate that it will be the case.

"The Secretariat reported on progress being made by the drafting group of the T-TT in the revision of the Convention, having regard to the objective of keeping, to the extent necessary and possible, the text of the Convention in line with the draft European Union Directive on audiovisual media services".

"Certain CDMC members underlined the need to bear in mind that the Directive is inscribed in the broader framework of European Union legislation, absent in the case of the Council of Europe Convention. In consequence, the latter is neither complemented nor subject to the constraints of the broader framework of European Union legislation."

Another issue concerns the *transition period* between the two instruments which could raise regulatory divergence or at least significant questions. When the TVwF Directive was last revised in 1997, a transition period of more than three years elapsed before the entry into force of the Protocol amending the ECTT, even though a system of so-called "negative ratification" had been introduced.

During its recent meeting mentioned above, the CDMC *"expressed the view that it would be desirable that the revision of the Council of Europe Convention be accorded priority (including, in budgetary terms) in order to shorten as much as possible the time between the implementation of the corresponding European Union Directive and the entry into force of the revised Convention"*.

The two texts will therefore be at variance inter alia with regard to services covered, jurisdiction, product placement and the role of co-regulation. While the issue of scope may not rise major problems; as one can assume that EU Member States would simply regulate non-linear services earlier than other parties, the issue of differing ancillary criteria for assessing jurisdiction may prove more delicate to tackle.

This is all the more problematic as countries *"only provide for a single set of national rules in order to regulate the issues addressed by the Convention and the Directive and do not build alternative approaches depending on which countries might be concerned by a situation of transfrontier broadcast"*¹⁰.

⁹ [http://www.coe.int/t/e/human_rights/media/1_Intergovernmental_Co-operation/CDMC/CDMC\(2007\)009_en.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/1_Intergovernmental_Co-operation/CDMC/CDMC(2007)009_en.asp#TopOfPage)

¹⁰ Goerens, Pierre, *Interplay Between relevant European Legal instruments, ECTT and TVwF Directive: Competition or Complementarity*, in Audiovisual Media Services without Frontiers, Implementing the rules, European Audiovisual Observatory, IRIS Special, 2006.