

**28th EPRA Meeting
Dublin, 29-31 October 2008
Plenary Session - Scope of the AVMS Directive:
Towards a Common Interpretation of Audiovisual Media Services?**

**Background paper: EPRA Secretariat
Emmanuelle Machet**

Introduction

Even though this background paper will be devoted to the EC Audiovisual Media Services Directive (hereafter AVMS), and not to its Council of Europe counterpart, the European Convention on Transfrontier Television (hereafter ECTT) as it is currently under review¹, it may be appropriate to start with a remark on the interplay between these two European instruments. Whereas the Standing Committee on Transfrontier television (T-TT) and the Steering Committee on the Media and New Communication Services (CDMM) of the Council of Europe finally decided that the Convention should be brought into line with the new Directive, both the Commission and the Council of Europe had launched a review process of the instruments practically simultaneously, the main subject of discussion being the issue of scope. But while the Standing Committee considered already at an early stage the necessity of an extension of the scope of the Convention to other audiovisual services besides traditional broadcasting², the Commission left this question open for a long time, before finally opting for a two-tier approach³.

The extension of the material scope from broadcasting services in the Television without Frontiers Directive (hereafter TVwF) to "audiovisual media services" in the AVMS Directive has been figuring prominently in the agenda of EPRA meetings for some time. In Budapest, in October 2005, a special plenary session was dedicated to the review of the TVwF Directive prior to the publication of the first AVMS draft. In Dubrovnik in 2005, the keynote address of Alexander Scheuer focused on issues relating to the distinction between linear and non-linear services, the related consequences in terms of the applicable substantive law and its monitoring, and practical effects both in terms of media regulation as well as implications for media markets⁴. In Sofia, in October 2007, a plenary session on future challenges for media regulators addressed, among other issues, the extension of material scope in the AVMS Directive⁵. As several Member States have now started to transpose the Directive⁶ or engaged into official consultations, a new plenary session, this time focusing on the practical application of the AVMS provisions with regard to scope by broadcasting regulators, seems timely.

The objective of this background document is to focus on practical issues arising from the application of the AVMSD provisions related to scope in order to identify concrete issues for debate. After a brief overview of the status of the transposition process in some EPRA Members States, the paper will examine a few concrete services which may challenge the application of existing or emerging legal concepts in practice on the basis of answers to a questionnaire circulated by the EPRA Secretariat.

¹ See the draft revised Convention: [http://www.coe.int/t/dghl/standardsetting/media/T-TT/T-TT-GDR\(2008\)001Fin_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/T-TT/T-TT-GDR(2008)001Fin_en.pdf), the T-TT note on the revised amendments: [http://www.epra.org/content/english/members/docs/T-TT-GDR\(2008\)006_en_note.doc](http://www.epra.org/content/english/members/docs/T-TT-GDR(2008)006_en_note.doc), available on the newly created EPRA online discussion forum on the ECTT review: <http://www.epra.org/phpbb2/viewforum.php?f=5>

² See for instance the Report by Dr Andreas Grünwald on possible options for the review of the European Convention on Transfrontier Television, T-TT(2003)002, [http://www.coe.int/t/dghl/standardsetting/media/T-TT/T-TT\(2003\)002_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/T-TT/T-TT(2003)002_en.asp#TopOfPage)

³ On this topic, see Pierre Goerens, Interplay between Relevant European legal instruments, ECTT and TVwF Directive: Competition or Complementarity? In Audiovisual Media Services without Frontiers, Implementing the Rules, IRIS Special, European Audiovisual Observatory, 2006.

⁴ http://www.epra.org/content/english/press/papers/Plenary_FMR_word.pdf

⁵ http://www.epra.org/content/english/members/working_papers/Sofia/Plenary_challenges_final.pdf

⁶ See the recently created EPRA online discussion forum on the AVMS transposition: <http://www.epra.org/phpbb2/viewforum.php?f=3> review

1. Overview of the current status of AVMS Transposition

It is far too early in the process to have a clear picture of the status of the transposition of the AVMS Directive in EU EPRA Member States. However, information available on the website of members' authorities and excerpts from country reports submitted for the Dublin meeting allow us a first insight of the transposition process. This information is by no means exhaustive and could be expanded in a later version of the paper.

Involvement of regulators

While the transposition is mainly a matter for the legislative, regulators usually actively participate in the process. As a rule, broadcasting regulators are included (among other players) in specially set up ad-hoc committees or working groups for the transposition of the AVMS Directive, as for instance in Greece, Netherlands, Romania or the Czech Republic. In Greece, "a Committee, set up in 2008 for the transposition of the AVMSD into the Greek Law, has started to work out the details for the transposition especially the clarification of the definitions of the AVMSD. This Committee consists of 17 members, experts from the National Council for Radio and Television, the National Telecommunications and Post Commission, the Hellenic Audiovisual Institute and the Secretariat General of Communication-Secretariat General of Information and will meet once a month at least. The amendment should be in force to the end of the next year⁷". Several regulatory authorities have published their contribution to the discussion on the transposition of the Directive on their respective websites, such as the CSA in France⁸ or the Collège d'avis of the CSA of the French Community of Belgium⁹.

Regulatory authorities may also play a key role in the organisation of public consultations with interested parties, as in Poland. "On the 2nd of July, the National Broadcasting Council invited all interested parties from the audiovisual sector to participate in the public consultation on implementation of the AVMS directive. The NBC prepared six issue papers on which interested parties were asked to reply, dealing with the change of regulatory approach, jurisdiction, audiovisual commercial communication, protection of minors and media education, promotion of European audiovisual production and exclusive rights and short reports. The consultation will result in the publication of a report to be submitted to the President, Government, Parliament as well as other interested parties¹⁰".

Technical details with regard to transposition

Transposition is a complex process, not always performed through the adoption of a single text or amendments to the broadcasting act but often implying a combination of change and amendments to different texts. As an example, in Greece, The transposition is likely to occur through a combination of legislative changes and amendments to existing clauses and codes, especially to the 100/2000 Presidential Decree, which had adapted the 97/36/EC Directive amending the 89/552/EEC Directive. In the UK, some of the changes introduced by the AVMS Directive (such as the rules on advertising) can be put into effect by Ofcom directly. The requirements on non-linear services will however require a change in legislation. The Department for Culture, Media and Sport (DCMS) launched a consultation in July 2008¹¹.

Overview of the transposition status in a few countries

Some countries are already far-advanced with first draft bills about to enter the legislative process. This is the case for example in Belgium (French Community), France, Latvia, Netherlands, Sweden or Romania. "The Romanian NAC, as a member of the Working Group reuniting experts of NAC and the Ministry of Culture and Religious Affairs, took part in the drafting of the Law for the modification of Audiovisual Law 504/2002. At present, the draft awaits the final approval by the Council for Competition. Following its approval in a Government meeting, the draft will be submitted to the Parliament for approval¹²." In Sweden, the implementation is due for 15th December 2008¹³.

⁷ Excerpt from the National Report of the Greek NCRT submitted for the EPRA meeting in Dublin

⁸ http://www.csa.fr/infos/textes/textes_detail.php?id=126365

⁹ http://www.csa.be/system/document/nom/826/CAV_20080617_decret_transposition_SMA.pdf

¹⁰ Excerpt from the National Report of the Polish KRRiT submitted for the EPRA meeting in Dublin.

¹¹ http://www.culture.gov.uk/reference_library/consultations/5309.aspx

¹² Excerpt from the Country report of the Romanian National Audiovisual Council (NAC) for Dublin.

¹³ Excerpt from the joint National Report of the SBC and RTVV (Sweden) submitted for Dublin.

Some countries have anticipated the adoption of the AVMS Directive and have started early with the transposition process. In Latvia, the Broadcasting Council took the initiative to draft a new broadcasting law taking into account the views of all the major stakeholders and the provisions of the AVMS Directive.

In other countries however, the process is not quite as developed yet and a transposition earlier than the deadline of December 2009 seems unlikely. The status of AVMSD transposition is still at a very early stage in Slovenia. So far, no interinstitutional or public consultations have been launched. The Slovenian regulator APEK included its opinion on certain issues, deriving from the legal framework set by the AVMS directive, in the proposal of the National Strategy of Radio and TV Broadcasting and is planning to give another incentive to the start of consultations by organising a public event on the regulatory challenges in the audiovisual sector¹⁴. In Germany, the Directive is to be implemented through the 13th Amendment of the Interstate Broadcasting Treaty, which is not yet drafted or under discussion. However, the 12th Amendment, which is currently being discussed, already addresses the issue of linearity. In the UK, according to the outcome of a recent stakeholder meeting organised by the DCMS, a consultation report is scheduled for January 2009, policy and legislation for January 2009, and the Parliamentary process for spring 2009.

Focus on scope

As the extension of the material scope from broadcasting services in the TVwF Directive to "audiovisual media services" is the major change of the AVMS Directive, it is not altogether surprising that the contributions from and the consultations launched by regulatory authorities identify the issue of scope as central, such as for instance in France, Belgium, UK or Poland.

The contribution from the French CSA to the public debate identifies the definition of audiovisual media services as one of the major issues at stake, "especially considering their changing nature and their resemblance with other information society services". Based on the current legal framework, on-demand audiovisual media services may be defined as on-line communication services, aimed at members of the public, offering as a principal purpose a catalogue of programmes whose content is composed of animated images. The CSA notes that this definition may be completed with exceptions, as recitals 16 to 21 mention several new services (such as non-commercial services) as outside the scope of the AVMSD. The CSA also raises the issue of the inclusion in the material scope of commercial user-generated websites (such as Dailymotion). The CSA remarks that the issue of whether such website providers exercise editorial responsibility - while unresolved at this stage - is crucial. With regard to the rapid pace of technological changes, the CSA considers that it may make sense to include such services in the scope of the law, conditional to the practical exercise of editorial responsibility. It appears that two major categories of commercial services, i.e. video-on-demand and catch-up TV, will be considered as on-demand audiovisual media services.

In the Netherlands, the new draft bill of the Dutch Media Act - and especially its explanatory memorandum - provides guidance in addition to the AVMSD criteria. The bill leaves the CvdM as a supervisor with enough leeway to find operational criteria to define 'audiovisual media services' and thus determining the scope of regulation. The CvdM has experienced most difficulties with the interpretation of the term 'programme' and the criterion '*principal purpose is the provision of programmes*'. Meanwhile, however, progress has been made towards an approach that seems to work out in practice and enables them to impose clear limits to the scope and thus to the number of services to be supervised¹⁵.

The issue of scope also constitutes the most substantial part of the public consultation launched by the DCMS in the UK. The criterion of editorial responsibility is given much emphasis. The consultation raises thought-provoking issues, such as the potential difficulties in identifying the boundaries between the scheduled and on-demand parts of the same overall service and in making different parts of the same overall service subject to different regulatory requirements and different regulatory bodies.

¹⁴ Excerpt from the Country report of the Slovenian APEK submitted for Dublin.

¹⁵ Excerpt from the Country report of the Dutch CvdM for Dublin.

2. Audiovisual Media services: Practical Issues of Identification and Qualification

This time, the preparation of the questionnaire in order to collect relevant information for the session background document proved a bit of a dilemma. A focus on transposition, rather than on the text of the Directive seemed promising. However, as mentioned above, it was clearly too early in the process to obtain a clear picture of the transposition of the provisions relating to scope in the national legislation. Was this information available, it appeared very difficult to draft a simple questionnaire as the provisions on scope are not only spelled out in Art. 1(a) but in seven related 'Lego-like' definitions ('audiovisual media services', 'programme', 'editorial responsibility', 'media Service provider', 'television broadcasting' 'broadcaster' 'on-demand audiovisual media service'), not to mention the several relevant recitals (16 to 21).

On the other hand, as mentioned in the introduction, several papers and presentations aiming at unraveling the complex provisions of the AVMS Directive dealing with scope had already been produced at the last EPRA meetings.

The last unexplored option, which was finally chosen, was to ensure a problem-oriented approach by asking members - 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. Very wisely, the AVMS Directive refrains from making such a list of services which is bound to be outdated very quickly - even though several recitals mention a few specific services.

It was clear from the outset that such an approach would not result in definite answers to the legal qualification of complex services but may solely help identifying services which may challenge the application of existing or emerging legal concepts in practice. As expected, the outcome of the questionnaire (in total 19 responses received¹⁶) failed to provide very conclusive answers, especially as only a few members justified their choices or provided information as to further borderlines services which may challenge a legal qualification in practice.

One clear shortcoming of the questionnaire, which may hopefully be set to right by the showing of concrete examples during the plenary session in Dublin, was to describe complex services in a few lines without visualizing them. Another failing is that a brief questionnaire is bound to oversimplify such a complex and multilayered matter.

However, as in almost every failure, the questionnaire proved to be of use in several regards. None the least, because it highlighted the difficulty of the tasks regulators will be faced with and the confusion felt by many. Difficulties of comprehension and lack of training were also mentioned.

2. 1. Situation under the current regulatory framework

The TVwF has a technology-oriented approach with regard to scope. It applies to 'television broadcasting' meant as "*the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services*¹⁷".

Whereas it seemed clear that the definition of television services did not include video-on-demand services, there were some initial uncertainties with regard to **near video on-demand/pay-per-view**. Near VoD services are made possible by channel multiplexing and broadcast films in a continuous loop with starting times every 15 or 30 minutes. In that context pay-per-view usually refers to a service that involves the broadcasting of films based on repeat programming, with showings in a continuous loop and users paying by the unit for what they order.

¹⁶ BE (CSA and VRM), BG, CY, CZ, DE, EE, ES (CAC), GB, GR, IE, IT, LT, ME, MK, RO, SE, SK, SI.

¹⁷ Art. 1 (a) of the TVwF Directive 89/552/EEC (as amended by Directive 97/36/EC).

These doubts were lifted by the *Mediakabel* decision of the European Court of Justice in 2005 which ruled that a Dutch pay-per-view service by the name of Filmtime was to be qualified as television broadcasting. According to the ECJ, the determining criterion for the concept of television broadcasting was the broadcast of television programmes “*intended for reception by the public*” and that accordingly, priority should be given to the standpoint of the service provider in the assessment¹⁸.

The issue of the inclusion of **scheduled television broadcasting via IP-based networks** in the scope of the TVWF Directive remained however rather unclear. It is interesting to note that Member States have taken different approaches on this point. Whereas the vast majority of regulators qualify scheduled television broadcasting via IP-based networks as television broadcasting and submit it to broadcast regulation, this is apparently not the case in Slovenia, Slovakia, Bulgaria or Cyprus.

The issue of the qualification of **webcasting/live streaming**, understood as the transmission of non-interactive, linear audio or video content over the Internet, is also handled quite differently in the Member States. It does not appear to be considered as television broadcasting in Montenegro, Romania, Slovenia, Ireland, Macedonia, Estonia, the Czech Republic, Italy or the UK, whereas this appears to be the case in Belgium, Germany, Sweden or Catalonia.

The qualification of **Electronic programme guides** (EPGs) as broadcasting is another divisive issue, only apparently considered as television broadcasting in the Czech Republic, Ireland, Italy, UK and Sweden. However, these differences may only stem from terminology as most of regulators qualifying EPGs as broadcasting mention that it is conditional to EPGs being part of a programme service.

Finally, it is interesting to note that in some countries or regions, such as Belgium (French and Flemish Community) or Estonia, **video-on-demand services** are already submitted to national broadcast regulation. In the French Community of Belgium, the regulatory authority has interpreted the notion of broadcasting in a dynamic way further to rulings of the Constitutional Court. In Catalonia, video-on-demand is defined as “Audiovisual Service” in the Law 22/2005, of 29 of December, of Audiovisual Communication. In the UK, video-on-demand services are currently subject to a self-regulatory (voluntary) regime.

In Sweden, it appears that streamed video elements on newspaper websites are considered as broadcasting.

In the Flemish Community of Belgium, video on demand, aggregated VOD and catch-up TV are currently considered as television broadcasting and are submitted to broadcast regulation as the definition of broadcasting in the Flemish Media Decree is very wide¹⁹. They do not require a licence from the Flemish Regulator for the Media but need to be notified to the Regulator.

User-generated content services are also considered as broadcasting. When there is an economic activity (such as defined in art. 49 and 50 of the EU Treaty) it must be notified and falls under the broadcasting regulation of the Flemish Media Decree. However, when there is no such activity user-generated content must only comply with a very restricted part of the Flemish Media Decree, namely the articles which deal with the protection of minors and hatred.

2.2. Under the framework of the AVMS Directive

2.2.1. Generalities

The main innovation of the AVMS Directive is the extension of its material scope from broadcasting services to “audiovisual media services”, which can be of two types: TV

¹⁸ Judgment of the European Court of Justice of 2 June 2005, *Mediakabel BV v. Commissariaat voor de Media*, case C-89/04

¹⁹ Broadcasting is defined in the Flemish Media Decree as “the original transmission via electronic communication networks, either in coded form or not, of radio or television programmes or other sorts of programmes intended for the public in general or part of it. It also includes the programmes which are transmitted on individual request, irrespective of the technology used for the transmission, including the point-to-point technology and the transmission of programmes between companies with a view to passing this on to the public. This does not include services which provide individualised information characterised by a form of confidentiality.” This definition goes back to a judgment of the Belgian Constitutional Court of 6 November 2002.

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 intention being that the applicable rules do not depend on the delivery platform used, in keeping with the principle of technical neutrality, but on the nature of the service provided.

In practice, the three main questions that regulators will need to address in presence of 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 not be developed further in this paper, is also of importance in order to determine which Member State has jurisdiction over the service. It could even be expanded in a further question, which kind of regulatory authority is responsible for ensuring the compliance of the media service provider with the rules?

In order to answer positively 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;
5. The *principal purpose* should be the provision of *programmes*;
6. A service with *audiovisual character*;
7. A service *provided by electronic communications networks*.

The answer to question number two, as to the distinction between linear and non-linear services is not of a theoretical nature as linear services will be subject to a significantly more restrictive regime. The definition of an on-demand audiovisual media service sheds some light in this matter whereby it is described as “*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*”;

2.2.2. Qualifying services under the AVMSD – A practical simulation

An important caveat at this point: the qualification of a few specific services under the AVMS services - as attempted below - is only to be seen as a highly subjective exercise in order to provide background information for the plenary debate and to identify potential practical problems in the future application of the legal concepts enshrined in the Directive. Similarly the tables provided below are to be considered as provisional working hypotheses.

Scheduled television broadcasting via IP-based networks

Generally, there seems to be no or little uncertainty among the respondents to the questionnaire as to the qualification of scheduled television broadcasting via IP networks as a *linear audiovisual media service*. The AVMS definition makes it clear that regulation of linear services applies not just to traditional television broadcasting but also to scheduled television broadcasting on IP-based networks such as ADSL or UMTS²⁰. It is to be remarked that IPTV providers often also offer on-demand services, whereby these services would fall under the provisions of non-linear audiovisual media services.

Near video-on-demand

Similarly, the qualification of near video-on-demand services as a *linear audiovisual media service* does not seem to raise any uncertainties among members. Near video-on-demand is also expressly mentioned by Recital 20 as an example of a television broadcasting service further to the Mediakabel case.

²⁰ European Media Law, Oliver Castendyk/Egbert Dommering/Alexander Scheuer (Eds), p.828.

Video-on-demand

In the same vein, the qualification of video-on-demand services as a *non-linear audiovisual media service* does not seem to raise any uncertainties among members. Video-on-demand is also expressly mentioned by Recital 20 as an example of a non-linear broadcasting service.

Live webcasting/streaming

The qualification of live webcasting/streaming, understood as the transmission of non-interactive, audio or video content in real time over the Internet, seems to raise more interrogations among respondents, even though such services are also expressly mentioned as an example of a *linear audiovisual media service* by Recital 20. Whereas many respondents tend to qualify live webcasting/streaming as a linear audiovisual media service, some tend to consider it as a non-linear service or openly declare their uncertainty as to their qualification as an audiovisual media service.

It is clear that each element of the definition needs to be tested in order to determine whether a particular instance of webcasting is an audiovisual media service. It may of course depend on the type of webcast or streaming. The simulcasting of a news programme from a broadcaster on a website seems a clear-cut case. But one could for instance imagine that a webcast consists of user-generated content. In that case, it would probably not fulfill the criterion of editorial responsibility. One could also imagine that some webcasts may be addressed to a closed circle of users and would then probably not satisfy with the mass media criterion. In this regard, a recent Contact Committee meeting, the Commission underlined that the actual size of the audience was not decisive to fulfil the mass media criterion but rather whether the recipients are individually identified or identifiable²¹. In contrast to live streaming, on-demand streaming is the playback of an archived file that is accessed via a link embedded on a Web page. Services with on-demand streaming, if fulfilling the requirements of Art. 1 (a), would be classified as non-linear.

Qualification Hypothesis - Live Webcasting/ streaming	
A service (economic activity)	Usually
Under editorial responsibility of media service provider	Usually
Mass media character	Usually
A service to inform, entertain and educate the public	Usually
The principal purpose is provision of programmes	Usually
Audiovisual character	YES
Provided by electronic communications networks	YES

Aggregated video-on-demand services

Aggregated video-on-demand refers to providers who offer members of the public a package of several video-on-demand services. They may provide access to packages of programming which are being separately offered to the public by other video-on-demand providers but as well providing their own package. Here again, the answers to the questionnaire reveal a rather high level of uncertainty.

The main issue here seems to be the determination of the media service provider and the degree of control the aggregator may have over the content²². This brings us back to the third question mentioned earlier: *who is the media service provider?* They may have full control over their own package but only some degree or none over the other elements of the other video-on-demand they are offering.

Qualification Hypothesis - Aggregated VoD service	
A service (economic activity)	YES
Under editorial responsibility of media service provider	YES but who?
Mass media character	YES
A service to inform, entertain and educate the public	YES
The principal purpose is provision of programmes	YES

²¹ http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/27_minutes_en.pdf

²² This is one of the questions raised by the public consultation in the UK.

Audiovisual character	YES
Provided by electronic communications networks	YES

Catch-up TV

Catch-up TV refers to a generally free-of-charge service, usually offered by broadcasters, allowing viewers, for a limited span of time that varies according to the countries, to catch-up with programmes after they have been broadcast. It offers television channels a second opportunity to distribute their programmes and is sometimes referred to as time-shifting service or FoD for free on demand.

The level of uncertainty here seemed rather surprising. While half of the respondents consider catch-up TV as a non-linear audiovisual media service, several answers are inconclusive.

One interesting issue, which was recently mentioned by Ofcom at a regulators' meeting in Brussels, is the case of the Catch-up TV service from the BBC, BBC i-player, which is also distributed on another platform, that of Virgin Media. In that case, it was alleged that it would be necessary to see whether the channel retained control of all elements or whether the platform was in practice responsible for controlling any or all elements.

Qualification Hypothesis - Catch-up TV	
A service (economic activity)	YES
Under editorial responsibility of media service provider	YES
Mass media character	YES
A service to inform, entertain and educate the public	YES
The principal purpose is provision of programmes	YES
Audiovisual character	YES
provided by electronic communications networks	YES

Download to rent (DTR)/download to own (DTO) services delivered to TV set or PC

Download to Own (DTO) refers to the purchase of a VoD programme by downloading it whereas Download to rent refers to the rental of a VoD programme. As an example, the Xbox Live Marketplace is a virtual market designed for the Microsoft Xbox video game console that allows members to download purchased or promotional content, such as trailers, games but also movies and television series through its video store. Lovefilm or Glowria operate a similar service of VoD rentals delivered to the PC. Economically speaking,²³ it is usually considered as a particular business model of video-on-demand. It is surprising to see, however, that almost all respondents are uncertain about the qualification of this service and whether or not it is a non-linear audiovisual media service.

Qualification Hypothesis - DTO/DTR	
A service (economic activity)	YES
Under editorial responsibility of media service provider	Usually YES
Mass media character	YES
A service to inform, entertain and educate the public	YES
The principal purpose is provision of programmes	YES
Audiovisual character	YES
Provided by electronic communications networks	YES

Network Personal Video Recorder Services (NPVR)

Network Personal Video Recorder Services are services enabling users to select television programmes on air for recording and later playback, storing the programmes on central servers (no download). Similar services are delivered by Fastweb, Imagenio, Arcor and other IPTV players. Users are allocated some recording space in a server and select the programmes they want to record and store to watch at a later moment. There are some strong similarities with Catch-up TV but such services are usually provided by telecom operators and IP Players. Here

²³ See for instance Video on Demand in Europe, A report by NPA Conseil, European Audiovisual Observatory, 2007 and Legal Aspects of Video on Demand, IRIS Special, European Audiovisual Observatory, 2007.

again, almost all respondents are uncertain about the qualification of this service and whether or not it is a non-linear audiovisual media service.

It seems, however, that the main argument against a qualification as AVMS is that NPVR is usually not provided under the media service provider's editorial responsibility.

Qualification Hypothesis – NPVR services	
A service (economic activity)	YES
Under editorial responsibility of media service provider	Doubtful?????
Mass media character	YES
A service to inform, entertain and educate the public	YES
The principal purpose is provision of programmes	YES
Audiovisual character	YES
provided by electronic communications networks	YES

Services with user-generated content (UGC)

Respondents to the questionnaire are almost unanimous in considering user-generated content as outside the scope of the AVMS Directive. Drawing on the first element of the definition of audiovisual media service, Recital 16 states that the *“Directive should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest”*.

However, experts have warned that Recital 16 may be insufficient to exclude all services per se containing user-generated content²⁴. First of all, Recitals in EC law are not considered to have independent legal value, even if they can expand an ambiguous provision's scope. Secondly, such services may evolve very quickly. For instance, services like YouTube do not only contain user-generated clips, but also professionally produced content. Nevertheless, in addition to the issue of qualification as a “service”, the main argument against a qualification as AVMS is that it not provided under anyone's editorial responsibility, since it is an open platform. *“Removing objectionable content to comply with an administrative order or general rights clearance does not by itself constitute the active decision-making that would be necessary to meet the requirement of the exercise of editorial control”* as was reminded recently by the Commission's Contact Committee²⁵. But what if YouTube was to take active measures to solicit or promote a specific content? Could it not be considered equivalent as operating a selection of content?

Qualification Hypothesis – Services with user-generated content	
A service (economic activity)	Questionable
Under editorial responsibility of media service provider	Questionable
Mass media character	Possibly
A service to inform, entertain and educate the public	YES
The principal purpose is provision of programmes	Possibly
Audiovisual character	YES
provided by electronic communications networks	YES

Online computer games

This time, respondents are almost unanimous in NOT qualifying online computer games as an audiovisual media service. Computer games are indeed mentioned by Recital 18 as being outside the scope of the AVMS Directive because their purpose is not the provision of programmes and the audiovisual content is merely incidental to the service.

This has not prevented some experts from considering that some very specific types of computer games such as Massively Multiplayer Online Role-Playing Games (MMORPGs) may fulfill the

²⁴ European Media Law, Oliver Castendyk/Egbert Dommering/Alexander Scheuer (Eds).

²⁵ http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/27_minutes_en.pdf

necessary requirements²⁶. The criterion of editorial responsibility seems however to be the weak point in the argumentation in favour of an inclusion in the scope of the AVMSD²⁷.

Qualification Hypothesis - Online computer games	
A service (economic activity)	YES
Under editorial responsibility of media service provider	Questionable
Mass media character	Possibly
A service to inform, entertain and educate the public	YES
The principal purpose is provision of programmes	Questionable
Audiovisual character	YES
provided by electronic communications networks	YES

Search engines for video clips

Respondents are almost unanimous in NOT qualifying search engines with video clips as an audiovisual media service. As above, Recital 18 mentions that search engines (in general) are outside the scope of the AVMS Directive because their purpose is not the provision of programmes and the audiovisual content is merely incidental to the service. Search engines for video clips, such as Google Video for instance, could potentially be considered as a kind of catalogue of programmes depending of course on the television-like character of the "programmes" offered. Here again, the criterion of editorial responsibility may constitute the weak point of such an argumentation. The organisation of programmes criterion, e.g. the arrangement of programmes according to specific genres or other organisational features may be lacking²⁸.

Qualification Hypothesis - Search engines for video clips	
A service (economic activity)	Possibly
Under editorial responsibility of media service provider	Questionable
Mass media character	Possibly
A service to inform, entertain and educate the public	YES
The principal purpose is provision of programmes	Questionable
Audiovisual character	YES
provided by electronic communications networks	YES

Newspaper websites with video elements

Respondents are almost unanimous in NOT qualifying newspaper websites with video elements as an audiovisual media service. Recital 21 mentions that electronic versions of newspapers and magazines should not be covered by the scope of the Directive. The main issue here is to assess whether the principal purpose of the provider is to distribute audiovisual content, or it is rather incidental or ancillary. As highlighted during a recent Contact Committee meeting, the contribution of the audiovisual offers to the overall revenue will be an important element to take into account when deciding whether the audiovisual elements are ancillary or the principal purpose of the service.

Qualification Hypothesis - Newspaper websites with video elements	
A service (economic activity)	YES
under editorial responsibility of media service provider	YES
Mass media character	YES
A service to inform, entertain and educate the public	YES
The principal purpose is provision of programmes	Questionable
Audiovisual character	YES
provided by electronic communications networks	YES

²⁶ Online Games from the Standpoint of Media and Copyright Law by Paul Göttlich, IRIS plus 2007: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus10_2007.pdf.en

²⁷ IRIS Special: Editorial Responsibility, Dr Wolfgang Schulz and Stefan Heilmann, European Audiovisual Observatory, 2008

²⁸ Ibid.

Electronic programme guides

About half of the respondents qualify electronic programme guides, if they are part of the programme service, as an audiovisual media service, the rest do not qualify them as such or are unsure about the right qualification. Recital 22 indeed mentions that the definition of audiovisual Media Services should also cover text-based content, such as subtitling services and electronic programme guides when they accompany programmes, whereas stand-alone text-based services should not fall within the scope of the Directive.

Qualification Hypothesis - Electronic Programmes Guides	
A service (economic activity)	YES
Under editorial responsibility of media service provider	YES
Mass media character	YES
A service to inform, entertain and educate the public	YES
The principal purpose is provision of programmes	Questionable
Audiovisual character	NO
provided by electronic communications networks	YES

Further services

No other specific service was mentioned by the respondents as challenging the legal concepts in practice. However, it was stated that the greatest difficulties arise around services which combine elements of different propositions described above.

In that case, recital 20 may provide guidance as it mentions that, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.

In the course of the plenary Session in Dublin, we will hear three presentations from EPRA members dealing with to the scope of the AVMS Directive: Marcel Betzel and Edmund Lauf, Commissariaat voor de Media - CvdM (NL); Jeremy Olivier, Ofcom (UK) and Elisabeth Flüry-Hérard, Conseil supérieur de l'audiovisuel – CSA (FR).
The presentations will be followed by a panel discussion and a debate with the audience.

Some issues for the debate:

- **Did broadcasting regulators attempt to interpret the concept of audiovisual media service in practice?**
- **Where to draw the line between services that are subject to the AVMS Directive and those who are not?**
- **How should exceptions to the definition of audiovisual media service be interpreted?**
- **Do European regulators tend to agree on a common interpretation of the audiovisual media services under the scope of the Directive when applying the concepts in practice?**
- **What are the practical consequences of the extension of material scope for regulators, also in terms of staff qualification required and workload?**
- **Are there any discrepancies with regard to scope between the AVMS Directive and the draft revised ECTT as it currently stands?**