

HERMES

Study on the Future of EUROPEAN AUDIOVISUAL REGULATION

Hans-Bredow-Institut for Media Research & Institute for Information Law



2015
FINAL REPORT

This project has been carried out in full compliance with the European Code of Conduct for Research Integrity. Funding included a grant from RTL Group.

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EXECUTIVE SUMMARY

The growth of digital services over recent years has seen increasing media convergence, both in Europe and around the world. Regulation designed primarily for linear media (such as traditional scheduled television services) has not adequately kept pace with the growth of non-linear media (such as on-demand services on televisions or other devices). To evaluate the regulation in place is crucial for the aim to promote the European digital economy.

This trend towards non-linear media – especially among certain age groups – presents a significant challenge to regulators. It will continue to do so in

ways that are difficult for regulators to foresee at this time. Technological development necessitates flexible and coherent rules.

The trends call for rethinking the structures of regulation. This report recommends the use of opt-in regulation that offers favourable terms for the provision of content of ‘public value’. This approach will ensure that common European aims and values are maintained and national cultural particularities respected in a stable and long-lasting regulatory framework.

I. WHAT ARE THE AIMS OF MEDIA REGULATION?

The European media regulatory framework seeks to protect certain values and promote certain objectives that are commonly held across the European Union’s 28 Member States.

These values include, perhaps most importantly, access to balanced news and information that is free from government control – a key element of any democracy. They also include diversity and inclusion (ensuring that minorities and small communities are represented and served), the protection of young people and respect for human dignity.

Consumer protection and the protection of personal data and the promotion of media literacy are also

among the principles underpinning European media regulation.

European Union decision-makers have decided to add certain objectives to the regulatory framework, too – such as promoting European content (including ‘European storytelling’) and innovation –, which also encompasses supporting a strong European audiovisual market.

These values and objectives are constants. However, the risks posed to them, and the priority accorded to each of them in the public policy debate, may change, which demands flexibility in regulation.

II. HOW IS THE USE AND DELIVERY OF MEDIA CHANGING?

The principle change in the use of media is the growth of non-linear media. Television series and films are increasingly being accessed on demand; certain age groups in particular also consume news and information via non-linear media – particularly in Finland, Spain, the United Kingdom, Denmark and Italy. For example, in the UK, online media are the primary source of news for two thirds of people aged between 18 and 24 years.

Regulation needs to address this phenomenon while also recognising that, for a large number of consumers, linear media remains important and the primary source of information and entertainment.

Another significant change is the use of the ‘second screen’ – accessing content simultaneously on more than one device (such as a television and a tablet or smartphone). Such a phenomenon puts linear and non-linear media in direct competition for attention, especially when the content being accessed on each screen is different.

However, below the general European trends there are national and age group-related differences and regulation needs to be sufficiently flexible to take proper account of this incoherent picture.

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Technological change enabled these changes in habits, and is likely to continue apace. Network convergence (such as 'multiple play' offerings) and better interoperability of different communications services, bandwidth increases and improved data transport have all aided a diversification in use and consumption of media.

Together, changes in technology and consumption have led to content being made available on a variety of devices, from (smart) televisions to computers, and tablets to smartphones.

As a result, there are also changes in the 'value chain', with an increasing number of opportunities for new players to enter the media services market (including data transport, electronic programme guides, media libraries, or operating systems software). While providing useful services, these new players - as platforms and intermediaries - can hold significant power. The regulatory framework needs to ensure they do not act to the detriment of content providers or consumers, and that 'findability' of content, signal integrity (ensuring that content arrives unaltered, and without delay or interruption) and access to infrastructure are not impeded.

III. WHAT IS THE CURRENT REGULATORY FRAMEWORK?

There are three principal pieces of European Union law that govern media services.

1. The Audiovisual Media Services Directive (AVMSD) provides basic regulation for the distribution of media content in the EU. However, it distinguishes between linear and non-linear audiovisual media, meaning that the same content may be treated differently, depending on the method of delivery.

2. The Universal Service Directive (USD) contains 'must carry' rules, but generally does not address

non-linear media (although there are provisions in the related area of net neutrality. The USD also covers technological aspects and 'findability' of content.

3. The Access Directive (AD) provides rules on the 'findability' of content but is rarely employed by Member States.

In addition, there is a series of other rules that play a role in shaping the media regulatory environment, as well as competition law.

IV. WHAT ARE THE OPTIONS FOR FUTURE MEDIA REGULATION?

Non-European media rules provide some useful options for changes to the regulatory environment in the European Union.

Canada, for instance, has similar objectives to Europe in promoting domestic content and cultural heritage. To ensure that its media market is not dominated by foreign imports, it has domestic content quotas and provides incentives, too - such as funding or priority carriage. However, these rules are limited to linear media, and so can be bypassed by on-demand services.

In the United States, local stations are also given incentives to provide certain types of content. These incentives include 'must carry' obligations, safe-guards for signal integrity, and 'findability' provisions.

The Australian Communications and Media Authority (ACMA) takes a flexible and forward-looking approach to regulation, seeking to learn from its own mistakes. In particular, it defines 'broken concepts' - those that are failing to achieve their aims - and 'enduring concepts' - those that are successful and can be continued.

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V. PROPOSAL: A FRAMEWORK OF INCENTIVE-BASED REGULATION

We can learn from these examples and discussions within the Member States that the material scope of regulation is crucial. But we can also see that opt-in and incentive-based regulation can provide a valuable tool in order to achieve regulatory aims. However, opt-in regulation cannot mean that it is completely up to the industry to decide whether regulation is applicable or not. European regulation will still guarantee a minimum standard for important aims.

In the light of the observations made, we propose that future regulation will have to be based on five pillars to ensure the necessary flexibility:

- **Principles rather than strict rules:** The general advantages of principles are flexibility, but also scalability and adaptability, giving the Member States an opportunity to experiment with different types of rules and, ideally, lead Member States to learn from each others' regulatory experiences. At the same time, clear principles offer strong guidance and provide a safeguard for a sufficient consistent European approach.
 - **Technological neutral and functional approach:** Since it is especially the technological environment that changes rapidly, regulation should not be triggered by specific features of technology but should follow a functional approach. Technology-focused regulations would not only bear the risk of impeding innovation in technology – such regulations could easily fail to meet the purpose of media regulation. To take an example, the regulation of platforms should not depend on an operator to control the physical infrastructure but only on the importance of the distribution of audiovisual media services, on the necessity for regulation and, therefore, the market conditions.
 - **Learning aptitude:** Regulation in this dynamic field should be subject to regular evaluation and – if necessary – to adjustments of the regulatory framework. In some cases, it might be sufficient to rely on an interpretive notice by the European Commission and/or the European Regulators Group for Audiovisual Media Services (ERGA).
 - **Rulemaking by regulators:** Regulatory theory teaches that – in cases such as media regulation – the legal framework should enable the regulators to not only decide on individual subject areas such as licenses or the enforcement of rules, but also provide an opportunity to enact bylaws to specify the legal framework. Co-operation between regulators can provide a sufficient system of checks and balances to safeguard a consistent approach. It is at this level that risk and evidence based elements can be introduced.
- An incentive-based regulation in this way has to set incentives for content providers to provide desirable content that holds a public value instead of focusing exclusively on types of content that appear to be most profitable. Such incentives could be the already mentioned must-carry-obligations for carriers, a safeguarding for signal integrity, as well as findability rules. Furthermore, it would be possible to offer other incentives such as financial exoneration, more flexible advertisement rules, and – under certain circumstances – advantages regarding distribution. An incentive-based regulation framework ties these privileges to certain types of content, for instance public value services. Content providers can then decide on their own to produce content that meets the criteria of certain content types in order to benefit from the corresponding benefits. This type of regulation has several benefits:
- Regulators do not have to put so much cost and effort into implementing the regulations since industry acts voluntarily.
 - Regulators do not have to force their will on content providers, making the regulatory process less conflict-laden.
 - Leaving the definition of requirements to the Member States creates an EU-wide coherent system that leaves room for a Member States' peculiarities in the same time.
- But, of course, such a framework requires a careful balance between the privileges granted for a type of

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content as well as the cost on behalf of the content providers who offer content that meets the criteria of the respective category. Also, regulators cannot stay passive, but will have to evaluate the providers' self-categorisation from time to time.

A flexible incentive-based regulatory framework will have to leave some leeway for Member States to address the specific situations present in the respective country. On the EU-level, it would be possible to establish a framework that takes into account the common regulatory aims and values, building upon these as basic principles to facilitate a coherent media regulation throughout the Member States. This EU framework predefines certain types of content that are tied to certain privileges. However, to give the Member States the needed leeway and flexibility to address the individual situation within their own sphere, it should be left to the national regulation to define the requirements to qualify for a category.

By adjusting media regulation to these principles, the regulatory structure would be flipped. Instead of providing regulatory rules based on the individual types of services – e.g. providing distinct sets of rules for linear and non-linear media – a general set of rules would apply to all audiovisual media to meet the risks provided by all kinds of media. Specialised rule sets for certain media would only be issued where necessary. This could streamline and harmonise media regulation not only across various types of media – especially linear and non-linear – but also lead to harmonisation of regulation between the Member States.

What has become obvious is that a regulatory view cannot be narrowed down to a single field of regulation. In this regard, many regulatory fields are intertwined and/or responsive in one way or another. We can see that fundamental rights – as in the Charter and Convention of European human rights –, copyright law, responsibility and liability rules, e-commerce regulation, consumer protection, telco regulation, fair trade regulation, competition law, and antitrust law – interrelate to a certain degree. To achieve some aims of media regulation, not only the dedicated framework comes into play: sometimes issues have to be addressed by other regulatory frameworks. For instance, in order to regulate access to infrastructure, telecommunication

regulation will have to be considered. Another example can be seen in a merger of or cooperation between content providers and the implications of antitrust law, which might be different from the implication of media regulation. Consequently, regulation needs to take a 360°-View and consider the implication of other regulatory fields. The development of interfaces between various fields of regulation requires increased attention.

A. PREFACE

The audiovisual landscape is rapidly changing. Due to various developments, described in this report, the present European regulatory framework needs rethinking. This report wants to contribute to the debate and offers several options for reform.

The report is the result of a cooperation between the Hans-Bredow-Institut (Hamburg) and the Institute for Information Law (Amsterdam). The project was lead by Professor Dr. Wolfgang Schulz and Professor Dr. Nico van Eijk. The following persons contributed to the report: Dr. Tarlach McGonagle, Lennart Ziebarth, Felix Krupar. The research has been supported by a grant from the RTL Group, Luxembourg.

Hamburg/Amsterdam, October 2015

B. INTRODUCTION

As early as in 1997, the European Commission published the „Green Paper“ on the convergence of the telecommunications, media and information technology sectors.¹ From this time on, convergence has been a ghost hunted in countless conferences worldwide. In 2013, the commission drafted a new green paper and started an extensive consultation process.² The found answers demonstrate that the ghost now has materialized, we can see the advantages but also the challenges more clearly now, looking at phenomena such as hybrid television or smart television and the changes associated within all IP-environments.

Against this background, Member States consider amending the regulatory environment and are rethinking the role traditional broadcasting plays within society and, in consequence, for regulation. Traditionally, regarding Member States, broadcasting is considered as something very special. On the one hand, it was – and still is – assumed to have significant power over public opinion making and was therefore highly regulated compared with the printed press and online-services.³ On the other hand, broadcasting was associated with the delivery of public value – a means to bring news even to parts of the society that don't read newspapers regularly, to add to regional diversity or to offer approved and trustworthy children's programs.

In the digital society where technical convergence has become reality, those assumptions at least have to be questioned – and the decision has to be made whether the regulatory part is still valid, whether it has to be amended or changed completely. Concerning this decision, the European audiovisual media policy plays a major role. It does not determine the national media policy in view of convergence completely, however, the current regulation provides some cornerstones for the Member States' media regulation. One of those is the definition of audiovisual-media services and the graduated approach with nearly audiovisual media services (television)

and audiovisual media services on demand associated with different levels of regulation. But that is by no means all. There are other aspects such as telecommunications regulation that define the leeway for the Member States.

Against this background, the present study intends to provide the following:

- Analysis of the content-related aims Member States follow when regulating audiovisual media services and a look at the role these aims can play in a converged environment.
- Assessment of the changes in media use and of the economic value chain that are relevant for the future of media regulation.
- Suggestion of options for the audiovisual media regulation considering the above mentioned changes.
- Discussion of consequences for the audiovisual media services regulation on the European level. An analysis of the regulatory options and their implementation, based on the study.

1. COM (97) 623 final.

2. COM (2013) 231 final.

3. Open Society Foundations 2014, p. 75 ff., 96 ff.; Mediadem case study reports 2011: UK, p. 5; Belgium, p. 6; Denmark, p. 7; Germany, p. 6.

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The following will be a short summary of aims and values targeted at and adhered to by media regulation in Europe. These aims and values serve as a guideline for the process of regulation, making them the decisive parameter for media regulation. In order to suggest a framework for a future regulation applicable to the whole of Europe, certain commonalities can be identified.

We focus on the aims that are associated with the specific role audiovisual media play for public communication – the very role that distinguishes them from other types of services, which calls for special regulation and – in consequence – a coordination of national regulation on a European level. Firstly, aims and values to be found in the Member States will be disclosed (I. to VII.), followed by a short look on the aims and values that govern the AVMS-Directive (VIII.).

I. PUBLIC OPINION MAKING

The probably most important aim of media regulation is to promote and enable public opinion making, as it poses a characteristic crucial to modern democracies.⁴ Though rarely stated expressively, the aim to enable public opinion making is installed in media regulation throughout the Member States of the EU through various other means. Also, it is enshrined within Article 11 of the Charter of Fundamental Rights of the European Union and an underlying aim of the AVMSD.⁵

A pluralistic media system is to be seen as a precondition for free and open public opinion making. For the majority of the Member States and the European Union as a whole, pluralism in the media is an official aim of media regulation.⁶ In order to develop and evolve a public opinion, the various opinions and points of view have to be made visible in the public and for the public. If this is realised, self-observation of society becomes possible – as a basis of a public opinion.⁷ To this end, national regulation is meant to enable different dimensions of plurality. Fostering political and social plurality, as well as a plurality of media types, are common aims among

many of the Member States.⁸ In order to do so, regulation also defines strengthening the freedom of expression and the right to information as core values,⁹ which includes a strict non-discriminatory approach towards opinions. Consequently, plurality of media and freedom of expression present two central values of European media regulation¹⁰ Pluralism can be measured by certain legal, socio-demographic, and economic indicators. Legal indicators are usually risk based, e.g. whether or not there are regulatory safeguards to provide the public with access to broadcast channels of general interest – or whether regulation or competition laws can prevent abusive behaviour (regarding digital bottlenecks, for instance). Possible socio-demographic indicators could be the proportions of employees dedicated to new media services, the number of online media services that offer space for publicly available comments and complaints, or the proportion of various political and ideological viewpoints and interests represented in the media. Finally, economic indicators could identify threats to media pluralism such as high concentration of ownership or a lack of sufficient market resources to support a wide range of media.¹¹

4. i.a. CM/Rec (2012)1; Mediadem Comparative Report: The regulatory quest for free and independent media 2012, p. 8f.; Jarass, Art. 5 GG, margin number 2, 23.

5. cf. COM (2013) 231 final, p. 13.

6. Council of Europe: Declaration of the Committee of Ministers on Public Service Media Governance 2012; Mediadem case study reports 2011: Croatia, p. 12; Denmark, p. 5f.; Finland, p. 7; Germany, p. 19; Greece, p. 8; Italy, p. 21.

7. cf. Luhmann 2000, p. 95.

8. Mediadem case study reports 2011: Germany, p. 19; Italy, p. 21; Finland, p. 5; Croatia, p. 7; Bulgaria, p. 6.

9. Council of Europe: Declaration of the Committee of Ministers on Public Service Media Governance 2012, para 1.

10. COM (2013) 231 final, p. 10 f.

11. Pluralism Monitor 2009.

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Accordingly, other aims and values that also serve the purpose of safeguarding the plurality of opinions are followed. One is that the free and unhindered work of journalists must be ensured.¹²

Some countries also provide the regulatory aim to install a body of journalism ethics in order to maintain the quality of journalism.¹³ Another is that the media as a whole must be independent from pressure and undue influence, be it from politics or any other instance that could exercise undue influence.¹⁴

In some Member States, there might be hindrances to this goal – as the media environment is sometimes heavily dependent not only on the usual economic advertising, but also on political advertising and state support.¹⁵

In the end, a multitude of opinions should be visible, providing the pivotal element of the public opinion making process.

II. COMBATTING POWER ON PUBLIC OPINION MAKING

The downside of the (audiovisual) media's purpose to enable public opinion making is to be seen in a possible misuse. In this manner another common aim comes up: avoiding or inhibiting power on public opinion making is an aim followed by regulation throughout the Member States.¹⁶ This aim strongly complements the aforementioned aim of enabling public opinion making. In fact, both aims can be considered as two sides of the same coin, since avoiding influence on public opinion making is meant to safeguard the pluralism of media.

This again requires substantial independence not only of the media, but also of regulatory bodies which have to be free of undue influence, while the media must be granted editorial independence and operational autonomy.¹⁷ This especially calls for a certain distance to political actors, which could use their power to affect regulation.¹⁸ Accordingly, "the independence of public service broadcasting from political and state influences is closely dependent upon the internal and external structures that are set up to govern the public broadcasters."¹⁹ In some countries, regulation also aims to govern me-

dia ownership as a measure to protect the media from undue influence.²⁰ However, not all countries have rules concerning the regulation of media ownership.²¹ A recent debate is revolving around the role of online intermediaries and their power over public opinion making. This lies, however, not in the focus of this study.

In the end, it is a substantial goal of media regulation in Europe to prevent any individual, social or political group to have a dominant power in the process of public opinion making.

16. Mediadem case study reports 2011: Denmark, p. 6, 10; UK, p. 13; Croatia, p. 17; Estonia, p. 20.

17. Mediadem Comparative Report: Media Freedom and Independence in 14 European Countries 2012, p. 10, 14; Mediadem case study reports 2011: Denmark, p. 13; Belgium, p. 31; Greece, p. 13; Romania, p. 27; Finland, p. 8.

18. cf. CM/Rec (2012)1; Mediadem Comparative Report: Media Freedom and Independence in 14 European Countries 2012, p. 10; Mediadem case study reports 2011: UK, p. 8; Finland, p. 7.

19. Mediadem Comparative Report: Media Freedom and Independence in 14 European Countries 2012, p. 39.

20. Mediadem case study reports 2011: Estonia, p. 9; Italy, p. 12; Spain, p. 5; UK, p. 13; Mediadem Comparative Report: Media Freedom and Independence in 14 European Countries 2012, p. 75 f.; also cf. Open Society Foundations 2014, p. 30.

21. Mediadem case study reports 2011: Bulgaria, p. 23 ff.; Estonia, p. 15; Finland, p. 19; Mediadem Comparative Report: Media Freedom and Independence in 14 European Countries 2012, p. 76.

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III. DIVERSITY AND INCLUSION

Diversity is not merely another aim of European media regulation, but also an intrinsic value within the EU and all of its actions, as made clear by Art. 167 TFEU. Diversity as a regulatory aim is not to be mistaken for the aforementioned aim of pluralism. While pluralism refers to a multitude of opinions and media types, diversity targets at a widespread cultural multitude, ideally representing a plethora of demographic and social groups. In the scope of media regulation, it also stresses the media's importance concerning the democratic dimension.²² Without diversity as a goal, many Member States expect certain media – e.g. media only targeted at a small cultural group – to vanish from public media or not to be offered in the first place, even though this media would be desirable as an offer for society as a whole. Regulation in this manner aims to provide diversity that would not exist without it.²³

Also, cultural diversity as a goal serves to include minorities and small communities that would likely go unnoticed by unregulated and wholly commercial media.²⁴ Many European Member States face the

problem of hard-to-include minorities, may they be defined ethnically, socially, through certain disabilities or otherwise.²⁵

As with the aim of pluralism in public opinion making, diversity can be measured by certain key indicators. Here, an important role might be played by socio-demographic indicators such as the proportions of employees dedicated to new media services, the number of online media services that offer space for publicly available comments and complaints, or the key indicators for cultural pluralism, e.g. proportion of European works in television broadcasting or in non-linear audiovisual media.²⁶ Thus, a diverse media landscape serves at least two purposes: It offers media services to meet the special needs and demands of and gives a voice to minority groups,²⁷ while also offering information on minorities and small communities to those who are not part of them, broadening their horizons and promoting acceptance for minority groups in society, enhancing tolerance and social cohesion.²⁸

IV. EUROPEAN STORYTELLING

Another aim of European regulation is a genuine European and national storytelling, not by ruling out foreign media productions, but by ensuring that a certain amount of the media content is focused on Europe as a whole or, respectively, the individual Member States.²⁹ Otherwise, it would have to be feared that streamlined media – which is lucrative for producers as it can be marketed in a multitude of countries – would completely dominate national

media and ultimately even compromise media plurality.³⁰ In the end, foreign productions cannot fulfil the same functions as domestic ones, e.g. national idiosyncrasies would not be considered in the media.³¹ Also, the way stories are told is highly dependent on the cultural background of writers, director and producers. In this way, national media helps to shape national identity, which is an important aspect.

22. Council of Europe, Declaration of the Committee of Ministers on Public Service Media Governance 2012, para 4, 14; Mediadem case study reports 2011: Belgium, p. 6, 8; Croatia, p. 10, 30; Denmark, p. 18; Denmark, p. 6, 37, Estonia, p. 20; Germany, p. 7, 36; Belgium, p. 32.

23. Mediadem case study reports 2011: Denmark, p. 35; UK, p. 26, 27; Spain, p. 28.

24. Council of Europe, Declaration of the Committee of Ministers on Public Service Media Governance 2012, para 4; Mediadem case study reports 2011: Belgium, p. 9, 21; Italy, p. 24; UK, p. 8, 26 f.; Spain, p. 28.

25. Mediadem Comparative Report: Quest for free and independent media 2012, p. 31 ff.; Mediadem case study report Denmark 2011, p. 58.

26. Pluralism Monitor 2009.

27. cf. Open Society Foundations 2014, p. 12f., 32, 118 ff.

28. Mediadem Comparative Report: Media Freedom and Independence in 14 European Countries 2012, p. 10.

29. Mediadem case study report Croatia 2011, p. 27, 28; Mediadem Comparative Report: Quest for free and independent media 2012, p. 88 f.

30. Mediadem case study reports 2011: Denmark, p. 25 f.; Belgium, p. 8; Estonia, p. 6; Croatia, p. 27 f.; Mediadem Comparative Report: Quest for free and independent media 2012, p. 87; cf. also Open Society Foundations 2014, p. 183 ff., 197 ff.

31. cf. Mediadem Policy Brief II 2012, p. 9; Mediadem Comparative Report: Quest for free and independent media 2012, p. 88, 89.

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An overrepresentation of non-domestic media could also have negative effects on public opinion making: as they tend not to address topics of specific national interest, they would not suffice to conduct national debates.

Ensuring national storytelling through regulation seems especially important for smaller countries, since it is usually less profitable to produce media content for smaller national markets than to produce contents for multiple markets or to buy such content and use it.³² Further, this notion should not be

ignored concerning the European level, as other foreign productions originating in bigger markets such as the US might dominate the media throughout Europe. In regard to the European Union, a European storytelling could help to further the integration of the Member States, helping to create and shape a European identity.³³

Additionally, this aim is connected to the aforementioned aim of diversity and inclusion of minorities, as the use of domestic media is at least an indicator for cultural diversity.³⁴

V. ECONOMIC RELEVANCE/ CONTRIBUTION TO A EUROPEAN MARKET

Establishing a European market is an aim followed throughout the actions of the EU in general.³⁵ Unsurprisingly, it can thus also be identified as an objective of media regulation.

Table 1: Size of the audiovisual market of the European Union in 2013, in EUR Millions;
Source: European Audiovisual Observatory Yearbook 2014

Broadcasters net revenues	71596
Public broadcasters (incl. radio)	32547
Advertising TV	20656
Thematic channels	10835
Home shopping channels	2813
Regional and local TV	1138
Private Radio	3607
VoD Online revenues (incl. taxes)	1526
On line on demand TV revenues	938
On line on demand film revenues	588

However, facilitating a European media market is reached through different other aims, many of which are basically means to harmonise the European framework for media regulation. Regularly such aims of harmonisation target at a mainstreamed freedom of the press, a consistent copyright enforcement and a coherent long-term regulatory policy, reliably independent from changes in politics.³⁶

Other aims try to coordinate and balance public service media and private media providers,³⁷ as well as domestic and foreign media content.³⁸ The latter makes a connection with the aim of European and national storytelling visible.

Meanwhile, by following the target of contribution to the European market as a whole, there are also positive stimuli for the European media landscape – since a coherent market promotes media production and marketing.³⁹

However, the media market at this point seems to be rather fragmented between the Member States, indicating that the aim of contributing to the European market will be of high importance. The different quantities of video-on-demand-services available in individual Member States may highlight this.

32. Mediadem case study report Denmark 2011, p. 5.

33. cf. Kielmannsegg 1996.

34. cf. Pluralism Monitor 2009, p. 67.

35. COM (2010) 608 final.

36. Mediadem Policy Brief II 2012, pp. 3, 5 f.

37. Mediadem Policy Brief II 2012, p. 7.

38. Mediadem Policy Brief II 2012, p. 9.

39. cf. Pluralism Monitor 2009, p. 52.

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FRAGMENTATION OF THE VOD-MARKET

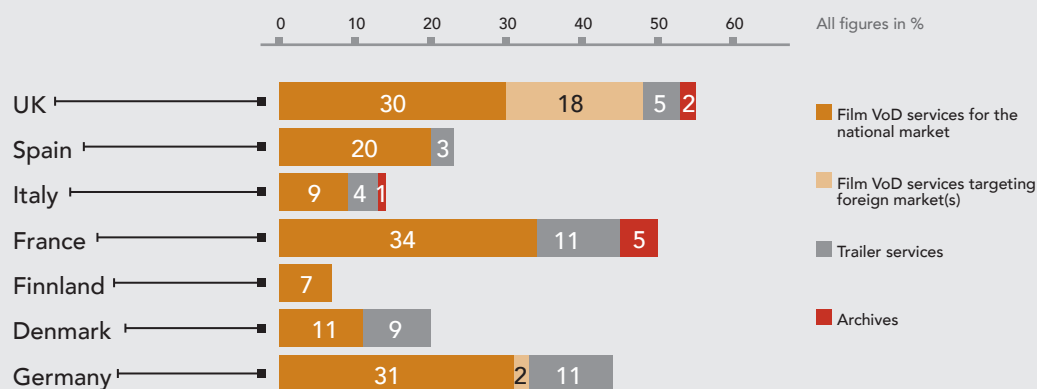


Figure 1: Fragmentation of the VoD-Market; source: EC 2014, Fragmentation of the single market

All in all, the aim to contribute to the European market means to work towards a coherent European framework that offers the same market conditions, making it possible to target broader audiences. Thereby, a borderless European market enables operators and providers to raise budgets more easily and utilise economies of scale, and to establish partnerships and cooperations with other media providers throughout the EU.

It is worth noting that a European market comes with a set of synergetic effects, such as the aforementioned refinancing opportunities. Targeting the entire European market can lead to a better remuneration for services that would not be profitable if offered in a single Member State. Hence, a coherent market can enhance the pluralism of offers and therefore contribute to public opinion making. In the same way, other aims – such as diversity of media, for instance – will benefit from a single market too.

40. COM (2013) 231 final, p. 5, 8.

41. CM/Rec (2012)1.

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VI. INNOVATION

The development of information and communication technology is changing the media landscape and the consumers' demands. The technological progress interferes directly with the circumstances of media production and reception, demanding the media to adapt.⁴²

In this way, another regulative aim in Europe is to facilitate and enable innovation. Innovation does not only address the theological side but also new ways to engage as a citizen or designing new cultural formats. As it shows, this aim is at least twofold: on the one hand, media is driven by innovation – and on the other, it is a nucleus for innovation itself. These two aims are covered by European regulation. There are, however, different priorities that can be placed on innovation, focussing either on economic innovation or primarily on the modes of communication.

Innovation from inside the media market should not be stifled by over-regulation or micromanagement.⁴³ Also, promoting innovation in media demands for a diligent balance between private and public service

media. Otherwise, it must be feared that strong state-funded media will impede an innovative private sector.⁴⁴ At the same time, media must be able to integrate and adapt to technological advancements and new possibilities, calling for some leeway for the media and, again, for a relinquishment of micromanagement.⁴⁵

Also, other regulatory provisions can support this aim. For instance, data protection rules can increase consumer trust in innovative products, hence promoting innovation.⁴⁶

Lastly, innovation as a regulatory aim itself can often work as a solution. Many obstacles that stand in the way of other regulatory aims are of a technical or technological nature. Such obstacles can consequently be overcome by the use and advancement of technology itself.⁴⁷

When addressing questions of innovation, it is crucial not to see the media system as something static that needs to be protected from imminent changes.

VII. OTHER AIMS AND VALUES

Some regulatory aims, which can be found in European regulation are left out in the analysis above. These share a certain distance to the listed categories as they can be pursued regardless of the overall media policy in place. In other words, these aims are connected to media policies, but it is possible to develop and establish strategies to fulfil them independently. Still, they have to be considered in media regulation and are important values in themselves.

Of course, it is an aim of utmost importance to respect human dignity – as it is also a fundamental part of human rights and is closely tied to other significant fundamental rights such as the right to life.⁴⁸ The reason why human dignity is so important concerning media-topics is that it is usually considered as a matter of priority when conflicting with other regulatory aims – to the extent that a publication or another kind of statement can be banned even if it is protected by the freedom of expression.⁴⁹

42. cf. COM (2013) 231 final, p. 4 f.; CM/Rec (2012)1.

43. Mediadem Policy Brief II 2012, p. 12.

44. Mediadem Comparative Report: Media Freedom and Independence in 14 European Countries 2012, p. 15; cf. the German 12th Interstate Treaty amending the Broadcast Interstate Treaty, rationale to Nr. 11/ § 11d, which introduced the so called "three-step-test" to determine which kind of media might be provided by public broadcasters.

45. Mediadem Policy Brief II 2012, p. 12.

46. cf. COM (2013) 231 final, p. 14.

47. cf. COM (2013) 231 final, p. 5.

48. European Human Rights Convention Protocol No. 13.

49. Mediadem case study reports 2011: UK, p. 25; Germany, p. 10, 32, 35; Croatia, p. 9, 11, 13, 26, 31; Estonia, p. 9f., 14, 23, 27, 43; Finland, p. 13, 30; Italy, p. 32; Romania, p. 5, 8, 12, 28, 48; Slovakia, p. 12, 21.

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Another of these aims is the protection of personal data,⁵⁰ which stands in close proximity to aims of innovation and contribution to the European market. Accordingly, data generated during the reception of media content is largely personal data, since it is related to an identified or identifiable natural person. Therefore, the EU Data Protection Directive (95/46/EC) becomes applicable.⁵¹ As the means to create, collect, transport and transfer data develop further, new risks emerge as well. While transfer and use of (personal) data is useful to customers and providers alike, these risks have to be balanced with privacy and data protection issues.

Yet another aim is the overall protection of minors from harmful content⁵² and it is especially the online environments that have so far been found lacking.⁵³ This aim also relates to the European market, as a fragmented market forces content providers to go through multiple national processes of content evaluation in order to offer their media throughout the EU. The protection of minors is also regulated by the AVMSD,⁵⁴ as is the protection of human dignity,⁵⁵ the inviolability of which is asserted in Article 1 of the Charter of Fundamental Rights of the European Union.

It is another aim of European regulation to promote the audience's media literacy. The importance of media literacy for society is explained in the Preamble to the AVMSD,⁵⁶ but the substantive part of the Directive only includes a reporting obligation for

the European Commission in respect of the state of media literacy at the national level, not a distinct obligation to actually promote media literacy.⁵⁷ Nevertheless, various other texts and commissioned studies refer to the importance of media literacy and its promotion,⁵⁸ which is also addressed by Art. 33 of the AVMSD. Media literacy means "the ability to access the media, to understand and to critically evaluate different aspects of the media and media contents and to create communications in a variety of contexts".⁵⁹ As a regulatory aim, media literacy is somewhat related to the goal of public opinion making, promoting the audience's ability to take part in public opinion making and to find and evaluate a range of sources of information.

There is also another set of regulatory fields that are to be considered, though not always part of the current framework of media regulation and following aims and values in themselves that don't even seem to be related at first glance. Such provisions are, for instance, competition law, telecommunications regulation, an overall fair trade regulation, and antitrust law, as they govern the (media) market.⁶⁰ Another aspect is e-commerce regulation, as it provides content regulation for the media too.⁶¹ Consumer protection is an important media-related issue as well, though it is in some Member States not targeted by the same authorities or laws as media regulation.⁶² Responsibility and liability rules stand in close proximity to these aims.

50. Mediadem case study reports 2011: Finland, p. 32; Greece, p. 12; Estonia, p. 7; Denmark, p. 16.

51. COM (2013) 231 final, p. 12.

52. Mediadem case study reports 2011: UK, p. 26; Finland, p. 32; Germany, p. 46; Mediadem Comparative Report: Quest of free and independent media 2012, p. 80.

53. Dreyer/Schellenberg 2014.

54. cf. amongst others Art. 3 para. 4 lit. (a) (i), Art. 12, Art. 27.

55. Preamble (various references), Art. 3(4)(a)(i) and Art. 9, AVMSD.

56. Recital 47.

57. Art. 33, AVMSD.

58. for an overview, see McGonagle 2011; COM (2007) 833 final; EC, Study on Assessment Criteria for Media Literacy Levels: Final Report 2009.

59. COM (2013) 231 final, p. 12.

60. Mediadem Policy Brief III 2013, p. 5; Mediadem Comparative Report: The regulatory quest for free and independent media 2012, p. 9ff., 65 ff.

61. Mediadem Comparative Report: The regulatory quest for free and independent media 2012, p. 74.

62. Mediadem case study reports 2011: Belgium, p. 9, 30; Denmark, p. 40, 42; Greece, p. 10; Slovakia, p. 25.

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VIII. AIMS AND VALUES OF THE AVMS-DIRECTIVE

The AVMS-Directive is guided by its own set of aims and values, which to a certain degree responds to the aims and values found in the Member States mentioned above. These aims and values include the contribution to a coherent European market with a fair competition, and safeguarding plurality in the media and cultural diversity.

Much of the coordination and harmonisation of regulation throughout the EU takes place through the provision of a single market. Therefore, it is a crucial aim to the directive to provide a level playing field with fair competition and low entry barriers.⁶³ Herein, competitiveness of European information technologies and media industry, and ensuring legal certainty play a role, while the impact of a changing technological environment has on business models must be taken into account.⁶⁴ But the central and pivotal point might be the country of origin principle, that aims for a European single market especially by precluding a secondary control in other Member States than the one of origin.⁶⁵ This can be seen as a cornerstone of the directive and the basis for the creation of a European media market.

Of course, in this matter, user protection is another aim of the AVMS-Directive, especially as regards advertisement in commercial breaks but also through product placement.⁶⁶

However, the Directive itself acknowledges the need for reconciliation of economic and also cultural aims.⁶⁷ Accordingly, safeguarding cultural diversity and plurality within the media is another major aim of the Directive,⁶⁸ and it seeks to encourage the

production of cultural content throughout Europe.⁶⁹ The Directive also acknowledges that ensuring cultural diversity within and through the Member States shall remain unaffected.⁷⁰

In this manner, the Directive states that private and public broadcasting shall continue to coexist, while the Directive also determines that – within this coexistence – public service broadcasting must benefit from technological advancement.⁷¹

Also, impediments from the freedom of movement and trade must be prevented in order to strengthen the common market and counter dominant market powers with negative effects concerning the freedom of information, the information sector, and pluralism.⁷²

Another aim is the protection of minors and human dignity, which is to be carefully balanced with freedom of expression.⁷³

In this way, the aims and values in the Member States and in the AVMS-Directive correlate, but due to the different levels the focus of regulation differs. The contribution to the European single market has a considerably stronger stand in the AVMS-Directives focus, hinting at the provisions of such a multi-level-regulation.

It has to be noted that the minimum standard established by the AVMS is in fact to a large extent the maximum as well since the Member States as a rule do not establish stricter rules for services under their jurisdiction.

63. cf. recital 1, 10, 11, 14 of the AVMS-Directive.

64. cf. recital 4.

65. recital 33 ff.

66. cf. recital 81, 83, 86, 90 ff.

67. cf. recital 5.

68. recital 6, 7.

69. recital 63, 69.

70. recital 19.

71. cf. recital 13.

72. cf. recital 8.

73. recital 59, 60.

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IX. SYNOPSIS

This look upon the aims and values provides us with several insights.

- Throughout many Member States a set of shared aims and values for media exist.
- Some of these are directly connected to media and media regulation. These are the aims and values represented by public opinion making, combatting power on public opinion making, ensuring diversity and inclusion, providing a European Storytelling, and also innovation in the media sector as regards content, economics and technology.
- Others are a result of surrounding regulatory fields that resonate with media regulation, e.g. fundamental rights, the contribution to a European single market, competition law, antitrust law, telecommunications law, consumer protection, as well as e-commerce regulation.
- However, these aims and values have not found their way directly into media regulation in all of the Member States.
- Aims and values in the Member States and in the AVMS-Directive correlate, but the focus may differ. This hints at the implications of multi-level-regulation.

D. DEVELOPMENT AND CHANGES

I. CHANGE OF MEDIA USE

We could see that the aims followed by media regulation on a national as well as on a European level are still valid. However, the way to achieve them might change in face of developments in media use and media economy. In this chapter, we will therefore present an overview of the challenges that can be observed.

In 2013, 73% of Europeans had access to the Internet.⁷⁴ Accordingly, new phenomena in media demand adjustments to existing frameworks, while asynchronous developments between countries and target groups challenge a holistic approach on a European level.

In many respects, news serve as an example for the current state of media usage. In this respect mostly

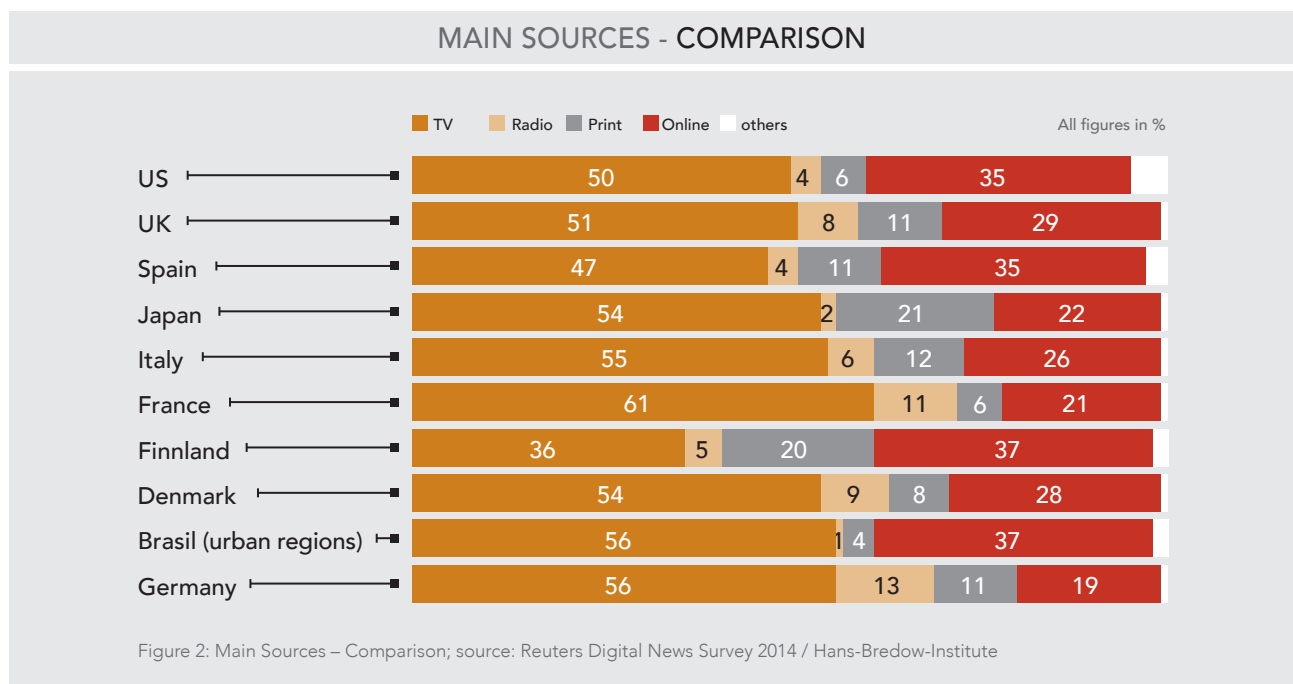
data from the Reuters institute Digital News Survey 2014 has been utilised as it provides a representable study carried out in ten countries around the world.⁷⁵ Here, two questions were of special interest: Question 3: "Which, if any, of the following have you used in the last week as a source of news?" with the answer options "TV", "Radio", "Print", and "Online". Followed by Question 4: "You say you have used these sources of news in the last week, which would you say is your MAIN source of news?" The figures presented accordingly depict the answers to Question 4. The Hans-Bredow-Institut, as a supporter of the survey, has the data at its disposal.

The data on news will be complemented by data on the reception of films and series and general media usage.

1. General: Linearity and Non-Linearity

One of these developments is the increasing importance of non-linear media. Even though traditional linear media may still be strong and even in the dominant role regarding overall media consumption,

non-linear media has gained importance to an extent that it competes with linear media in the same playing field.



74. ITU 2014.

75. cf. Reuters Institute Digital News Report 2014.

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When taking a look at the overall reception, however, it becomes clear that traditional linear media is still strong and competes with non-linear media. There is no indication to suggest that linear media will become irrelevant for media usage in Europe in the midterm. But hints at a change in media use can be identified, highlighting the increasing popularity of on-demand-media.

In some of the Member States, online media already has a high standing as the main source for

news throughout all age groups. In Finland, 37% of recipients name online media as their main source for news. In Spain, 35% of recipients do so as well, followed by 29% in the United Kingdom, 28% in Denmark, and 26% in Italy. In contrast, online media is not as widely accepted as a main source for news in Germany, where 19% of recipients consider online media their main source for news. A similar situation can be found in France, where 21% name online media as their main source.⁷⁶

MAIN SOURCES - FINLAND

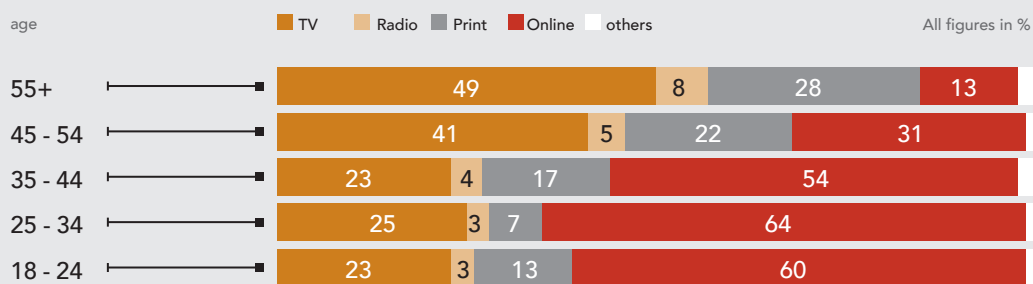


Figure 3: Main Sources – Finland; source: Reuters Digital News Survey 2014 / Hans-Bredow-Institute

MAIN SOURCES - UK

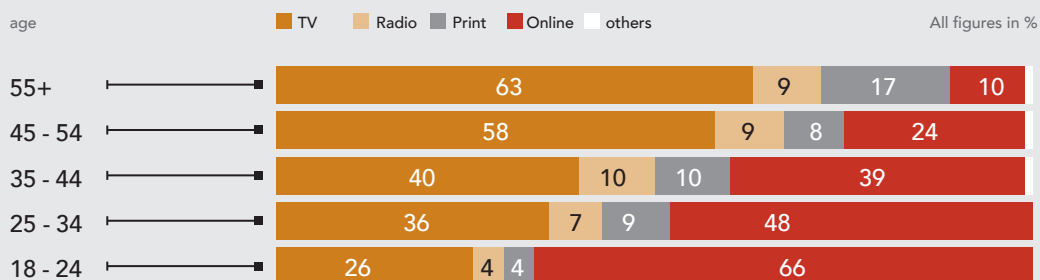


Figure 4: Main Source - United Kingdom; source: Reuters Digital News Survey 2014 / Hans-Bredow-Institute

76. Reuters Institute Digital News Survey 2014 / Hans-Bredow-Institute.

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Additionally, the recent years have shown an ever increasing growth on the markets for video-on-demand services throughout Europe, let alone the market for video-on-demand services offered via the open Internet (in contrast to TV-set based offers) has doubled from 2011 to 2012 to a total of € 673.7 million.⁷⁷

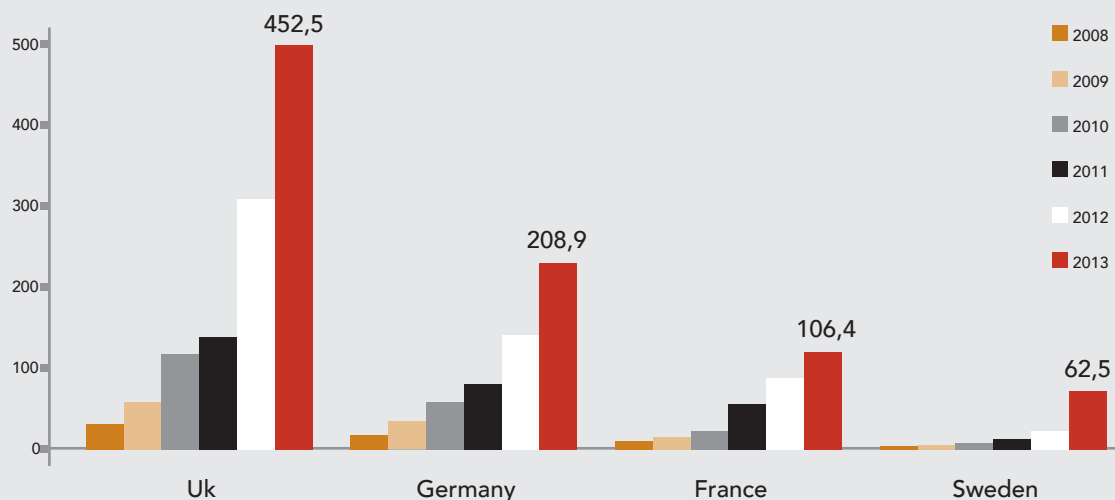
Indicators for a trend towards non-linear content can be seen in individual Member States, too. The UK can provide an example: For the year 2013, a total of 50% of adults claimed to have used such services during the past twelve months, representing an increase of 23% in comparison to the three years before. Here, the most popular genres of content were films and drama.⁷⁸ A similar picture can be seen in Germany where the market for video-on-demand-services grew rapidly in the recent years. From a volume of 64 Million in 2011 to an estimated volume of 350 Million in 2013 and still growing.⁷⁹ 64% of Germans use online video portals at least occasionally, while 56% stated that they watch videos

online occasionally. Many also use online media libraries for videos (43%), some of which are run by TV broadcasters (32%). Video-on-demand-services are already used by 13% of Germans on an occasional basis. The overall usage of video-offers has also increased drastically through the years: whereas 28% of Germans watched online video content in 2006, it showed that 75 % of Germans do so at least occasionally in 2014.⁸⁰

All in all, the growing market for on-demand movies and TV series can highlight the trend towards on-demand-media, but also the different pace with which the change of media use takes place in the individual Member States. For instance, while 27.3 Mil. € were spent on movies and TV series in the UK in 2008, this value climbed to an amount of 452.5 Mil. € in 2013. In Germany, the value grew from 13.5 Mil. € to 208.9 Mil. € in the same time frame.

CONSUMER LEVEL DIGITAL VIDEO

The purchase or rental of movies and TV series delivered over the open internet through transactional models or on a subscription basis



Total spending on digital video in Euro

Figure 5: Consumer Level Digital Video; source: International Video Federation – European Video Yearbook 2014

77. EC, On-demand audiovisual markets in the European Union 2014, section 8.

78. Ofcom, The Communications Market Report 2014, p. 144 ff.

79. VPRT 2012; VPRT 2014.

80. ARD/ZDF-Onlinestudie 2014.

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However, though visible in all European countries, this development does not show the same pace in every Member State. For instance, the German market for these non-linear services only grew by 77.1 % from 2011 to 2012, whereas the market in Belgium

grew by 696.3 % in the same time.⁸¹ The reasons for such discrepancies are probably manifold. But whatever the explanation, these discrepancies shed a light on the different situations in the Member States.

MAIN SOURCES - GERMANY

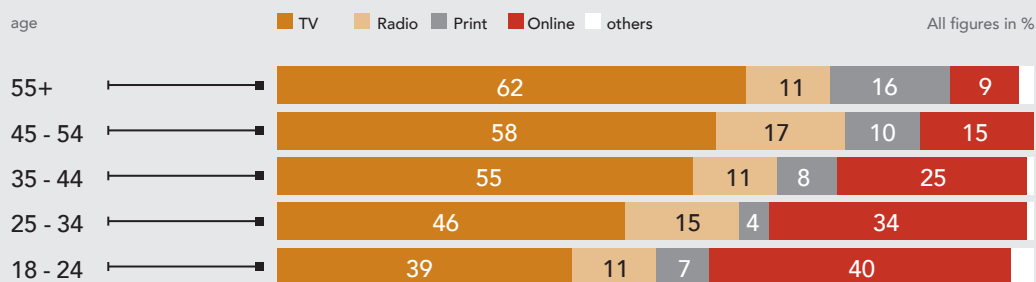


Figure 6: Main Sources in Germany; source: Reuters Digital News Survey 2014 / Hans-Bredow-Institute

MAIN SOURCES - FRANCE

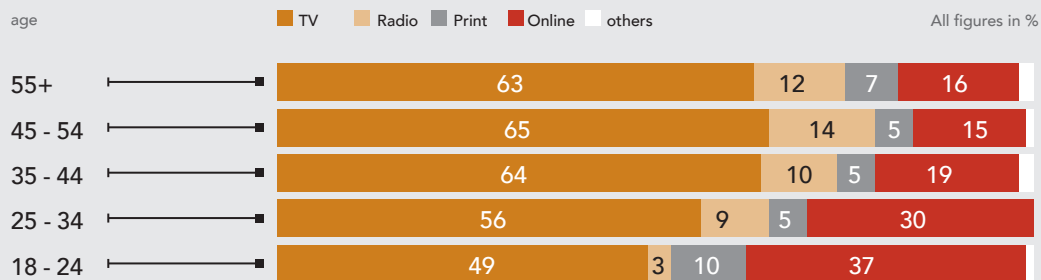


Figure 7: Main Sources France; source: Reuters Digital News Survey 2014 / Hans-Bredow-Institute

Linear media currently still provides a strong main source for recipients throughout the Member States. In France, 61% of the recipients consider traditional TV news their main source for news. 56% do so in Germany, followed by 55% of recipients in Italy. In peak periods, a large proportion of the entire Internet traffic consists of such real-time entertainment. In Europe as a whole, such content makes for 43.34% of downstream in fixed

Internet access and 35.58% in mobile access. However, there are significant differences between the individual Member States, with real-time entertainment quotas ranging from 22% to 65% in downstream traffic for fixed Internet access. These differences can be explained by the individual range of offers, such as the BBC iPlayer and other video-on-demand platforms, present in the different Member States.⁸²

81. EC, On-demand audiovisual markets in the European Union 2014, section 8.

82. Sandvine Global Internet Phenomena Report 1H 2014.

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MAIN SOURCES - SPAIN

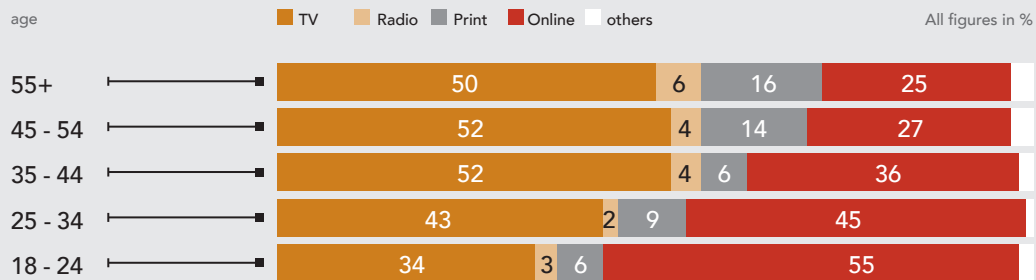


Figure 8: Main Sources in Spain; source: Reuters Digital News Survey 2014 / Hans-Bredow-Institute

In contrast, watching TV via the Internet is gaining popularity, but does not come close to watching TV on a TV set. Only 8% of Europeans watch TV via the Internet every day and 10% do so two or three times a week. As opposed to these numbers, 60% of Europeans never watch TV via the Internet.⁸³

Traditional TV and online media both show high reception rates throughout all age groups. Even though daily TV consumption on a TV set has declined, it is still an important medium in all Member States. Throughout the Member States, 87% watch linear TV on a daily basis (on a TV set or via the Internet). Though the figures for daily use may differ between the respective groups, criteria such as gender, age, formal education, the socio-professional category, or solvency do not seem to have a crucial impact on the weekly consumption of linear media.⁸⁴ In several Member States, a high percentage of recipients received traditional TV news as well as online media, leading to high use rates in both. In the United Kingdom for instance, 73% received traditional TV news, whereas 68% received news via online media. In Italy, 84% received traditional TV news, whereas 77% received traditional TV news. Similar observations can be made for Italy, France, Denmark, and Germany, where traditional TV news

and online media are both strong sources for news, with traditional TV news still being in the top spot.⁸⁵

However, the gaps between usage of traditional TV news and online media vary from Member State to Member State. For instance, a small gap can be found in Spain, where 85% used traditional TV news to inform themselves while 81% used online media. In contrast to that, Germany shows the biggest gap in usage between the Member States examined: 86% usage of traditional TV news and 58% usage of online media.⁸⁶

However, there are exceptions to these findings. In some Member States, the use of online media might have already surpassed the use of traditional TV news. Again, Finland provides an example: Here, traditional TV news were viewed by 79% of the population, whereas 82% turned to online media.⁸⁷

All in all, there are still differences in media consumption behaviour between the demographic groups. By tendency, it is still the older age groups that make more use of traditional media than the younger age groups, while the younger age groups tend to make more use of non-linear media than older age groups.⁸⁸

83. Sandvine Global Internet Phenomena Report 1H 2014.

84. EC, Standard Eurobarometer 80 2013.

85. Reuters Institute Digital News Survey 2014 / Hans-Bredow-Institute.

86. Reuters Institute Digital News Survey 2014 / Hans-Bredow-Institute.

87. Reuters Institute Digital News Survey 2014 / Hans-Bredow-Institute.

88. Reuters Digital News Survey 2014 / Hans-Bredow-Institute.

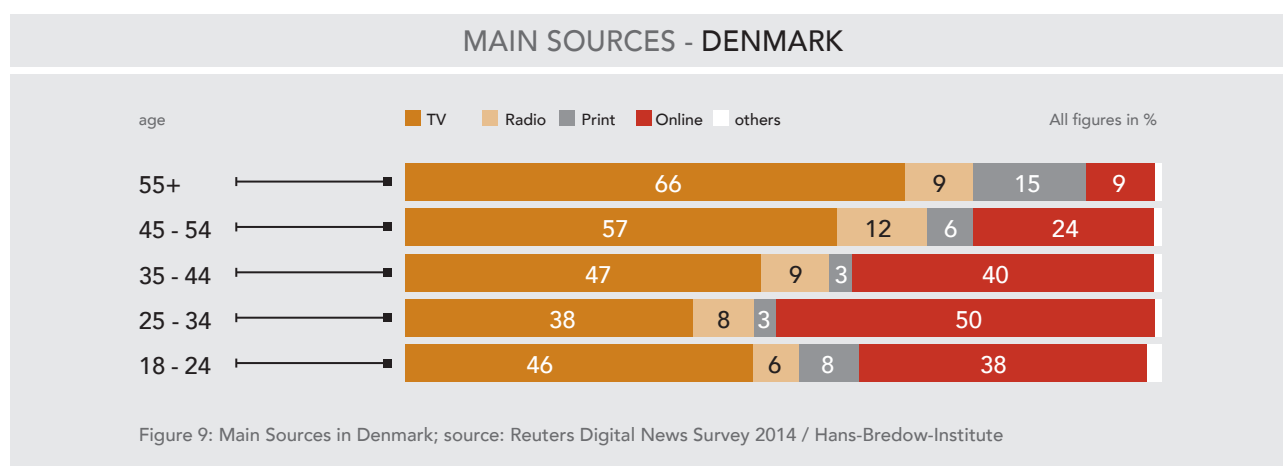
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2. Specific Trends in Target Groups and Member States

The disclosed developments in the change of media use are, however, taking place in different paces. Asynchronous developments can be discovered between the Member States, but also between different demographic groups.

Concerning the age of users, there is a clear trend that younger recipients prefer to turn to online media. In Germany, for instance, 40% of the age group of 18 to 24 name online media, which contains websites as well as video platforms and other non-linear media, as their main source for news. In the same group, only 39% name traditional TV news as their main source for news while overall per day

TV consumption went back by 6 % in the last five years.⁸⁹ The older the respective group is, the more this relation changes in favour of traditional TV news – in the age group of 35 to 44, only 25% name online media as their main source for news, whereas 55% name traditional TV news as their main source for news. In the age group of 55 years and older, only 9% consider online media their main source for news, whereas 62% see traditional TV news as their main source. This can be observed in other European countries, such as in Italy (see Fig. 10, p. 35), Denmark, and France, too, where the numbers resemble those found in Germany.⁹⁰



In some European countries, the contrast in media use between the demographic groups is even more stark. In the United Kingdom, 66% of those in the age of 18 to 24 name online media as their main source for news, whereas only 10% of those in the age of 55 and older say so. In this demographic group, 63% name traditional TV news as their main source for news, whereas only 26% in the age of 18 to 24 consider traditional TV news their main source for news. Similar situations are to be found in Finland and Spain.⁹¹

Some of these countries follow a clear pattern, where the number of people who consider online media their main source for news decreases with age continuously, while the importance of traditional TV news increases. However, in other countries, though the overall pattern can still be observed, disruptions become visible, as some age groups name online media the most important source for news by a few percent points more than the next younger age group. In Denmark, for instance, 50% of the age group 25 to 34 name online media their main source for news, but only 38% of the age group of 18 to 24.

89. ARD/ZDF-Onlinestudie 2014.

90. Reuters Institute Digital News Survey 2014 / Hans-Bredow-Institute.

91. Reuters Institute Digital News Survey 2014 / Hans-Bredow-Institute.

92. Reuters Institute Digital News Survey 2014 / Hans-Bredow-Institute.

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There are similarities in Finland, where 64% of the age group of 25 to 34 name online media as their most important source for news, but only 60% in the group of those between 18 and 24.⁹²

Another striking example is the consumption of television via a traditional television set, as it also strongly correlates with the age of users. The older a person, the more likely he/she is to watch television regularly, whereas this kind of media use consumption is less common for younger consumers. In this manner, 75% of the 15 to 24 year olds, 80% of the 25 to 39 year-olds and 93% of the age of 55 or older watch TV via a traditional television set.⁹³

Also, depending on the Member State, linear and non-linear media have a different standing regarding their importance. In Germany, a relative proportion of 19% of the population consider online media to be their main source for news, whereas 37% do so in Finland. Between these Member States lie France (21%), Italy (26%), Denmark (28%), the United Kingdom (29%), and Spain (35%), showing a diverse importance for online media as a main source for news, depending on the respective Member State. A more, but not fully coherent picture can be drawn regarding traditional TV news as a main source for news. In France, 61% of the population consider them their main source for news, whereas in Finland only 36% do so. Between those two lie Spain (47%), the United Kingdom (51%), Denmark (54%), Italy (55%), and Germany (56%) – thus showing a narrower yet diverse field.⁹⁴

Denmark, the United Kingdom, and Spain have in common that traditional TV news are considered the main source of news by a drastically higher amount of recipients than online media. Finland, on the other hand, provides an exception to this pattern as only 36% of recipients regard traditional TV news as their main source for news but 37% consider online media to be their main source, making online me-

dia a marginally more important a TV news source there.⁹⁵ Throughout Europe, 85% of people watch TV on a TV set on a daily basis. Another 10% watch TV on a TV set two or three times a week, only 2% never do so.⁹⁶

Also, media consumption can differ notably depending on the Member State. Here, Portugal and Bulgaria lead the board with 93% of people watching TV on a TV set on a daily basis. Even in the Member States with the least daily consumption, Luxembourg (77%) and Sweden (76%), the amount is still high. In Portugal, 0% never watch TV on a TV set, and only 1% in Bulgaria. In Luxembourg and Sweden, both 3% of users never consume TV on a TV set. In contrast to that, the amount of consumers who watch TV via the Internet on a daily basis is rather low. In Finland, the board leader in this matter, 15% watch TV via the Internet every day, whereas 27% never watch TV via the Internet. The lowest daily consumption of TV via Internet can be found in Bulgaria where 3% watch TV via the Internet on a daily basis, but 61% never do.⁹⁷

This is not only applicable for TV consumption, but also for Internet usage. Here, the Netherlands and Sweden have the highest quote of daily Internet usage throughout all citizens with 87% who do so. On the other end of the statistics, we can find Romania (33%), Portugal (35%) and Hungary (37%).⁹⁸

93. EC, Standard Eurobarometer 80 2013.

94. Reuters Institute Digital News Survey 2014 / Hans-Bredow-Institute.

95. Reuters Institute Digital News Survey 2014 / Hans-Bredow-Institute.

96. EC, Standard Eurobarometer 80 2013.

97. EC, Standard Eurobarometer 80 2013.

98. EC, Standard Eurobarometer 80 2013.

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3. Multi-screen Use

Multi-screen use is a phenomenon not researched thoroughly in the European Union yet. Thus, no clear picture can be drawn about usage patterns, but it seems that single-screen use is (still) dominant. If more than one screen is used, the screens are most commonly used for different, unrelated purposes. But there are differences depending on the respective Member States.

Most of the time, only one screen is in use. Across the Member States in consideration, single-screen use is dominant over the use of more than one screen at a time. In Italy, 75% of the overall time of screen usage can be appointed to only one screen being used – and in the Czech Republic, 60% of the time is single-screen time. Between these two countries lie Germany (62%), Spain (65%), Slovakia (66%),

Poland (67%), France and the United Kingdom (both 68%), Hungary (69%), and Romania (70%).⁹⁹

When consumers use more than one screen, the different purposes are most commonly not related to each other. However, differences exist throughout Member States. The highest amount of related usage of multiple screens is seen in Poland, where 49% of the time with multiple screens is spent with something related, closely followed by Romania with 48%. In the UK, on the other end of the statistics, only 24% of the time spent with more than one screen concerns related issues. Between these countries lie France (25%), Spain and Hungary (both 32%), Germany (37%), Italy (40%), Slovakia (44%), and the Czech Republic (46%). All in all, diverse usage patterns are to be found throughout the Member States.¹⁰⁰

MAIN SOURCES - ITALY

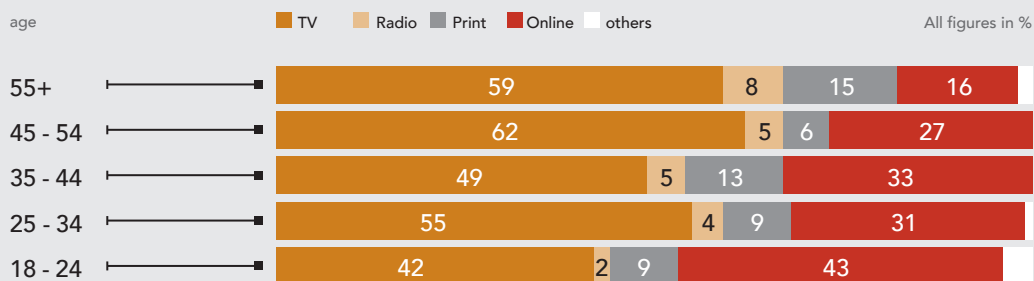


Figure 10: Main Sources in Italy; source: Reuters Digital News Survey 2014 / Hans-Bredow-Institute

As an example, we can take a closer look at Germany. 15% of Germans age 14 and older make daily parallel use of TV and Internet, while 38.3% do so at least once a week. The most common device to be used parallel to a TV is still the laptop computer (41%), followed closely by smart phones (38%), considering all ages above 14. Again, the figures shift when looking at more diversified age brackets: As expected, the smart phone is the dominant second screen of choice for the younger age group of the 14-29 year olds, being used by 65% of that group. In the same

age group, the laptop computer follows with 34%. In the age bracket of 50 years and older, the laptop computer remains dominant with 48% of persons using it as second screen in that age bracket. Smart phones, however, are very weak with that group with a mere 10% of persons using it as second screen. However, 29% of Germans older than 14 years say that they use a second screen more often in 2014 than before, whereas 41% never use a second screen. All in all, younger age brackets are more likely to use a second screen than older groups.¹⁰¹

99. MillwardBrown: AdReaction 2014.

100. MillwardBrown: AdReaction 2014.

101. ARD/ZDF-Onlinestudie 2014.

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4. Synopsis

Through the data analysed here, several trends are made visible.

- Video-on-demand enjoys increasing popularity throughout the EU – especially regarding entertainment content such as films and series.
- As non-linear audiovisual media is used more and more frequently, the same is also true for other kinds of content – such as news. Altogether, non-linear and linear audiovisual media have started to compete for similar audiences and can therefore frequently be found on the same playing field.
- Linear media still stays strong and important

for many recipients, at least in the midterm.

- But the disclosed developments are taking place at different paces – in the individual Member States and between the different age brackets. When looking at usage patterns within the different Member States, a general trend becomes visible, showing that younger consumers tend to use more online features as well as more non-linear media than older consumers. However, usage patterns still vary not only between Member States but also between the same age brackets in the Member States – consumers in the same age bracket still behave differently, depending on the member state they are in.

II. TECHNOLOGICAL AND ECONOMICAL DEVELOPMENT

Access to audiovisual information primarily depends on its distribution. In a traditional environment, audiovisual media services are distributed via wired and wireless communication networks.

This chapter serves to outline the technically relevant developments in the field of distribution and findability.

1. Networks – Wired and Wireless

Traditionally, wired distribution of audiovisual content is managed by cable television networks (CATV). Especially in the seventies and eighties, special networks were built for this purpose – and they have spread considerably in various Member States. In countries like the Netherlands, Belgium and Switzerland, they cover virtually all of the national territory, whereas the other European Member States and further countries show an extensive or near-complete coverage. In other Member States, particularly in Southern Europe, cable television networks are of less relevance for the distribution of audiovisual content. Nevertheless, networks for the distribution of audiovisual content are still being built and extended. The use of optical fibre technology is often chosen for the entire network or for major parts of it (also called 'hybrid networks'). Optical fibre networks have a much higher transport capacity than coax cable-based networks.

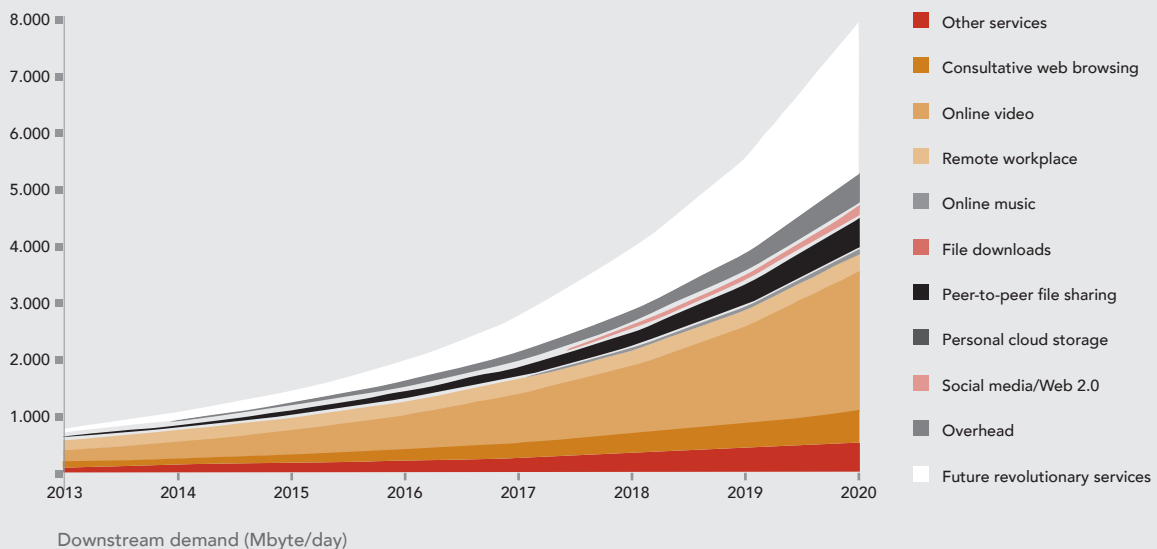
Technological developments have had a major impact on distribution possibilities. One of these is the use of optical fibre. Technological progress also made it possible for existing networks to become

interactive. As a result, cable television networks can be used for telephony services, and television services can be used interactively, for instance for video on demand or for purchasing products. Digitisation and compression have increased the capacity of originally analogue networks and allow for the old telephone infrastructure to be used for distributing audiovisual services. Consequently, the networks have increasingly converged. They used to be complementary to each other but have become each other's competitors. Fiber optic networks can be seen as networks that are converged 'by nature', so to say.

Thanks to technological progress, audiovisual distribution via the same network can take place in several ways by the use of available Internet access in addition to the distribution of audiovisual services as a special service (using the DOCSIS-standard on CATV networks or by prioritising traffic on IP-networks). The field of "Over-the-Top" (OTT) audiovisual services (providing and purchasing) is growing fast. Therefore, video traffic in general will be the main traffic driver.

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ESTIMATED DOWNSTREAM DEMAND FOR SERVICES (IN THE PERIOD 2013-2020)



Wireless distribution of audiovisual services has developed in a similar way. The original method of analogue airwave distribution was later replaced by digital distribution. The analogue and later digital networks were specifically designed/optimised for the unilateral distribution of audiovisual content. Interactivity is not an independent part of networks. At the very most, a certain form of interactivity – such as reacting to broadcasts via telephone or the Internet – is possible (so-called ‘hybrid’ solutions). The architecture of all current wireless distribution networks (digital terrestrial airwave broadcasts and broadcasts via satellite) is still traditional.

The latest generation (fourth-generation) of mobile communication opens the way to mobile networks as an alternative for the distribution of audiovisual content. Various providers offer access to video services (live, but also on demand) via streaming. More and more frequency space is made available for mobile communication. In Europe, for instance, the 700MHz band will be made available, a frequency range previously used for other services (including traditional distribution for audiovisual services).

With respect to mobile communication networks that also provide Internet access, the OTT offer also comes into play, as discussed above in the context of wired networks.

LTE COVERAGE

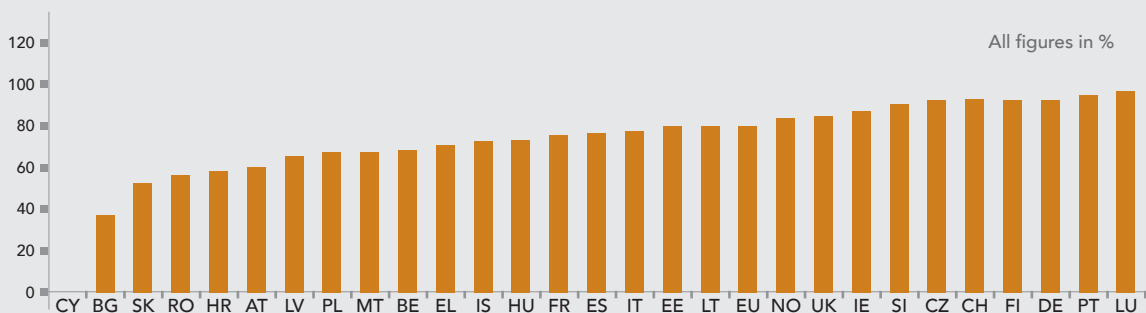


Figure 12: LTE Coverage, end of 2014; source: EU implementation report 2015/HIS and VVA, June 2015

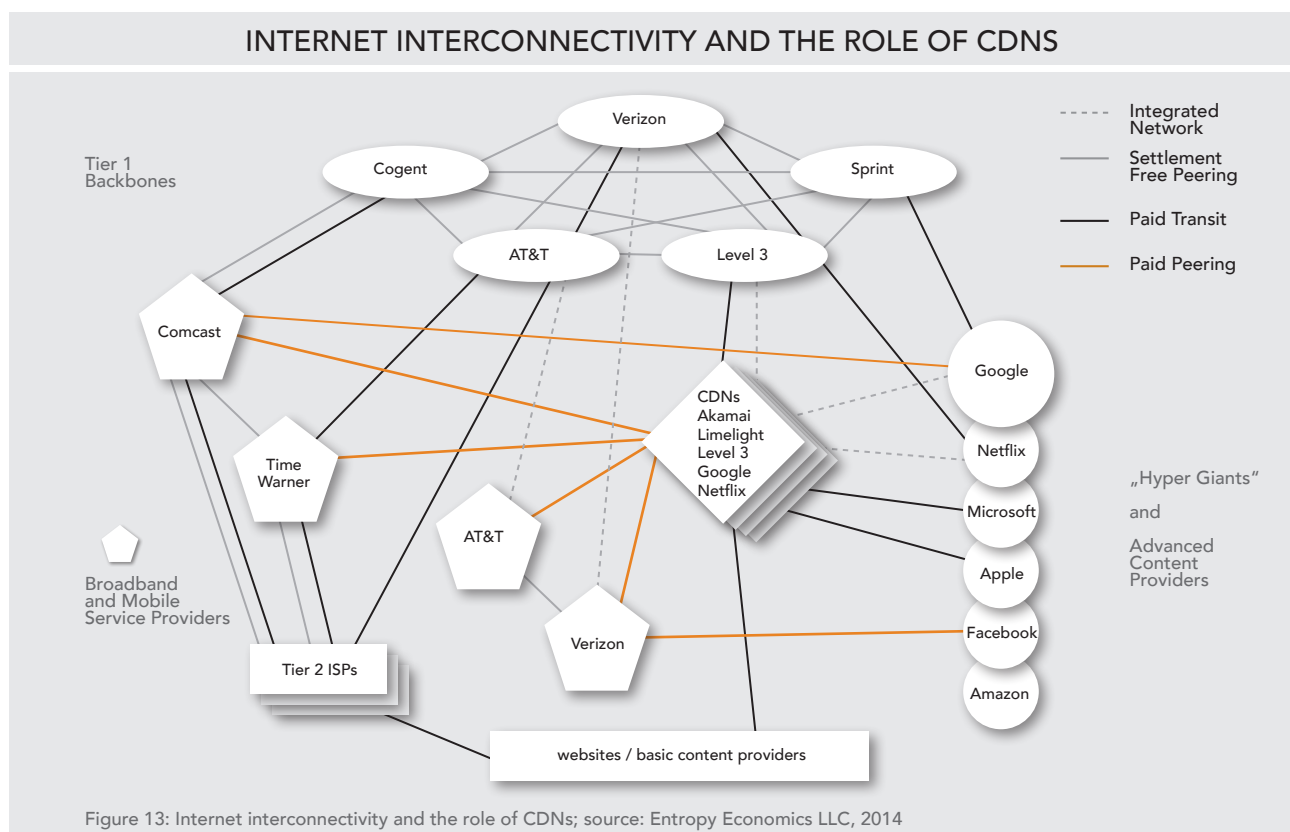
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2. Interconnection and Distribution Optimisation

The distribution of audiovisual services via communications networks poses several challenges. Signals need to be provided or collected by the network operators. These signals are then distributed to the end-user. In some cases, a direct link between the signal provider and the distribution network – referred to as interconnection – is necessary both for economic and technical reasons. This interconnection¹⁰² is established when the content provider delivers the content directly to the distributor to ensure a certain level of service quality (this type of direct delivery is often accompanied by payments). Additionally, intermediaries can be used that bring their delivery networks to bear. Here, the so-called Content Delivery Networks (CDNs) play a crucial role – especially with respect to Internet distribution. These networks, including

players such as Akamai and Level 3, ensure that signals are transferred to the Internet service providers in such a way that congestion is prevented or reduced (partly paid for). Next to these three options, the traditional peering of Internet traffic remains available (more or less based on reciprocity without payments). Other techniques, such as deep packet inspection (DPI) and caching, are often used to safeguard the speed of Internet traffic, including OTT services.

Interoperability ensures that the signal that becomes available will actually be forwarded to the end-user in a way that it can be used, for instance by adjusting the technical standards of the signal provided and the delivered signal to each other.



In the United States, this has already resulted in direct contracts between content providers and distributors in order to diminish risks of congestion (for example between Netflix and Comcast).

More generally: In online environments, Internet interconnectivity has become a topic of growing importance. Quality of service, competitiveness and other arguments require content service providers to enter more direct negotiations with infrastructure providers.

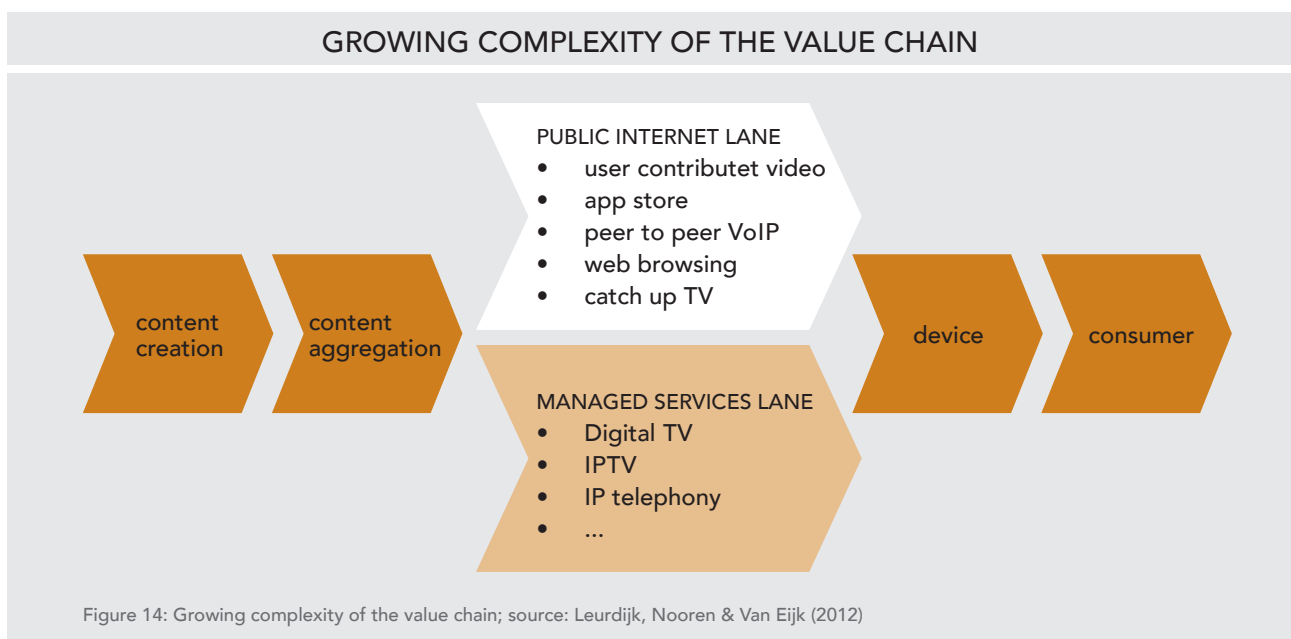
102. Swanson 2014/Frieden 2014.

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3. Value Chain

The figure below illustrates the growing complexity of a value chain relating to the distribution and findability of audiovisual content. It in particular addresses the situation of the OTT services, but similar developments also apply to the field of linear broadcasting. Each player in the value chain has the potential of a 'bottleneck', exercising control over those before or after him. At the same time, however, certain gatekeepers can be bypassed. For example, OTT services – assuming they have access to

the open Internet – such as Netflix are not subject to control by traditional gatekeepers, including regular content aggregators such as broadcasters. On the other hand, certain devices, operating systems and apps appear to function as new means of control. Another aspect of the value chain is the increasing interest of market players to become part of several different elements of the value chain (Google TV, Apple TV; Smart-TV providers).



4. Integrity

Providers of audiovisual content primarily want distributors to ensure that their content actually reaches the end-user without any delays or interruptions, which requires a certain quality and durability level of the networks used, ranging from power supply safeguards to back-up facilities. Besides, the signal should have special properties as well. The image and audio quality (mono/stereo, HD/4K), the size used, the subtitling and teletext signal are well-known examples. Technological progress, and the increased interactivity in particular, poses new challenges. In addition to the traditional television screen, there is the 'second screen' (tablet computer, smart phone) that is used to provide additional information and services interactively, mostly via hy-

brid technology (television signal via the traditional network, additional services via the Internet). There are integrated forms too, such as HbbTV (Hybrid Broadcast Broadband Television), an open standard in which TV is combined with interactive services. In this way, the linear digital TV signal received via satellite, airwave or cable, can be enriched with additional information. The services can be called via the "red button" on the remote control. Besides this open standard, there are various proprietary standards that are not compatible with HbbTV.

Integrity is furthermore influenced by new technologies for the exploitation of audiovisual media services. These technologies include, for example, per-

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sonalised advertising based on gathered data about the users and their media consumption behaviour. Intelligence in TV sets and other devices facilitate this type of data collecting. Technology also provides enhanced possibilities for presentation. 'Overlay advertising' is as such not an unknown exploitation method, but its range of application has grown so that it can now not only cover the original screen, but also provide exploitation models outside the control of the provider of the underlying services (,piggybacking'). At the same time, these practices represent clear convergence issues, not only from a technology-centred perspective but also from a regulatory perspective. Traditional advertising in a broadcasting environment is highly regulated, but

overlay advertising only needs to meet more generic regulatory requirements. This is a clear example of the lack of a level playing field.

In addition to these integrity aspects, which have a typical telecommunication-focused character, integrity plays another role, which we will describe here as 'material integrity'. Material integrity is about the content itself and its presentation, for instance. This is also the realm of signal theft, exploiting customers, ,piggybacking' on the commercial exploitation model, and other acts that can be regarded as unlawful. Many of these aspects are directly related to the reputation of the provider of the audiovisual services.

5. Findability

Findability of audiovisual services is very largely dependent on the devices. In this respect, devices play an essential role in the distribution value chain. By providing an overview of the channel-programming, they are able to replace hardcopy TV guides as well

as live presenters. Our definition of devices is rather wide and concerns TV sets, set-top boxes, tablets, smart phones etc. The number of connected TVs alone is expected to be present in the majority of households in 2016.¹⁰³

DEVICE USAGE

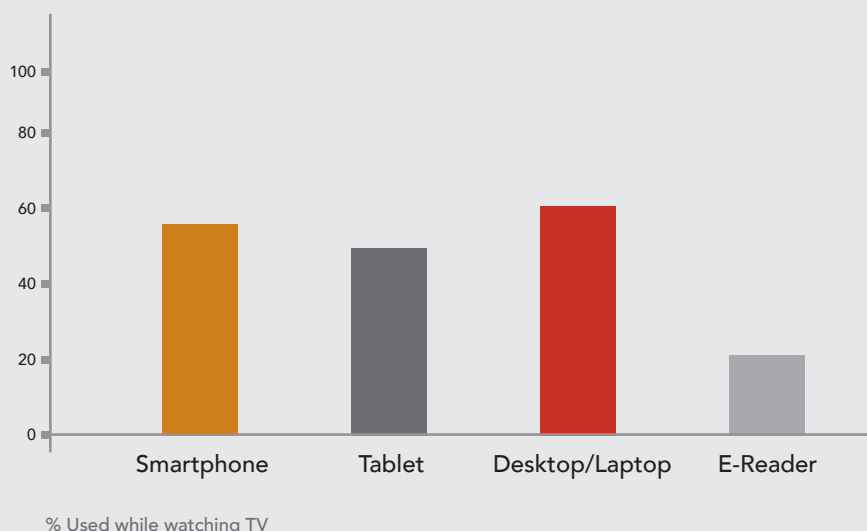


Figure 15: Device usage while watching TV (data reflects US market); source: NPD, 2013

103. COM (2013) 231 final.

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Only due to convergence and the increased computing power of devices, the technical possibilities of distribution networks can be used to their full potential. Devices no longer have a specific function but are multi-deployable. The tablet computer is a good example. It is suitable for independent use, for Internet access and watching audiovisual content.

The functionality range of mobile telephones is becoming more and more similar to that of tablets, but mobile phones also provide access to mobile communication networks (like some tablets do). Smart TVs are suitable for interactivity and Internet access. Wifi and Bluetooth are complementary technologies to link devices, to switch from fixed to wireless, and to offload traffic from mobile networks to fixed networks.

These devices can all be used to access audiovisual services, not only because they have the technical properties required for making content visible, but also – and maybe especially – because they are equipped with operating systems, menus, apps and electronic programme guides, which are decisive for the findability and possible functionality of the services. These often concern open systems but also fully or partly closed (proprietary) systems, which can complicate interoperability. Increasingly, they are to be seen as a bottleneck between the content provider and the end-user.

E. REGULATORY / POLICY ENVIRONMENT

This chapter focuses on the major regulatory instruments concerning the technological developments described above, starting off with the instruments on the European level. Where appropriate, examples of interesting forms of national implementation are included.

I. CONTENT REGULATION (AVMS DIRECTIVE)

The Audiovisual Media Services Directive (AVMS) is important for the subject matter of this study, especially with respect to the preconditions of the directive for the cross-border provision of audiovisual media services based on traditional conceptual frameworks. The Directive is about 'programmes' and distinguishes between 'broadcasting' (linear audiovisual media services) and 'on demand' (non-linear audiovisual media services). It regulates a range of issues that concern the public interest (see Section B, above), including the promotion of the production and distribution of (independent) European audiovisual works, access to events of significant societal importance, access to high-interest events via short news reporting, protection of minors, advertising, sponsoring, product placement, etc.

With respect to cross-border distribution, no distinction is made as to the nature of the service (all audiovisual services are subjected to the provisions, but with a distinction between linear and non-linear), and no distinction is made as to the question if the service is a more or less public service by nature.

Technology only plays a role concerning the issue of jurisdiction, which partly depends on the technology used, for instance whether signals are sent to or from a satellite.¹⁰⁴ This is remarkable, because the jurisdiction differs as a result, depending on the technology. In practice, this could mean that certain services provided from outside Europe (which do not have any activities in Europe, such as establishment or editorial decisions) would not be covered by the directive (e.g. OTT services accessible via the Internet). In such cases, it is up to the individual Member State to determine the legal framework.

The limited scope of the Directive means that other European regulatory instruments are relevant in the context of audiovisual media services. This also applies to the telecommunication regulation, which is discussed in the following paragraphs. It should be noted that the telecommunication regulation¹⁰⁵ includes a mirroring provision: "This Directive as well as the Specific Directives are without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audiovisual policy." The demarcation between the two domains has been defined in further detail by the Court of Justice, partly via case law concerning the so-called must-carry obligations (see paragraph 4.2.2) and partly via case law concerning the demarcation of regulatory powers in a more general sense. A key judgment is the UPC/Hilversum case from 2013¹⁰⁶. The Court concluded that "Article 2(c) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) must be interpreted as meaning that a service consisting in the supply of a basic package of radio and television programmes via cable, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content, falls within the definition of an 'electronic communications service' and, consequently, [...] the new regulatory framework applicable to electronic communications services, in so far as that service entails primarily the transmission of television content on the cable distribution network to the receiving terminal of the final consumer."

104. COM (2013) 231 final, p. 11.

105. Article 3, paragraph 3 of the Framework Directive.

106. case number: C-518/11.

In comparison to the AVMS Directive the E-Commerce Directive has a different scope. Its primary focus is to ensure the free movement of information society services between the Member States. Information society services can be defined as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”. It thus deals *inter alia* with the harmonisation of rules on jurisdiction, commercial communications, electronic contracts, liability of intermediaries, codes of conduct and dispute settlements. It does however in contrast to the

AVMS Directive not apply to the regulation of media content. Nevertheless, the AVMS Directive has no effect on the exemptions from liability established in the E-Commerce Directive. Further information about the relation between the two directives can also be found in the recitals to the AVMS Directive.

In short, the technical aspects associated with the distribution and findability of audiovisual services are subject to the telecommunication regulation. Interactive aspects are partly covered by the E-Commerce Directive.

II. MUST CARRY

One of the most central provisions of the telecommunication regulation concerns Article 31 of the Universal Service Directive (USD).¹⁰⁷ The article provides that the Member States “may impose reasonable ‘must-carry’ obligations, for the transmission of specified radio and television broadcast channels and complementary services, particularly accessibility services to enable appropriate access for disabled end-users, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcast channels to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcast channels. Such obligations shall only be imposed where they are necessary to meet general interest objectives as clearly defined by each Member State and shall be proportionate and transparent.” Member States are under the obligation to review the imposed obligations regularly. According to the second paragraph of Article 31 USD, Member States can determine appropriate remuneration, while ensuring that there is no discrimination in the treatment of undertakings providing electronic communications networks.

Article 31 USD therefore provides for the possibility of assigning a preferential position with respect to traditional radio and television channels. Must-carry obligations, however, should meet strict criteria that have been derived from general European law (fair,

reasonable and non-discriminatory – the so-called ‘FRAND’ conditions) to a considerable extent. With due observance of these principles, general European law allows exceptions – concerning the general interest, for example. At the same time, it should be noted that the provision is no longer in keeping with current reality. Despite the Court’s wider interpretation, ‘must-carry’ is restricted to linear programmes. Interactivity and non-linear distribution are beyond the scope of this article, unless they can be considered ‘complementary services’. In order to create a more robust approach, it will be necessary to re-define ‘must-carry’ in such a way that it covers both linear and non-linear services. The question has to be addressed, what “carry” means in a non-linear environment.

A second problematic aspect concerns the phrase “where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcast channels”. The underlying purpose of the provision – the possibility of ensuring the distribution of relevant content – may be jeopardised if this phrase is interpreted too strictly. Convergence, differentiated public choices, and a bundled offer (‘triple play’) require a more nuanced approach. Users may not have much choice or are faced with high transaction costs to move to a distribution platform that fulfils the requirement of “a significant number of end-users”.

107. Van Eijk/van der Sloot 2012.

With respect to possible alternatives, the system in the United States comes to mind, in which local stations can choose between a 'must-carry' and a 'may-carry' status via an 'opt-in' system (see F. III. 3. for a more detailed description). If the former variant is opted for, compulsory transmission via cable can be claimed. Under the latter variant, a fee (or

other rights and obligations between parties) is negotiated with the distributor. In the case of successful negotiations there is 'retransmission consent'. If parties fail to reach an agreement, content cannot be distributed.

III. FINDABILITY

The Articles 5 and 6 of the Access Directive (AD) provide a framework that is to promote findability of audiovisual services. Pursuant to Article 5 AD, regulators must have powers to the extent that is necessary to ensure accessibility for end-users of digital radio and television broadcasting services as specified by the Member State, to impose obligations on operators to provide access to the other facilities on fair, reasonable and non-discriminatory terms. Two services are mentioned in particular in the appendices to the Directive: Application Protocol Interfaces (APIs) and Electronic Programme Guides (EPGs). In Article 6 AD, the Member States are instructed to ensure that "in relation to conditional access to digital television and radio services broadcast to viewers and listeners in the Community, irrespective of the means of transmission, the conditions laid down in Annex I, Part I apply." Here, the second of these conditions is of particular interest. It imposes the obligation on all operators of conditional access services – irrespective of the means of transmission – who provide access services to digital television and radio services and on whose access services broadcasters depend to reach any group of potential viewers or listeners, to offer to all broadcasters, on a fair, reasonable and non-discriminatory basis compatible with Community competition law, technical services enabling the broadcasters' digitally transmitted services to be received by viewers or listeners authorised by means of decoders administered by the service operators, and to comply with Community competition law. Finally, the fourth paragraph of Article 6 AD confirms another interesting power of the Member States. Independent of what is stipulated in the other paragraphs, Member States can impose obligations in relation to the presentational aspect of electronic programme guides and similar listing and navigation facilities.

As such, articles 5 and 6 AD are very interesting. However, the practical application of these articles by Member States has remained slight. Nevertheless, the provisions have been used in the United Kingdom and Germany to establish a so-called 'due prominence' rule: channels with a public service character should have a prominent place in electronic programme guides or there should be no discrimination between public and private programmes in the presentation via an electronic programme guide.

The provisions of the Access Directive have met with little response in the Member States (so far), perhaps because they are included in telecommunication regulation and could have come into their own much better in a more content-orientated regulatory environment. Another possible reason is that the focus was primarily on the application within the range of the set-top boxes (decoders are mentioned explicitly). Yet, the articles provide a basis for a more generic regimen that is in line with a more converged view on audiovisual media services. After all, the rules support a technology-neutral approach (for instance by referring to APIs and electronic programme guides in a general sense), whereas Member States have a possibility of filling in details. Another interesting aspect is the fact that promoting findability does not depend on whether the respective platform has market power. This is indicative of a clearly general interest.

The AVMS Directive, too, contains a number of provisions that are relevant to the question of findability. Article 13, which has the goal of promoting European works by on-demand audiovisual media service providers, includes among its suggested promotional strategies, giving prominence to European works in programme catalogues. The Directive's

Preamble explains the importance of media literacy and the importance of making audiovisual media services accessible to persons with a visual or hearing disability and to the elderly. Both of these focuses

are attempts to help particular groups of individuals to find audiovisual content. However, neither focus has yet found its way into strongly-worded provisions in the substantive part of the Directive.

IV. NET NEUTRALITY

Net Neutrality is a concept that was originally developed in the United States, where it was put on the agenda via Tim Wu's famous paper *Network Neutrality, Broadband Discrimination* from 2003.¹⁰⁸

The essence can be summarised in this quote: "An Internet that does not favour one application (say, the World Wide Web) over others (say, e-mail)." The US regulatory authority FCC was the first to develop policy rules for net neutrality, which eventually could not be upheld in Court because the FCC was found to lack the proper authorisation. The FCC has presented an alternative approach in February 2015. The guiding principles are a) no blocking, b) no throttling and c) no paid prioritization.¹⁰⁹

In Europe, the original developments in the United States served as a reason to include provisions in both the Framework Directive and the Universal Service Directive when the telecommunication framework was revised in 2009. After a fierce debate and much lobbying, with NGOs and industry parties being diametrically opposed to each other, the Framework Directive eventually included the provision of Article 8.4 that Member States are to promote "the ability of end-users to access and distribute information or run applications and services of their choice." This is laid down in further detail in the Universal Service Directive, in which transparency is prescribed and regulators are given the possibility of intervening. Transparency means that users need to get information on any procedures put in place by the undertaking to measure and shape traffic so as to avoid filling or overfilling a network link, and information on how those procedures could impact on service quality.¹¹⁰ Regulators are authorised to set minimum quality of service requirements on an undertaking or undertakings providing public communications net-

works in order to prevent the degradation of service and to prevent traffic over networks from getting delayed or blocked.

Few Member States have followed up on the European framework for net neutrality. The Netherlands is an exception and was quick to put a specific regulation in place, under which discrimination and the imposition of fees on service providers for Internet access were prohibited. This last prohibition in particular has led to the fact that Internet services are not delayed or blocked on fixed and mobile networks.

On a European level, the problem has been investigated further by both the European Commission, which conducted a consultation, and the Body of European Regulators for Electronic Communications, BEREC. Whereas the need for a further extension of the net neutrality regulation was initially considered unnecessary, a more detailed regulation has been proposed.¹¹¹ It confirms the principle of net neutrality, but also offers the possibility of so-called specialised services.

Net neutrality is an emotionally charged subject and receives much attention. From the perspective of the developments of the last few years, there is wide agreement with respect to the normative aim of net neutrality: ensuring an 'open Internet'. The realisation of this aim raises many practical questions, apparently consistent with the experiences of regulators and governments that have followed up on the net neutrality framework.

The complexity of the problem is bigger and more intricate, which requires sufficient room to take concrete situations into account and find practical so-

108. Leurdijk, Nooren & Van Eijk, 2012.

109. FCC 2015.

110. Articles 19 and 20 UD.

111. On 1 October 2015, the council approved a new law, which will also include the first EU-wide provisions to safeguard open Internet access, Council of the EU Press Release 688/15

lutions. With respect to audiovisual services, there are at least two major issues concerning net neutrality. First, it is about the extent to which new (i.e. lower) barriers are created via net neutrality for services that are active in the same market as opposed to barriers that apply to more traditional market parties (OTT providers versus 'broadcasters'). It is vital that a proper balance is found, envisaging a wide and multiform (European) offer. Second, net neutrality again brings up the issue of interconnection and interoperability. It is generally assumed that both aspects are not part of the net neutrality regulation as such. At the same time, this is a further indication for the relevance of a converged environment. Once again, the discussions about access of CDNs or other forms of qualified access to networks indicate that interconnection and interoperability are to

be seen as bottlenecks. It is only a matter of time that disputes between content providers and distribution networks will reach Europe too. Therefore, it is important that interconnection issues can be brought up for discussion similar to the way such issues could be raised in the past, when interconnection and interoperability primarily played a role in traditional telecom services, such as voice telephony.

We note that in literature on net neutrality a link has been argued between Net Neutrality and must-carry.¹¹² There are interesting parallels between the two issues. So far, however, little attention has been given to this in the scope of policymaking, although both topics are part of the same telecommunications framework. A 360°-Approach would justify more consistency.

V. OTHER FIELDS OF REGULATORY RELEVANCE

The relevance of integrity was discussed in the previous section, and a distinction was made between integrity issues with a telecommunication character and what has been described as 'material integrity'. The signal integrity described is primarily focused on the uninterrupted and unchanged distribution of the signal. In addition, it is about added services linked to the basic service (i.e. interactivity, subtitles, teletext, signal quality). National regulation is the first orientation for both. Media legislation often provides for this additional regulation. Belgium has included a special integrity provision in the legislation¹¹³ and the Netherlands introduced a provision that "makes it possible to prescribe a form of net neutrality on cable television networks". With further ministerial regulation it will be possible to designate services, the signal of which has to be passed on as an integral part of the programme channels. Rules can also be set for the transmission of these types of services. The provision is intended to prevent blocking of certain facilities, such as teletext and subtitling, for the signals are normally sent along with the broadcast signal. It is presumed that the government will first negotiate with the parties involved to come to a voluntary solution. Any measures to be

imposed should be in line with European law. In the explanatory memorandum to the provision, the net neutrality regulation is referred to explicitly.

In many Member States, the third form of integrity ('material integrity') is protected by various laws. Copyright protects rightful claimants against infringements such as unauthorized distribution. Moral rights provide protection against damage to the creator's integrity (omitting parts from a work). Infringements on the relationship between the provider and the end-user can be within the domain of a privileged privacy relationship. Regulation of the economic aspects of the relationship between service providers and end-users can be found in consumer legislation, rules on unfair business practices, etc. Many of these provisions can be traced back to European Directives (e-commerce, unfair business practices, consumer protection). They need to protect consumers against confusion and providers against 'piggybacking', hitching a ride on their performance by a third party. Of course, tort law can be invoked too, which is not uncommon to protect the reputation of individuals and organisations.

112. Van Eijk 2013.

113. The new rules oblige service providers/distributors to broadcast linear signals with interruption and change. Non linear media services such as "catch-up TV" require the prior consent of the broadcaster. Distributors and broadcasters need to negotiate in good faith. The underlying decree provides for an arbitration procedure in case the negotiations fail.

REGULATORY / POLICY ENVIRONMENT

As aforementioned (cf. B. VIII.), there are other fields of regulation surrounding media regulation that are not directly parts of media regulation, but belong to a broader regulatory environment. Namely, these are copyright law, competition law, antitrust law, consumer protection, and e-commerce regulation.

So, for the protection of publicly relevant content, many countries have a wide variety of regulations in place. These instruments can be used when problems occur – and they seem to be sufficient as such, provided that proper attention is paid to effective enforcement.

VI. CONCLUSION

Clearly, technological and market developments have an impact on the distribution and findability of audiovisual content. However, the regulatory environment only recognises these developments to a certain extent. Regulation has not yet reached the level of a converged approach but is strongly following traditional silos of media and telecommunications regulation. The level of detail also differs, while certain types of regulation (i.e. on findability) need to be 'renew' and new angles (i.e. on integrity) have not yet reached the level of European regulatory relevance.

F. RECENT CHALLENGES AND TRENDS IN REGULATION

I. DEFINING THE SCOPE OF REGULATION

The AVMS directive brought Europe the concept of linear media, a concept which is now under discussion especially since to some extent linear and non-linear offers have become exchangeable from the viewer's perspective and, in consequence, for advertisers as well. For public communication, linking regulation to linearity has introduced a technological aspect to the definition of the scope. However, what the criteria must clarify are the specifics of a medium for public communication – of which the recipient is aware and for which it is the providers' responsibility to define the structure of the programming. Linearity has to be seen in the context of the attempt to focus the scope of the AVMS to "media".¹¹⁴ Therefore, it is closely linked to the regulatory aims elaborated above.

Determining what is to be within the scope of media regulation will also determine its effectiveness regarding the aforementioned aims. If the scope is too narrow, this will pose the risk of excluding aspects that are crucial to achieve the regulatory aim in question. If the scope is too broad, the regulatory framework might become overburdened, to the extent of losing its ability to fulfil its aims. Considering that linearity does not seem to be a suitable criterion to define the subject of regulation in a convergent media environment, the question arises how the scope of regulation has to be adjusted in order to achieve the regulatory aims again.

Therefore, dealing with the regulatory consequences of convergence does to a large extent mean to address the scope of regulatory frameworks. This is obviously the case regarding the definition of what constitutes "audiovisual media" in a digital environment. It is also true for the definition of media that are entitled to "privileges" like must-carry in 31 USD. On the other hand, regulation has to define which types of service can be regulated in order to grant privileges to media that deliver public service, telecommunication services, TV set manufacturers or providers of navigation devices. This problem

culminates at the EU level as Member States define their services in line with the European regulation to make sure that they transpose the respective directives properly. Therefore, it is mandatory to have an intelligent scope management on the European level.

As mentioned above, Member States as well as the European institutions have to face the fact that it becomes less and less plausible to rely on linearity as the core criterion to define services that fulfil a special public service. That does not mean to say that the time of reception does not matter anymore. Media had and still has the function of setting the rhythm of societal information.¹¹⁵ The function is, however, not linked to (technical) linearity: the update of an online news portal can cater to the need of information update as well or even better than the hourly broadcasting news show.

In face of those changes lawmakers and regulators all over the world are searching for new criteria to define "media" and link the scope of regulation to those criteria.

114. cf. Scheuer 2006, p. 71.

115. Jarren 2013.

RECENT CHALLENGES AND TRENDS IN REGULATION

II. INCENTIVE-BASED REGULATION

Incentive-based regulation can be seen as an economic concept of regulation.¹¹⁶ At least it requires the lawmaker and the regulator to assess the economic effects of regulatory instruments and adjusts the instruments accordingly. For the regulated industry, regulation has effects, which are to be reflected in a cost-benefit-analysis. Based on this analysis, corporate actors are able to change their behaviour.

This is true for broadcasting regulation as well. To ponder about a more incentive-based approach in media regulation does, however, not mean that it will be completely up to the companies to decide whether they are regulated or not. In the field of minor protection, to take an example, strict rules are required for any audiovisual offer that might harm children. Therefore the suggestions made in this report do by no means lead to an erosion of minimum standards.

This perspective is rarely taken, with the exception of Great Britain and – recently – Germany. For the UK's regulator Ofcom, it is daily business to calculate the costs that are associated with public service obligations taken over by private broadcasters and to assess the value of the privileges Ofcom can offer in return – for example by granted access to transmission technology or guaranteed due prominence on electronic program guides.¹¹⁷

Within this framework, the UK enjoys public service broadcasting in addition to the program delivered by the BBC. There is Channel 4, a commercial public service broadcaster, as well as S4C, a Welsh-language broadcaster. Although those stations are largely commercially self-funded and self-financing, they are ultimately state-owned. Also the two commercial analogue broadcasters, ITV and Channel 5, fulfil significant public service obligations that are part of their broadcasting license. In addition there is

a great number of small community broadcasters. As of today there is a total of 228 stations with FM broadcast licenses by Ofcom. These usually run on a non-profit basis and cover a relatively small geographical area.¹¹⁸

In Germany, a discussion has started about introducing an incentive-based approach¹¹⁹ or an opt-in-approach¹²⁰ in the broadcasting sector and, therefore, following a regulatory path similar to public-service-programming in the UK. In Germany, however, the idea is to merely amend the regulatory system accordingly – not to change the regulatory path completely. Furthermore, the approach has so far not been implemented. The idea has recently been suggested to the Broadcasting Commission of the German states, which are responsible for the German broadcasting regulations, by a report in 2014.¹²¹

A basic cost-benefit-analysis shows the costs produced by regulation in two respects:

- Program obligations (news broadcast, cultural programming, regional programming and the like) can result in additional costs, compared to a program that was merely guided by economic considerations.
- Regulation can restrict the refinancing of broadcasting especially by but not restricted to advertising regulation (watershed regulation for minor protection can have similar effects).
- There can even be a combination of the costs described under [1] and [2], e.g. a public demand for news broadcasting and at the same time – based on article 20 para 2 AVMS – a ban on advertising in news programming.

116. OECD Report 2006.

117. cf. for example Ofcom, PSB Annual Report 2014.

118. Ofcom, PSB Annual Report 2014.

119. Held/Schulz 2012.

120. Möllers 2015; Reulecke 2014.

121. Schulz/Kluth 2014.

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On the other hand, traditional broadcasting regulation comes with benefits for the broadcasting industry, especially:

- Privileged access to transmission technology
- Must-carry-regulation
- Findability regulation for electronic program guides

As mentioned before, it is nothing new that regulation can have these effects. A really new approach, at least for many countries and on the EU-level, would be to explicitly include those effects into the regulatory approach and design the regulatory system in such a way that it offers several packages of obligations and privileges, ideally resulting in a framework in which industry actors voluntarily opt for a suitable package and therefore promote the regulatory goals.

The design of such a system can be challenging since the assessment of the costs and the benefits might create problems for the regulator. Furthermore, there are some regulatory goals that have to be followed in any event – e.g. for constitutional reasons – and cannot be made subject to voluntarily acts by the industry. Combatting media concentration can serve as an example. That is, however, not true for other regulatory goals like the production of high quality news programming or minority content.

There are some advantages associated with incentive-based regulation, such as:

- Regulators do not have to put so much cost and effort into implementation of regulations since industry acts voluntarily.
- Regulators do not have to force their will on content providers, making the regulatory process less conflict-laden.
- The industry has to define the service for which the incentive is applied for shifting the problem of defining the service in an on-demand-world to the industry.

- Leaving the definition of requirements to the Member States creates an EU-wide coherent system that leaves room for a Member States' peculiarities in the same time.

There are, however, some challenges to be considered while adopting an incentive-based regulatory, e.g.:

- There has to be some kind of evaluation to see whether the promised surfaces are in fact delivered, this can be done by structural self-evaluation to avoid bureaucracy-building.
- The system of privileges and impediments needs to be balanced in a way that categories with high requirements are still attractive to providers.
- Finding the right scale is crucial: granting privileges only to the content in the respective category might fail to recognise the interdependence of content, whereas granting privileges to all content from one provider because parts of his offers are in a certain category goes too far (cf. also below F. II. 2.).

Self-categorisation based on transparent guidelines must not lead to a situation in which certain regulatory aims cannot be pursued. For instance, countering power on public opinion making must not be compromised by providers who decide not to categorise their content in accordance with the respective regulations of their own accord.

Especially when it comes to the definition of incentives, European regulation plays a major role since – under the current framework – advertising regulation is largely determined by the regulation in the Audiovisual Media Services Directive while access to infrastructure is regulated by the telecommunications directives, namely the framework directive and the access directive.

Even under the current regime, Art. 19 para 2 AVMS-Directive could be understood in a way that it is in the Member States' discretion to allow for

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economically valuable single spots in return for the promise of public value programming.¹²² It seems to be an option to design a new framework for advertising regulation with these effects in mind, i.e. to create incentives for the production of public value content by facilitating refinancing.

In order not to have too much advertising in and around public value programming itself, the advertising regulation could be relaxed for another part of the programme. Thus, for instance, a new show would not create its return on investment in its own time slot ("Sendeplatz") but by functioning as a precondition for less restrictive advertising provisions concerning another programme.

Possible incentives to offer broadcasters and content providers contain privileges known from traditional broadcasting regulation, but can also include new ones:

- Must-carry: Granting content privileged access to infrastructure (also cf. below, I. III.).
- Distribution privileges: Much has evolved around the possibilities of network management in IP-networks and especially the permission of managed or specialised services. At this point, the debate is still in progress and its outcome unclear. However, if in the end privileges in data transport may be given, e.g. distribution in different service qualities, these might also be granted to certain content so that this content would benefit from a guaranteed quality at any given time.
- Must-be-found: Increased findability, e.g. on electronic program guides (EPG; also cf. below, I. III.).
- Content integrity: Safeguarding content from any external interference, e.g. overlays (also cf. below, I. III.).
- Financial exoneration: Possible compensation for certain high-cost content, e.g. regional content.
- Accommodating advertisement rules: Certain desirable offers, such as public value services, might be subject to restrictions on advertisement. Providers offering such services can be granted privileges at other places in the programme to cross-finance these services.

Furthermore there is the phenomenon of "felt incentives". As a rule, incentives can be seen as financial benefits and the company can just calculate whether the benefits outweigh the costs for a specific public value element. This is common practice in the negotiations between Ofcom and public value programme providers.¹²³ There is, however, evidence that it is not only monetary incentives that play a role.¹²⁴ Take, for example, a regulation due to which a programme has to be given due prominence on EPGs. Even if the programme would most likely be granted prominence simply due to its popularity, such a regulation might help when negotiating with EPG providers over bundles of programmes. It could work as a safety net in case the programme gets less popular – and producing a program that belongs to a special basket could also go along with an image improvement. Surely, it can be of interest to belong to a certain category of service – as can be seen from the rather odd requests of early web radio providers to get a licence in Germany, even though the regulator did not see the need at that time and considering that there were only disincentives associated with licensing.

When considering other fields of regulation, even more incentives become visible. Media privileges such as access to official information could be linked to media services belonging to a specific basket of services and, at least to some extent, be subject to opt in. However, it must be considered that there are other public interests and fundamental rights at stake.

122. Schulz/Held 2011, p. 82; Castendyk/Dommering/Scheuer 2008, European Media Law, Article 10 TWFD Rn. 39 ff.

123. cf. Ofcom 2013.

124. Schulz/Held 2011, pp. 39, 106-108.

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III. CASES OF A NEW REGULATORY APPROACH OUTSIDE THE EU

Lawmakers and regulators outside the EU struggle with similar problems, offering a side-glance for us to see whether there are any learning opportunities. Here, we chose jurisdictions that brought forth interesting responses to regulatory challenges in the past.

1. Canada

Considerations on content regulation are likely to profit from a glance to Canada. One of the main goals of Canadian broadcasting regulation is the promotion of Canadian content. The fear of being culturally undercut by US productions is deeply rooted in the DNA of Canadian media policy.¹²⁵

The Broadcasting Act (Section 3.1 (d)(ii)) recognizes this and declares that the Canadian broadcasting system should encourage the development of Canadian expression by:

- Providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity.
- Displaying Canadian talent in entertainment programming; and
- Offering information and analysis concerning Canada and other countries from a Canadian point of view.

At this point we cannot deliver a detailed or even comprehensive description of Canadian media regulation, but we would like to highlight the problems a regulator structure faces when there are strong content regulations concerning convergence.

Canadian Content regulation rests on three pillars:

- Funding for productions: The Canada Media Fund (CMF) receives contributions from Canada's cable and satellite distributors and the Government of Canada.

- Quota regulation for broadcasters: There are various regulatory schemes under which broadcasters have to dedicate a certain amount of airtime for Canadian content, the nature of which is defined by the regulator by means of the Broadcasting Act.
- Incentives for broadcasters in the area of delivery: Broadcasting Distribution Undertaking should give priority to the carriage of Canadian programming services (3.1 (t) (i) Broadcasting Act).

For all above-mentioned pillars the scope of regulation is paramount: To what extent does it apply to broadcasting solely transmitted via the Internet? What is regarded as a Broadcasting Distribution Undertaking? To what extent are video-on-demand platforms like Netflix subject to Canadian content regulation? The debate revolving around those issues in Canada has been fuelled by a study issued by the regulator Canadian Radio-television and Telecommunications Commission (CRTC) in summer 2014. It shows an increasing importance of online video consumption, partly at the expense of traditional broadcasting: almost 30% of the English-speaking households in Canada have subscribed to Netflix.

Even though the Broadcasting Act defines the material scope in an abstract, technologically neutral way and does not explicitly refer to linearity as a criterion for a service being regarded as broadcasting, the whole regulatory system is very much focussed on traditional broadcasting networks. One reason for this is a decision by the Supreme Court of Canada

125. Raboy 1994.

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in 2012.¹²⁶ The Court confirmed that Internet service providers (ISPs) do not act as “broadcasting undertakings” in providing end-users with access to broadcasting content through the Internet. This ruling was significant as it addresses the scope of the regulatory jurisdiction of the CRTC under the Canadian Broadcasting Act. The Supreme Court has evaluated the different roles of actors in the value chain and found that ISPs merely provide the means of communication. Broadcasts delivered by mobile devices are already exempted from regulation by law.

Also in 2012, the Supreme Court nullified a CRTC policy on the ground that the CRTC acted outside the scope of its mandate since the proposed policy, which was intended to give broadcasters more leeway in negotiating with delivery undertakings, touched aspects of copyright law.¹²⁷

As for the application of Canadian Content rules to video on demand services the discussion is still ongoing. In September 2014, the CRTC started a process including hearings on the development of the broadcasting regulation. One of the core suggestions is the inclusion of video-on-demand platforms into the regulatory regime. Under discussion are mandatory contributions of platform providers such as Netflix and Google to the Canadian Media Fund. Due to subscription services, this might lead to higher fees to be paid by the Canadians, making this approach rather controversial.

Furthermore, the extension of the licensing scheme to online services is under discussion. To reduce the US-made content, CRTC is even considering to ban Canadian advertising in US-programming delivered in Canada.

While the future of the regulation is still under consideration, observers have already declared the end of Canadian Content regulation.¹²⁸ It is surely too early to evaluate the Canadian path to cope with convergence; however, there are already some takeaways:

- The success of on-demand-services from abroad can pull the rug from under traditional broadcasting content regulation.
- There is significant risk in building a regulatory system focussed on traditional transmission of broadcasting.
- A comprehensive view including copyright issues seems to be necessary to come up with coherent regulation.

126. Reference re Broadcasting Act, 2012 SCC 4, [2012] 1 S.C.R. 142.

127. Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, [2012] 3 S.C.R. 489.

128. Oberman 2013.

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2. Australia

Australia is recognized for innovative and elaborated regulatory concepts especially in the communications sector. It can, to take an example, be seen as the “homeland” for co-regulation, a form of governance that has been developed to serve in the field of broadcasting as well as in the telecommunication industry in Australia.¹²⁹ Therefore, a side-glance might reveal interesting insights concerning ways to deal with convergence.

The Australian Communications and Media Authority (ACMA) – a single regulator dealing with broadcasting as well as telecommunications – is to be seen as the main driving force concerning the transition. Furthermore, there have been some reports informing the stakeholders about the change and possible options to deal with it.¹³⁰

There are at least two takeaways as regards the analytical approach to handling the problem in Australia:

- The concept embraces the “networked society” and the necessity to integrate the engagement of citizens into the concepts of the communication order.¹³¹
- There is a concise set of questions that drives the debate: (1) determining what is a media company; (2) regulatory parity between ‘old’ and ‘new’ media; (3) treatment of similar media content across different platforms; (4) distinguishing ‘big media’ from user-created content, and: (5) maintaining a distinction between media regulation and censorship of personal communication.¹³²

The ACMA has bundled the insights in reports, revealing the kind of approach the regulator intends to follow:

- The analysis identifies so-called “broken concepts”. Here we find evidence that some goals or some instruments of regulation are not valid anymore in a converged environment.¹³³
- There are also enduring concepts that should be followed by regulation in future. Even with those concepts that should be followed by regulation in future, the question remains to what extent an amendment will be called for. ACMA suggest identifying the high-level principles of regulation and focuses on those principles when amending the regulatory concepts.¹³⁴

The Australian approach cannot simply be transferred to Europe, but the basic way of thinking might be an inspiration for the European debate.

129. ACMA, Optimal conditions for effective self- and co-regulatory arrangements 2011; Schulz/Held 2004.

130. ACMA, Convergence and Communications, Report 1: Australian household consumers’ take-up and use of voice communications services 2009; ACMA, Convergence and Communications, Report 2: Take-up and use of communications by small and medium enterprises 2009; ACMA, Convergence and Communications, Report 3: Australian consumer satisfaction with communications services 2009; The Hon R Finkelstein QC, Report of the Independent Inquiry Into The Media And Media Regulation 2012; Convergence Review Final Report 2012.

131. ACMA, Connected citizens – A regulatory strategy for the networked society and information economy 2013; The Hon R Finkelstein QC, Report of the Independent Inquiry Into The Media And Media Regulation 2012, p. viii, 1, 4, 111, 142.

132. Flew 2013.

133. ACMA, Broken concepts – A 2013 update on the Australian communications legislative landscape 2013; Robertson 2013.

134. ACMA, Enduring concepts – Communications and media in Australia 2011.

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3. USA

In the United States, access regulation has been put into place for a long time. The regulation mainly affects the providers of traditional cable television networks as they represent the dominant way of watching audiovisual content in the United States. The present rules date back to the 1990's, underpinning a system that includes an opt-in mechanism, embedded in a system of must-carry and retransmission consent.¹³⁵ In summary, the regulatory system obliges operators to carry the signals of local commercial television stations and qualified low power stations.¹³⁶ The obligation also includes so-called Noncommercial Educational Channels, but these are not further discussed here as they only play a marginal role.

The special position of local stations follows from the definition of the Federal Communications Commission (FCC, the US regulating authority on the media and telecommunication sector), which describes localism as "policies designed to promote a marketplace in which broadcast stations respond to the unique concerns and interests of the audiences within the stations' respective service areas".¹³⁷ Further texts confirm the public service character attached to this interpretation of localism.

Every three years, local channels can opt-in to the must-carry system and the operator is obliged to carry them without any form of remuneration. Must-carry channels can occupy up to one third of the available capacity.

However, the channels can also choose not to select a must-carry status. In such a case, the operator needs consent to carry the channel. Consent can be obtained through ordinary negotiations. These negotiations can include various forms of remuneration (financial and non-financial). After receiving "retransmission consent", the operator can carry the channel. If no consent can be found, a channel cannot be carried or the existing carriage needs to

be terminated, resulting in channels 'going dark'. Incidents like this have already occurred – and they can cause quite some publicity. Blackouts also occur outside the market of local channels.

The US distribution framework also includes rules on signal integrity.¹³⁸ The distribution needs to include the entirety of the program schedule and therefore all audio and video without alteration or deletion of the content (ancillary services such as closed captioning and program-related material in the vertical blanking interval must be carried too). This 'non degradation'-rule can be found in the Communications Act and has been specified by the FCC.

As to the findability of TV-channels, it is of interest to mention the fact that must-carry channels can claim a channel number that resembles the channel number of their terrestrial distribution ('shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air').

All in all, the US model provides some interesting angles for a more elaborated system of must-carry rules by offering a choice for channels that can claim must-carry status (in fact an opt-in alternative). Findability and integrity are already part of the regulatory framework.

135. Perl 2012.

136. 47 U.S. Code § 531-537.

137. see: FCC, FCC 11-18, 22 December 2011.

138. FCC:2014.

G. ANALYSIS AND CONCLUSIONS

I. FACTUAL BACKGROUND

1. Heterogeneous Developments in Media Use

The empirical data analysis (see above C. I.) in this study suggests that the development of the use of audiovisual media in Europe has undergone considerable changes. However, these changes are not to be seen as a shift from a clear pattern A (e.g. use of linear media) to a clear pattern B (use of on-demand media) – but as a development that is heterogeneous in many respects.

Since it is not likely that we will be able to point out stable trends and homogeneous developments soon, law-makers and regulators as well as companies have to make their decisions based on the landscape we see today and considering the aforementioned heterogeneity, even though we see a continuous development on a general level that might conceal a trend concerning younger target groups. These trends might turn into dominant or more general changes in consumer behaviour with long term effects.

The phenomenon can be characterized by the following findings:

- For audiovisual content such as movies and TV series, we can already see a general trend towards non-linear use. On the other hand, the second-screen being used for social media interaction while watching linear television might increase the importance of simultaneousness of media use by creating unique events.
- Apart from that, media use changes at different speeds in the various countries of the EU. While we can already see signs of substitution of traditional linear broadcasting by non-linear and Internet-based services in some countries,¹³⁹ the

traditional, linear broadcasts – watched on conventional television sets – are still most common in other countries.¹⁴⁰ In general, the habituation of the use of Internet-services depends on cultural context as well as on the availability of high-speed Internet access and other factors – and is thus asynchronous in Europe. The same can be stated for the various means of content access in the different countries. In some countries, such as Germany and Denmark, the use of mobile devices for content access is increasing faster than in others, for example the UK and Finland.¹⁴¹ Availability of broadband can be another driver.

- The same is true for different target groups within the individual countries. The self-assessment of the relevance of different media for receiving general information in Germany can serve as an example.¹⁴² Overall, traditional television is still the most relevant source of information; however, a closer look reveals that this is to some extent due to the aging of the population. An analysis of younger target groups indicates an increasing importance of online services – especially social media – and, again, the rapidly growing importance of mobile devices.¹⁴³

139. consider for instance the dominance of domestic targeting video-on-demand-services in countries like Belgium, France and Germany, cf. EC, Fragmentation of the Single Market for online video-on-demand services: Point of view of content providers 2014, p. 12.

140. for instance in Portugal, Bulgaria, Hungary and Spain, where more than 90% of the citizens watch linear TV on a daily basis using a conventional TV sets, cf. EC, Standard Eurobarometer 80 2013, p. 8.

141. cf. Reuters Institute Digital News Report 2014, p. 9.

142. Hasebrink/Schmidt 2012 p. 28 ff.

143. cf. Reuters Institute Digital News Report 2014, p. 9, 40 ff., 60.

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2. Dynamic of Markets

Assessing the dynamics of markets and the development of value chains also leads to inconclusive results. There is no doubt that the digitalization of communication platforms opens up opportunities to establish new services that slide into the value chain. In many environments, aggregators are currently positioning themselves in the chain between content providers and customers or users – where they can take on various roles, not all of which seem beneficial for the market. Digitalized environments can offer an abundance of content and information, to an extent that customers and users can be easily overwhelmed at times, impeding informed consumer decisions that are usually desirable. Accordingly, such aggregators can fulfil a beneficial role that comes close to editing or curating, providing customers and users with orientation between different offers or content. Content providers can benefit from this kind of service as well, as the service can foster the matchmaking between providers and customers, who might be unable to find a suitable offer on their own.

However, the aggregators' intervention can also have negative effects. Aggregators might divert the revenue away from content providers and over to themselves, making it harder for content providers to exist in the market. Further, they might even be able to discriminate content, e.g. depending on its findability, by using gatekeeper positions to demand remuneration, or even to influence the content itself. It is, however, hard to predict whether – judged against the regulatory goals – such new aggregating services provide added value or are rather "parasitic".

This increased interaction/convergence within the value chain has created new dynamics and is setting new challenges for the involved market players. It will be of great importance to keep a good balance between the interests of these players and the interests of society/consumers. One of the great challenges is to find a balance between the role in the value chain and these interests.

In any case, the issue of the "ownership" of and control over the content becomes more and more important. This includes the aspect of the "integrity of the signal" as well as the decision about the aggregation of content. Furthermore, this development sheds light on the issue of findability. This also has consequences for services with a special relevance for public communication that are competing with more and more other services on the same playing field, trying to catch the users' attention. In this new situation, privileges they might usually be granted due to their functions in traditional situations might get lost or become ineffective.

More in general, a value chain – or linked stakeholder-analysis can be helpful not only to determine the dynamics of the market, but also to assess the risks linked to role of stakeholders in the value chain. Such an assessment can be helpful to determine the actual responsibilities.

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3. Multi-level Regulation

European regulation has to deal with a multi-level system, which is created by European laws, laws on the national level of the Member States and – at least in some countries – legal structures created by regional governance. Within this study, we could not map the media policies of all the Member States and the respective trends. However, based on the information at hand, we can conclude the following:

- At least in the foreseeable future, it is likely that the Member States will not abandon specific regulations for media services with special relevance for public communication, especially broadcasting. Many of the Member States seem to attach high priority to the diversity of media output, pluralism and attempts to curb media concentration. Furthermore, the political system needs media platforms that create a public sphere for political communication.
- According to our findings, there is no current trend of Member States changing their media systems in such a way that traditional, linear broadcasting should no longer remain subject to specific regulations. The so-called media crisis has merely caused some governments to consider a relaxation of regulation and an introduction of self- and co-regulatory systems. At the same time, we can observe that governments that hamper with the independence of the media system are focusing on traditional media as well. While those actions have been rightly criticized for violating human rights, it also demonstrates the persistent relevance of linear media.
- Having said that, we can see that several countries, including Germany, consider changing – at least gradually – the media order and to introduce systems based on an opt-in or an incentive-based regulation. The bottom line of those approaches is the realization that the main problem of future communication systems will be to motivate companies to deliver public value content such as news, local reports and other forms of high quality content. Accordingly, the regulatory system should provide incentives for

companies willing to do so and thus encourage them to opt-in to a specific regulation designed for this kind of public value service, meaning services that fulfil a specific beneficial function for public communication, based on a specific set of regulations. The possibility to develop adequate regulatory environments – and especially to provide substantial incentives – is to some extent subject to the European regulatory framework. Nevertheless, such approaches offer great benefits because they are more suitable to deal with the complexity and instability, offering possibilities for tailor-made solutions based on shared values at the same time.

Against that background, the case can be made that the whole structure of regulation of audiovisual media on a European level needs structural rethinking. Regulators and lawmakers that failed to address those developments in due time have encountered serious problems (in the study, we shine a light in the case of Canada (see above F. III. 1.) which can serve as an example).

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II. CONCLUSIONS: REGULATORY CONCEPTS

1. Structure of Regulation

Generally speaking, regulation in the Member States as well as on the European level draws on the type of medium as a starting point. Thus, we define broadcasting or television (aka linear audiovisual media services) and the instruments devised to protect regulatory goals as intended to be linked to the types of services. Thus, we have minor protection for broadcasting, advertising rules for broadcasting and so forth. At the same time, several elements of this broadcasting-oriented approach have been transposed to other areas, sometimes masked as a ‘technology-neutral approach’.

The assumptions on which this structure is based have, however, become weak. If linear and non-linear services have become exchangeable at least for some usage motives – and if advertisers regard those services to be replaceable – it might be appropriate to consider a new starting point. Furthermore,

drawing a distinction between the various types of services has become more and more difficult – if not impossible.

An alternative approach might be to take the regulatory aims as a starting point (a kind of ‘peeling of the onion’-approach of going back to basics). Media related goals – such as protecting diversity (which is one of the focus points of our study), but also minor protection, consumer protection and others – could serve as a structure for a new regulatory framework that is more normative and risk-oriented. Whoever triggers a risk concerning these goals would fall within the scope of the regulation, regardless of the type of service. There might, however, be differentiations for characteristics of services on the second level. Here, empirical or evidence-oriented parameters should be used to determine possible risks/harm.

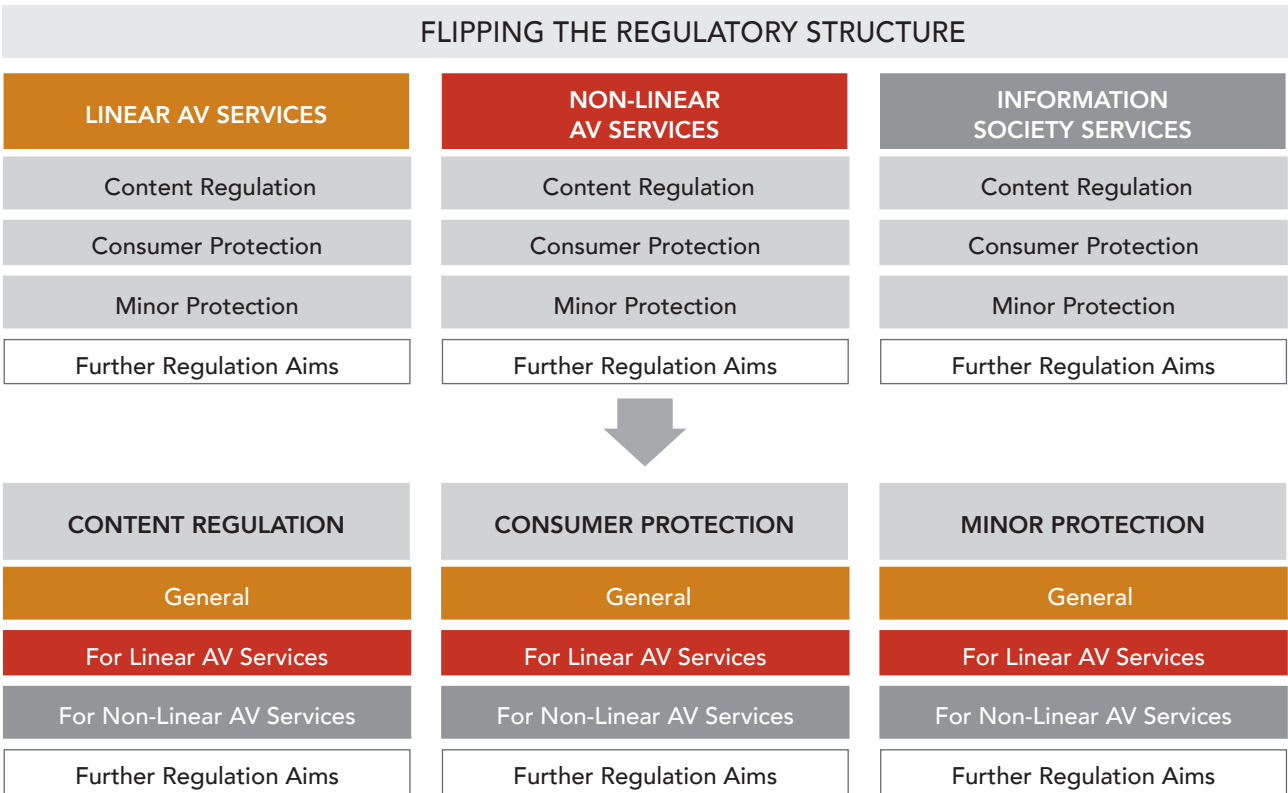


Figure 17: Flipping the Regulation Structure

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The approach of flipping the regulatory structure comes with the aforementioned advantages. There are, however, also challenges:

- This option creates a modular approach, which might make regulation more complex.
- Regulation in itself plays a role in defining services and social practices. Broadcasting, for example, is to be seen as a medium with low risk for children because it is highly regulated. Thus, the approach could accelerate the dissociation of distinct types of services.
- Thinking in terms of regulatory aims disintegrates media policy as a unique policy field focusing on special services.
- It might be the beginning of a development path in which Member States regain more responsibility concerning the development of the AV sector.

The first issue is to be seen as an inevitable consequence of the option, while the other challenges can be addressed. As long as Member States will define services with special relevance to public communication, there will be a need for coordination on a European level. Furthermore, the task of developing the new architecture would be subject to a European audiovisual media policy.

This would by no means entail abandoning the country-of-origin principle as such. It is of pivotal relevance for the aim of the current AVMS regime (although various elements of interactivity are bound by country of residence principles, including consumer protection). The approach suggested here would make it easier to cope with the multi-level system, since Member States just need to make sure that the rules that are in place to react to specific risks are compliant with the European framework. They can, however, use different concepts where the regulation is not coordinated or harmonised by European Law, e.g. ensuring diversity.

An additional advantage of this kind of regulatory approach lies in the focus on overarching regulatory aims. It forces the policy maker not to see regulation as an endeavor that has merits in itself but to check where there are (still) problems that need to be addressed by regulation. While this seems to be evident for aims like minor protection or the protection of human dignity, this is not necessarily true for a regulation of advertising time. Accordingly, true risks need to be assessed and regulation must draw on a more evidence-based/empirical approach.

From this perspective it becomes apparent that must-carry regulation enabled by Art. 31 USD is in fact a part of content regulation and might be better laid down in a future AVMS.

Some examples may highlight what flipping the regulatory structure means. For instance, the aims of establishing a European single market and ensuring minor protection could be to some degree provided in a general set of rules:

- A coherent market for linear and non-linear services is to be established – and its development shall not be impeded by regulation of the Member States, as Art. 3 paragraph 1 AVMS-Directive demands.
- According to Art. 3 para 2 E-Commerce-Directive, a European single market for information services, which can also contain audiovisual content, shall be achieved without impediments imposed by the Member States, too.
- However, both rules allow for exceptions regarding minor protection (among other things) in Art. 4 para 3 (a) (i) AVMS-Directive and Art. 3 para 4 (a) (i) E-Commerce-Directive. Within a flipped regulatory structure, both provisions could be integrated into the same general provision framework with a rule that forbids impediments of the European single market, but leaves room for exceptions when it comes to measures of minor protection.

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Another example can be provided by the provisions on the protection of minors of the AVMS-Directive:

- According to Art. 27 para 1 of the Directive, programmes that might seriously impair the physical, mental or moral development of minors, e.g. pornography or gratuitous violence, can never be provided via linear television broadcasting.
- For on-demand audiovisual services, however, according to Art. 12 of the Directive it is possible to offer such content – provided that it is not accessible for minors, ensured by a pin code protection, for example.
- As it is technically possible to implement a pin code requirement in TV broadcasting as well, the differentiated regulation seems unnecessary.¹⁴⁴ Both services, linear TV broadcasting and non-linear on-demand services, can be subject to the same general provision as governed by Art. 12 AVMS-Directive. However, if special provisions for linear media still seem necessary, they can be appointed in a specific framework. For linear media, this could be achieved by a rule such as Art. 27 para 1 of the AVMS-Directive, by a mandatory warning notice to indicate harmful content in linear media.
- Information services subject to the E-Commerce-Directive only have to be clearly identifiable as such, make the person behind the advertisement identifiable, and meet requirements regarding the recognisability of promotional offers and competitions.¹⁴⁸
- In a flipped regulatory structure, both services can be subject to the same general advertisement regulation with special rules applied only where found necessary to meet certain regulatory risks, like consumer protection. A basic coherent regulation seems especially necessary in this example, as both offers can be received on the same device simultaneously, e.g. a smart TV¹⁴⁹, or simultaneously on different devices when the consumer is using a second screen.

A final example can be provided by commercial communication or advertisement regulation:

- According to Art. 19 ff. of the AVMS-Directive, strict advertisement regulations apply to linear TV broadcasting, including (amongst others) a separation rule¹⁴⁵, a programme integrity protection rule¹⁴⁶, and certain requirements like the abolishment of the depiction of minors drinking alcohol¹⁴⁷.

144. see also Kogler 2011, 623.

145. Art. 19 AVMS-Directive.

146. Art. 20 para 1 AVMS-Directive.

147. Art. 22 (a) AVMS-Directive.

148. Art. 6 AVMS-Directive; cf. also p. 68.

149. cf. Kogler 2011, 625.

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2. Modes of Regulation

Given the complex situation as regards the development of media use, the market dynamics and the multilevel system we face in Europe, we are trying to work out orientation guidelines for a strategic position of points. First of all, European regulation has to decide which of two modes of regulation it will install for the future: whether coordination and harmonization of audiovisual media policy shall be a strict and comprehensive system, or if it will leave leeway for the Member States to follow more tailor-made paths of development based on shared values.

Especially in view of the importance of audiovisual media policy for cultural aspects in the Member States, there is a lot to be said for allowing the Member States leeway to react to the development in different ways. At the same time, it must be ensured that the core themes of European regulation – such as facilitating cross-border services and avoiding duplications of control for services – are still met.

HARMONISATION AND COORDINATION

Harmonisation and coordination can be achieved using several instruments:

- European guidelines
- Coordination between regulators
- Decisions by regulators in a particular Member State (which must take possible significant effects in other Member States into account)

Since changes of European regulations generally take more time than changes on a national level, the speed of development in the media sector also gives preference to a European framework rather than a comprehensive regulation on the European level. Accordingly, regulation in the field of convergent media calls for a rather flexible regulatory framework on EU-level. For the framework to be effective, it must not only adhere to certain basic requirements, but must be flexible enough to give the regulating Member States enough leeway to follow both na-

tional and European aims. Additionally, it must be self-learning in order to adapt to the quickly and ever changing field of the European media market. To some extent, we can use the existing structure of the telecommunications regulation as an example: a framework directive sets out the basic principles, while additional instruments provide further detail. Just to give an example: Article 8 of the Framework Directive formulates the general goals of the regulation, namely the combined interests of competition, the internal market and the end users.

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A European regulation of audiovisual media services should therefore take account of the following guidelines to ensure a flexible as well as self-learning regulatory structure:

- **Principles rather than strict rules:** The general advantages of principles are flexibility, but also scalability and adaptability, giving the Member States an opportunity to experiment with different types of rules and, ideally, lead Member States to learn from each others' regulatory experiences. At the same time, clear principles offer strong guidance and provide a safeguard for a sufficient consistent European approach including general standards such as fairness, reasonableness and non-discrimination (See also below: Rulemaking by Regulators p. 70).
- **Technological neutral and functional approach:** Since it is especially the technological environment that changes rapidly, regulation should not be triggered by specific features of technology but should follow a functional approach. Technology-focused regulations would not only bear the risk of impeding innovation in technology – such regulations could easily fail to meet the purpose of media regulation. To take an example, the regulation of platforms should not depend on an operator to control the physical infrastructure but only on the importance of the distribution of audiovisual media services, on the necessity for regulation and, therefore, the market conditions.
- **Learning aptitude:** Regulation in this dynamic field should be subject to regular evaluation and – if necessary – to adjustments of the regulatory framework. In some cases, it might be sufficient to rely on an interpretive notice by the European Commission and/or the European Regulators Group for Audiovisual Media Services (ERGA).
- **Rulemaking by regulators:** Regulatory theory teaches that – in cases such as media regulation – the legal framework should enable the regulators to not only decide on individual subject areas such as licenses or the enforcement of rules, but also provide an opportunity to enact by-laws to specify the legal framework. Cooperation between regulators can provide a sufficient system of checks and balances to safeguard a consistent approach. It is at this level that risk and evidence based elements can be introduced. Furthermore, regulators could be under the obligation not only to look at the legality of their decisions but also to include an impact assessment of their decisions on other Member States. Member States might be rightly concerned about the risk of cherry picking when organisations have to decide on the jurisdiction over their activities (similar concerns exist for example in the field of privacy and data protection).

3. Coherence: The need for a 360°-View

The system has to be designed with reference to other relevant fields of regulation, especially [a] fundamental rights (in the Charter and European Convention of Human Rights), [b] copyright law, [c] responsibility/liability rules, [d] e-commerce regulation, [e] consumer protection, [f] Telco regulation, [g] fair trade regulation, [h] competition law, and [i] anti-trust law and therefore needs a 360°-Perspective. The basic principles at stake can be deducted from the instruments – including the jurisprudence of the European courts.

In addition, some of the existing instruments can be used too, including European guidelines and coordination between regulators (for which there are examples from other regulated markets). We also see potential value in the introduction of a significant effect-based mechanism, which is more or less based on the existing doctrine on circumvention. Thus, it is not allowed – or subject to restrictions – to offer services from another Member State to bypass national legislation. This can be deducted from the jurisprudence of both the European Court of Justice (Goudse Kabel, etc.) and of the European Court of

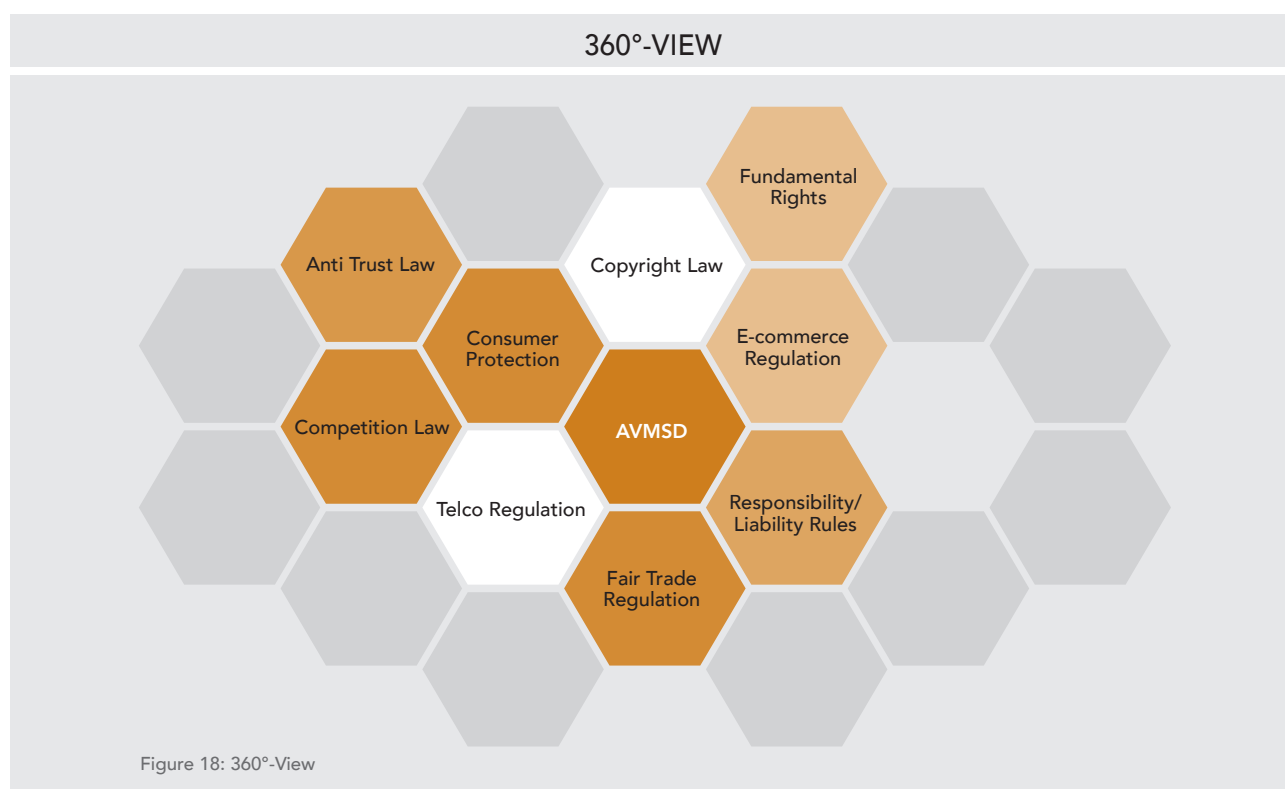
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Human Rights.¹⁵⁰ This jurisprudence also defines the limitations of such an approach by explicitly protecting fundamental rights.

Points [e] and [g] – consumer protection and fair trade regulation – seem to be crucial for any change of the current system. While there might be leeway for lifting regulatory burdens for audiovisual media services and granting them “privileges”, the specific regulation of those services depends on other regulatory fields allowing for that kind of special regulation. Another point of increased importance is point [b] – copyright law. As far as the provision of public value services is addressed, the protection and profitability of such works must be kept in mind – be-

side the needs of the public. Here, a balance is to be struck between the public interest (e.g. in news coverage of certain events) and the interest of content providers in refinancing their offers. Furthermore, the issue is directly linked to access to the broadcast signal and other provisions for short news reports.¹⁵¹

During the more than 25 years of existence of the EU’s sector-specific framework for audiovisual services, many of these general instruments have been developed and are as such applicable to the audiovisual sector. Overlapping means of regulation need to be avoided – and sector-specific regulation can be reduced where generic instruments prove to be sufficient.



150. see: Groppera/Autronic (ECHR) and Goudse Kabel e.a. (ECJ).

151. cf. recital 56, AVMD.

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To take an example: Any regulation of access to infrastructure for public value services depends on the telecommunication framework to allow for this kind of access rule enacted by the Member States. Therefore, a 360°-View on the regulatory environment is essential.

Another example relates to article 9, sub 1a of the AVMS-Directive: 'Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements: a) audiovisual commercial communications shall be readily recognisable as such (..)'. These provisions are almost identical to other provisions in more generic instruments such as article 6a of the E-Commerce-Directive ('the commercial communication shall be clearly identifiable as such'). Furthermore, the addressed practice might be falling under the Unfair Commercial Practices Directive.

This approach requires focussing on interface management as regards the different legal areas. After an agreement on a goal for regulating public value offers – to take an example – there has to be an assessment what the framework has to look like in audiovisual media services regulation to reach that goal. The same has to be done in the field of state aid regulation and competition laws and possible other fields of regulation. The interfaces have to be designed accordingly.

360°-APPROACH

Laws from different sectors determine the regulatory structure for audiovisual media; one can even say that media policy is what other fields of regulation allow it to be. Thus, reforms must draw on concerted regulation in various policy fields, especially:

- Telecom regulation
- Antitrust regulation

Freedom of speech and diversity are the basic requirements.

150. see: Groppera/Autronic (ECHR) and Goudse Kabel e.a. (ECJ).

151. cf. recital 56, AVMD.

H. IMPLEMENTATION

I. DEFINING THE SERVICES

1. Options

Our suggestions for implementing the framework follow one core assumption: Member States will continue to support the concept of public value services – meaning the provision of services that fulfil a specific beneficial function for public communication with a specific rule set of regulation. Therefore, they will still define certain public value services in a convergent environment building on a more functional approach, in line with basic principles found in European institutional frameworks.

Linearity for this matter can still be an indicator for this specific function of public communication, for example, because it reaches a considerable part of the public. However, non-linear services are taking over parts of this specific function, placing them in the same playing field and putting linear and non-linear services in direct competition, e.g. for advertising revenues. Another relevant argument could be the fact that non-linear services are complementary or have a relevant role for reaching particular parts of the audience (such as specific age groups or groups with different background). Whereas, however, linear media with this specific function is subject to specific regulation, non-linear media usually is not. This leads to the conclusion that in a convergent environment, linearity or non-linearity cannot be the decisive criteria when it comes to determine the regulation of such services with a special function for public communication. Therefore, European regulation has to consider how to define these public value services in the future.

Principally, there are three options for defining such public value services and, accordingly, the scope for a specific regulation:

- **Option 1 – Legal definition:** The traditional way is to find a set of criteria that characterizes the service and to use those criteria as a basis of a legal definition like it is done with audiovisual media services in the AVMS-Directive in Article 1 para 1 point (a) lit. (i). This approach has the undeniable advantage that it fits in with the traditional legal methodology. However, in dynamic media markets, it comes with the downside that it is challenging – if not in fact impossible – to

find criteria that are flexible enough to be applicable to new types of services but also clear-cut enough to serve as a basis for legal analysis.

- **Option 2 – Mandate:** Under this option, the legal consequences of European regulation depend on a Member States' act vis-à-vis a specific service. In the media sector, the mandate of public service broadcasting can serve as an example. Under sec. 106 (2) TFEU there is an exemption from EU state aid regulation in case there is a clear-cut mandate for that service. That approach has the desirable side effect of clearly identifying a specific service and its function. It can be especially valuable in an on-demand environment where the definition of what the service actually entails is not evident simply due to its linear nature.
- **Option 3 – Opt-in:** It has already been mentioned that – especially in Germany – there is a media policy debate revolving around incentive-based regulation and opt-in. In an opt-in scenario, the service provider itself defines a public-value service by opting into a specific regulation offered by a Member State in its regulatory framework. As in the mandate-scenario, this comes with the advantage of a clear definition of the specific service, in this case by the service provider instead of the Member State. European regulation, which in its present form doesn't provide for an opt-in model, could just tie in with the national regulations and establish a framework that is applicable only to public value services as defined by the opt-in under national regulation.

In terms of flexibility, Option 2 and 3 are preferable. Like in the current AVMS, the European regulation could define a broad concept of audiovisual media with basic regulatory requirements and could define opportunities for the Member States to deal with services that fulfil special roles for public communication. Option 2, however, comes with the challenge of maintaining the necessary distance between the state and providers of media services. Again, regulation addressing some risks can for obvious reasons not be subject to opt-in solutions.

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2. Recommendation

Accordingly, we recommend exploring the third option (the opt-in model), as it provides some major advantages:

- It is clear and unambiguous about what content will be governed by which category.
- The content providers are responsible for categorising the content, so the regulator does not have to get involved at this point.
- Regulators do not have to force their will on content providers, making the regulatory process less conflict-laden.
- Leaving the definition of requirements to the Member States creates an EU-wide coherent system that leaves room for the individual needs of the Member States at the same time.

Of course, this incentive-based opt-in-approach has some drawbacks:

- The categorisation by the providers will have to be reviewed, demanding some kind of evaluation.

- The system of privileges and impediments needs to be balanced in a way that categories with high requirements are still attractive to providers.
- It is crucial to find the right balance: granting privileges only to content in specific categories might fail to recognise the interdependence of content, while it would surely go too far to grant privileges to all of a provider's content simply because parts of his offers are in a certain category (cf. also below II.).
- Self-categorisation based on transparent guidelines must not lead to a situation in which certain regulatory aims cannot be pursued. For instance, countering power on public opinion making must not become impossible because providers do not categorise their content so that it is subject to the respective regulation of their own accord. European regulation still has to guarantee a minimum standard.

OPT-IN FOR PUBLIC VALUE SERVICES

The regulatory framework defines opt-in possibilities/specifics and gives guidance by offering a non-limitative selection of criteria that Member States can use to determine the public value of services, such as:

- Contribution to – especially local – information and other public value content (i.e. culture, education, minorities, specific underprivileged groups)
- Investment levels for the production of public value content

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The asynchronous development between the Member States and within the Member States calls for a system on the European level that – while taking into account the defined principles – allows Member States to decide in which way they want to make their national system more future-proof, for example by experimenting with opt-in regulatory approaches. The implementation of this system would allow to stick to the concept of regulating linear audiovisual media services, but also to introduce a category of non-linear public value services with a specific set of rules.

This suggests a twofold demand for action in the long term. Principles of regulation have to be established for non-linear media and its coexistence with linear media – while older rules, most of which will adhere to linear media, will have to be examined concerning their validity and efficiency under changed preconditions. The latter point will be an objective of the supposed regular evaluation (cf. above I 2 b): Principle of learning aptitude).

PRIVILEGES ATTACHED TO OPT-IN

Providers that are granted an opt-in status are entitled to certain privileges in terms of access and findability, such as (also cf. above, E. II.):

- Must-carry or a privileged transmission consent regime
- Privileged transport in networks
- Due prominence / must-be-found
- Sound content integrity
- Financial exoneration
- Accommodating advertisement rules

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II. CONTENT REGULATION

In case the (future) European regulation is to encourage the incentive-based regulation, the regulatory framework should allow Member States to grant incentives for public value services. These services fulfil an important role in public communication and therefore in society. However, they are not always cost-efficient, so that content providers will have to utilize revenues generated by other services to refinance these public value services. However, European regulation usually imposes restrictions on services that are not public value services. Consequently, content providers wanting to provide public value services may face problems in refinancing them by offering other services. This may even make producing and providing public value services unattractive altogether.

In this sense, regulation can – while acting in good faith – create disincentives for providing services that

are important for society. This paradox can be dissolved by a more tailor-made and integrated approach according to which bundles of services and not only the single public value services are granted privileges. These can be provided in the field of access, fundability and integrity of the offered service, but also as regards the possibility to finance those services by advertising.

Since we can already observe that linear audiovisual media services and non-linear services are competing on the advertising market, it should be evaluated whether the European level is still in need of stricter advertising regulations for broadcasting. The same can be said about other very detailed rules in the AMVS-Directive of which the relevance and/or effectiveness can be questioned in a converged environment.

III. ACCESS, FINDABILITY AND INTEGRITY

As mentioned before, access, findability and integrity are key aspects for content services in digital environments. Concerning their regulation in European law, they can tie in with the regulation already in place:

- **Access:** Article 31 of the Universal Service Directive gives Member States the opportunity to grant access in the area of broadcasting. When it was established, the provision matched the actual situation and could guarantee adequate distribution channels to meet public service criteria (and possibly provide for a remuneration). Given the fact that the distribution of those channels only took place via traditional infrastructures that were used by almost all households, it was not necessary to put obligations on non-significant networks. Convergence, as well as the fact that we are now dealing with a complex value chain, emphasizes the need to review the existing arrangements. First of all, more infrastructures are in use (former telephone networks, mobile network) and users tend to choose all-in-one solutions (such as triple play). The increased

complexity requires Member States to arrange for enough flexibility to determine whether obligations should, for example, apply to all networks and beyond the element of a significant part of the audience. This flexibility is necessary because local markets for distribution can differ significantly both from a technical aspect (availability of fixed and wireless – terrestrial/mobile/satellite – networks) and competitive perspective (complimentary or substitution; transaction costs of and possibilities to switch providers).

- **Findability:** Innovation/convergence has made clear that the access-issue is no longer exclusively linked to physical networks, but has become an important element elsewhere in the value chain. Access to (Over The Top, virtual)-platforms including apps, operating systems and devices (i.e. smart TVs providing their own recommendation system/electronic program guide) has become a crucial factor for the match between the provisioning of content and reaching the viewer, both in a quantitative (access as such to a platform) and qualitative way (i.e.

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within a selection mechanism such as an electronic program guide). Articles 5 and 6 of the Access Directive deal with this issue in a rather rudimentary way. They were clearly drafted with a particular technical device in mind: traditional set-top boxes. Nevertheless, these provisions offer the basis for a technological, neutral and functional approach in order to recognize the importance of public value services. Actually, an approach that focuses more on public value might help to avoid overregulation and, instead, put the right emphasis on societal relevance and on what could be left to commercial negotiations. There should be no doubt that Member States – based on the principles put into place – have possibilities to accommodate access concerning other relevant parts of the value chain.

- **Integrity:** In the traditional environment, integrity was of less importance, because value chains were vertically integrated or limited to a handful of players, which meant that issues could be dealt with in a fairly confined and controlled environment. This has changed with the emergence of a more complex value chain. Market developments such as the introduction of new players in the Internet-market and technological developments are responsible for this change. In the context of this study, the aspect of integrity of an audiovisual service has at least three components: a) the uninterrupted and unchanged distribution of the signal, b) the added services linked to the basic service (i.e. interactivity, subtitles, quality of the signal) and c) the material integrity of the service. Telecommunications regulation should allow Member States to deal with the first two. This is mainly achieved by regulating the quality of service or by making clear that the role of the telecommunications providers is primarily governed by common carrier principles. Sometimes, national media regulation is used. The material integrity of the service – including signal theft, 'piggy backing' and effects on the reputation of the provider – are generally covered by specific and generic regulation outside the scope of traditional audiovisual media services regulation. The Member

States should provide sufficient levels of protection, based on copyright law, privacy law, unfair business practices law and tort law. It could be considered to allow the integration of additional safeguards, for example in the context of an opt-in regime for public value services.

I. SYNOPSIS

European media regulation currently faces several challenges: technology, media and markets have become convergent, while – at the same time – the situations in the individual Member States differ in respect of media use, the usage of end devices as well as regulatory aims and frameworks.

These challenges can be met with an updated regulatory framework. Core attributes of this updated framework are a reorientation relative to the current framework, a basis in principles, learning aptitude, and a coherent approach to media regulation. This is, however, not just an incremental but a structural change.

Other than the regulatory framework currently in place, which takes different types of audiovisual services as a starting point for specific regulation just to follow the same aims, a reoriented regulatory framework could allow for effective regulations that follow specific goals and that address the media landscape as a whole – also taking into account the peculiarities of certain types of media in specific provisions by introducing a general regulation as well as one built upon that. Such a framework is capable of effectively managing a convergent media landscape.

An incentive-based opt-in approach would further improve the efficiency of this framework, offering a self-categorisation option for content providers and unburdening regulators while retaining the needed flexibility. Privileging desirable public value services will give incentives for providing such media content across different audiovisual services and form the basis of a vivid and pluralistic media landscape. However, European regulation still has to guarantee a minimum standard.

To address the different situations in the Member States, they will need some leeway for implementation. This calls for a principle-driven approach, setting coherent regulatory aims and a general framework across Europe, but leaving it to the Member States to define requirements for the different content categories for the providers to opt-in to. This will finally lead to a consistent regulatory framework throughout the EU, which is still able to manage the heterogeneity of the different media landscapes.

The way ahead might be easier to find if one remembers that there is no need for the EU media policy to be comprehensive. It should – coming back to the roots – rather be seen as a frame. Consequently the questions should be:

- Where do we need coordination (i.e. making sure that service providers do not need to follow minor protection schemes of all Member States)?
- Where do we need minimum standards in the EU guaranteed (guaranteeing human dignity)?
- Where do Member States need leeway, and therefore exemptions or limits in the European framework, to follow their media policy aims (e.g. findability does not have to be solved on EU level)?

This approach might help both the Member States and the European institutions deal with the enhanced complexity and dynamics triggered by convergence.

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