

Content Regulation in the New Media Environment

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Introduction

Chairman, Ladies and Gentlemen, Distinguished Colleagues,

It is an honour for the Institute of European Media Law (EMR) to be invited to this EPRA Meeting, and, for me personally, a pleasure to participate. In the past, we have benefited enormously from the information provided particularly by representatives of media authorities which feature prominently among the correspondents of the EMR Media Network. Hopefully, the Institute's endeavour to support your work has been able to provide some useful information in return; as you know, it has been and continues to be our firm intention to foster our mutual relations. In this vein, I am indeed grateful for the opportunity to open this first plenary session which will address the question of how to regulate, in terms of principles for the content provided, the "new media".

The EMR was founded 16 years ago, in order to provide information on media law and policy in Europe. This initiative was clearly motivated by the fact that the adoption process of the main European instruments for the audiovisual sector at the time, the Convention and the Directive, had led to numerous and sometimes quite intensive debates on a national level - not least in Germany. You are well aware of the discussions which are ongoing in your respective countries and at a European level in relation to the Proposal of the European Commission to modify the Directive.¹ Though individually, the regulatory authorities take part in the related discussions with their input being "readily recognizable" (to quote from Art. 10 TWFD).

Through the Partnership Agreement with the European Audiovisual Observatory which was concluded in 1994 and since renewed continuously, the EMR was enabled to set a clear focus on the media law development in the Central and Eastern European countries. Given the enlargement process, in particular the accessions in 2004, the recent decision by the European Commission on the future Member States Bulgaria and Romania, and the ongoing negotiations with further countries, on the one hand, and the revision process of the TWFD which shall soon reach a first climax, i.e. the first reading in the European Parliament, on the other hand, it is clear that we are at the crossroads of a new era in media regulation.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0646:FIN:EN:HTML>

The most challenging question appears to be the suitable approach to regulating new media services, in the jargon of the Commission Proposal: the non-linear audiovisual media services. Therefore, I am happy to take up the request of the Chair to concentrate on issues relating to (1) the distinction between linear and non-linear services, (2) the related consequences in terms of the applicable substantive law and its monitoring, and (3) practical effects both in terms of media regulation as well as implications for media markets. I shall try to highlight, in particular, the questions which may arise when it comes to the practical implementation of the new rules.

1 The new Directive's Scope of Application

After two extensive consultation exercises in 2003 and 2005, the European Commission has proposed in December 2005 to amend the existing directive and to make it a "Directive on Audiovisual Media Services" (AMSD). The title signals clearly the intention to depart from regulating television broadcasting only and to extend the minimal harmonization rules to non-linear audiovisual media services, too.

This paper is concentrating on the Commission Proposal. As you all know, the legislative process is still pending, and neither the European Parliament nor the Council to date have taken definitive positions. Hence, what I am able to present to you is a preliminary appraisal based on the current stage of discussions.

a) What constitutes an "audiovisual media service"?

In the first place, it is important to discuss what is meant by an "audiovisual media service". The proposed definition goes as follows (Art. 1 lit. a AMSD):

“'[A]udiovisual media service' means a service as defined by Articles 49 and 50 of the Treaty the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of [Framework] Directive.”

Looking at this definition, I think it is fair to say that the Commission obviously did not suggest to "regulate the Internet".

- Firstly, much debate has focussed on two elements contained in the definition, i.e. the character as a "service" in the meaning of the EC-Treaty and the phrase "provision ... to the general public". Neither private initiatives, such as personal websites which do not aim at an economic activity, nor private communications, eMail messages sent to a limited number of recipients, for instance, would be covered by the new rules.
- Secondly, given the emphasis put on the *mass media* character of the envisaged audiovisual media services, it is not sufficient that there are some audiovisual elements present in a given offering (not "merely incidental", Rec. no. 14). In contrast, the provision of moving images has to constitute the "principal purpose" of the service.
- Thirdly, and also in relation to the focus on *mass media*, the service has to pursue a certain function, that is "to inform, entertain or educate". This reminds us of the classical description of the BBC's remit, and it seems to embrace quite a number of different

concepts for audiovisual services. Still, is teleshopping an information or entertaining programme item or rather an outlet for selling products?

All these elements taken together, in my opinion, justify to say that we will be dealing with audiovisual services that have a certain impact on society. The Commission has explicitly referred to “the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions” (Rec. no. 29).

According to the draft report by Mrs Hieronymi, rapporteur of the EP’s Committee “Education and Culture”, some additional elements should be introduced to underline the understanding, by the Directive, of the nature of those services that shall be governed by it.

These elements are the notions of “editorial responsibility” and of “programme”:

“a) ‘audiovisual media service’ means a service *provided under the editorial responsibility of a media service provider* as defined by Articles 49 and 50 of the Treaty the principal purpose of which is the provision of *programmes consisting of* moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council.”

A new letter to the definition sections would define “programme” in the following way:

“kb) ‘programme’ means a unit of content shaped by the editorial activity of a media service provider and comprising moving images with or without sound within a fixed transmission schedule or in a catalogue.”

It is suggested to also add a further definition on “editorial responsibility”:

“kc) ‘editorial responsibility’ means the definitive compilation of programmes by a professional provider of media content for broadcasting within a set time frame or for ordering from a catalogue, and intended for the general public.”

If these lines of reasoning should be followed in the subsequent debate at the EP and the Council, it becomes clear that the distinction between audiovisual (media) services that fall within the scope of application of the Directive, and those other services that are not caught by it, but may be regulated by other instruments such as the eCommerce Directive, is shaped more precisely.

There is, obviously, a practical problem: When “[is] the audiovisual part not the primary constituent” (proposal Hieronymi, Art. 1 lit. a) AMSD)?² In other words, how to establish that the principal purpose of the provider is to distribute audiovisual content (not: “only ancillary manner”, Commission Proposal, Rec. no. 14)? To date, it is not outlined how to define this. The risks involved are twofold: On the one hand, it may be up to the courts, finally, to decide on this question – as we all know, this by far is no guarantee for quick answers. On the other hand, the implementation by Member States’ legislation and practice may lead to divergent results. However, in principle, my standpoint would be that given the rapid changes in technology and business models, in order to keep the new approach “future-proof” there is little room for tightening-up the definition. Nevertheless, this will not exclude giving some examples.

² Another problem which has already been hinted at is why the minimum rules foreseen for non-linear audiovisual media services should not also be applicable for audiovisual elements which are contained in a different service.

b) How to distinguish between linear and non-linear services? What set of rules to apply, if the case may be, to a combination of those two?

Now, I would like to move on to the apparently more crucial question of how to distinguish between linear and non-linear services.

In principle, the separation line between linear and non-linear is clear: whenever the user/viewer decides on the programme item he wants to watch and the point in time when this shall happen, there is a non-linear service. Opposed to this, if we as viewers are depending on the schedule set by the provider/broadcaster, and the only choice left is either to turn on and out or to switch to another channel, then it is a linear service – traditional TV broadcasting.

Nevertheless, two point must be addressed that may deserve clarification:

- Firstly, let us assume that there are, e.g. through the use of the split-screen technique, two or more audiovisual feeds simultaneously, one being a streamed content, the other one(s) being available for on-demand selection by the viewer. What kind of rules do apply? Shall we say that the relevant services must be treated separately? Or: Would we suggest that as long as the linear element is prevailing, the entire offer has to respect the rules for television broadcasting? There have been different approaches followed to this fundamental question in the Member States, already under the existing European framework, and I doubt that answers are more easily to be found in the future.
- Secondly, what kind of solution is available in case the very same content is made available in either of the two modes? On the one hand, it is already common practice in a number of countries that for those who were unable to follow the initial airing of a given programme, a download is offered. On the other hand, there are business models in place where a subscriber to a service may access content at an earlier point in time than the (subsequent) showing on TV. Mrs Hieronymi has taken up this issue and suggested to apply the rules foreseen for linear transmissions.³

Concluding this part of my presentation I would like to ask you about the obligations imposed on providers of *platforms*? There is concern by some policy makers that the traditional way of regulating audiovisual services might not be suited in view of the predictably more important role the platform services will play in future. The proposal now made by the Parliament goes to say that if there is a media service provider which clearly bears editorial responsibility for a given content, those persons that only organise its transport shall fall outside the scope. This will even be true if they should make choices, e.g. by re-bundling or re-packaging channels or other service items (Rec. no. 17a, Art. 1 lit. b) Proposal Hieronymi).⁴ But still the question remains, how do you treat a live-feed of a concert, for instance, which is available via a pull-link on your mobile phone? Personally, I think that the regulation in the French Community of Belgium and, partly, also in France are more advanced in this respect.

³ “For linear audiovisual media services or television programmes which are also offered on a live or deferred basis as non-linear services by a media service provider, the requirements of this directive are deemed to be met by the linear transmission.” (rec. no. 28).

⁴ “This definition does not cover any natural or legal persons who merely transmit content for which the editorial responsibility lies with third parties.”, Art. 1 lit. b); “The mere technical transmission of a terrestrial or satellite audiovisual media service does not of itself confer the status of a media service provider within the meaning of this directive, even where a selection decision is made, if a third party clearly bears the editorial responsibility.” (rec. no. 17A).

2 Consequences of determining the respective service's nature

The more theoretic question of how to distinguish between linear and non-linear services cannot be dealt with on an exclusive basis, i.e. without looking into the consequences of such determination. I am referring here mainly to the substantial rules that govern the two kinds of audiovisual media services.

- In this respect, I would like to highlight, firstly, that the Commission Proposal does not suggest to apply a uniform set of rules to both kind of services - in contrast, the proposed provisions clearly follow the concept of a two tier approach. In other words, the more detailed and mainly stricter regulation remains to apply to television broadcasting; new media services are subject only to some basic principles or minimal standards.
- Take advertising regulation as an example: for TV broadcasting the requirement is that you have to keep advertising separate from programme/editorial content, and there are quantitative rules on how much commercial communications may be broadcast. This is not the case with non-linear services. Take the protection of minors as another example: According to Art. 22 there are restrictions also on programmes which are likely to impair the physical, mental or moral development of minors; for non-linear services, conditions are imposed only for audiovisual media service which might seriously impair the said development of minors.

My second point is that you cannot separate the question of what is requested from the question of how you implement the relevant obligations. The “lighter touch approach” in this sense entails the making use of new regulatory instruments like co-regulation. I am fully aware of the fact that the Directive does not proscribe to use co-regulation only in respect of non-linear services. But if we look into the practice in a number of Member States, there exist several initiatives, mainly of a self-regulatory character, for on-demand services that could be linked-up to state regulation by one way or another – in accordance with the legal culture and regulatory traditions in a country.

3 Effects/Impact on the media landscape

Forecasts on the impact of a given legislative measure - this is not something that a lawyer is educated to do. What we have taken up mainly – in this respect – is that “Prediction is very difficult, especially about the future.”!

Apparently, there is no standard tool-kit for “Regulatory Impact Assessment” (RIA), so I sometimes feel a little bit surprised about the strong convictions that are expressed in respect of the foreseeable results of certain regulatory measures.⁵ I believe that especially the present

⁵ See http://ec.europa.eu/comm/avpolicy/docs/reg/modernisation/proposal_2005/newtwf-ia.pdf, at p. 5; it is far from easy to retrieve the study supporting the Impact Assessment done by the Commission, on its website: http://ec.europa.eu/dgs/information_society/evaluation/data/pdf/studies/s2004_01/tvwf_rand.pdf. See also: <http://www.ofcom.org.uk/research/tv/reports/videoregulation/> .

topic of convergence in the media and IT sectors has proven to be full of surprises, and therefore it is a rather prominent example of what I am hinting at.

Anyway, what a lawyer should be able to do is to read carefully a legal text and to think of the possible implications that its adoption might have. Take this together with some experience in relation to media market developments over the past years, and you are familiar with the background against which I will present only three thoughts on the Directive's future impact:

- **Strong incentives to move towards non-linear services**

Experience shows that once there is a legal framework in place which is considered less strict than another, the industry knows to adapt quite rapidly. I am not referring to the issue of Forum-Shopping here, which under the title "Jurisdiction" will be addressed by you later on. But, we have seen the following in Germany on two occasions: first, when in 1997 the category of media services was introduced holding less strict obligations, this was felt attractive for teleshoppers; second, when in 2003 it became possible to offer pornography in media services provided to a closed users-group, (existing) pay-TV operators introduced adjustments to the technical means of conveyance and started doing business on this new basis.

I think that the lighter touch approach foreseen in the basic tier of the Directive offers strong incentives to start on-demand services or to switch from traditional TV platforms and schedules to new on-demand media. This means, in the medium term, that the majority of detailed provisions for television broadcasting in the Directive will remain relevant only for a smaller number of channels, i.e. the public service broadcasters and the commercial "flagships".

- **Advantages of sector-specific regulation**

Is a sector of the industry really better-off with a general framework, i.e. rules which are not specifically tailored to the specific factual circumstances of a given activity? I have strong doubts on this. The constantly upheld and legitimate request for legal certainty is of importance here. It is a clear myth that there would be no legislation in place which could be applied to new media services – just think of criminal law stipulations on illicit content or the law on the protection of a person's or group's dignity etc. So, we are not talking about regulating services that previously would have been left unregulated. The considerations moreover concern to identify the best-suited solutions for new services – bearing in mind that there are a number of public policy objectives that need to be safeguarded. I think that the growth in the television broadcasting sector over the last two decades has underlined that a sector-specific framework does not endanger the economic development.

- **Implementing the new regulation in practice**

Often, we encounter allegations that it is impossible, in the online environment, to regulate effectively. This has been said in particular with a view to *traditional* regulation and enforcement for the Internet. You will, however, be aware of a number of examples where regulation has been extended also to services delivered over the Internet, sometimes this takes the form of a combination of state and non-state regulation (co-

regulation), like in Germany or in Italy. The point here is, in my view, that models of regulation – where there are incentives to the industry to participate – show high prospects for establishing effective monitoring. Besides, if we take again into consideration the somewhat limited scope of the future Directive and then look at the existing offerings in some Member States, it is clear that we know whom to address. It is not the anonymous Internet, but a small number of players which have ties to broadcasting or telecommunications operators, and, seemingly, have a strong link to the economy of the country they are doing businesses in.

Conclusion

As you will have noticed, I am not afraid at all of using the word “regulation”. This may be due to the fact that I am not presenting an undertaking. But, as you will sometimes remark, perhaps more often recently, they also ask for regulation. The TV broadcasting industry is very well aware that they still are in the focus of policy and regulatory attention – therefore, the frequently-quoted “level playing field” is clearly an issue for them. Of course, if the Commission is right to predict that on-demand services have the potential of substituting traditional television, then there will be requests for a new level playing field. I.e., broadcasters will strongly advocate more liberalisation. This will mean in essence that the basic tier regulation shall become the “unisex” legal framework.

For the time being, I personally believe that the approach followed by the Commission Proposal to regulate new media services, but with lighter touch, represents a fair balance of the relevant interests involved.

This, of course, may pose some challenges to regulatory authorities. But given that there is considerable experience and know-how in dealing with traditional audiovisual services, I do not see anybody looking frightened.

Of course, endorsing concepts of co-regulation will mean for some of the authorities who have not yet experienced this kind of division of work, that there might be a new heading to their remit: “The times, they are a changin’!”. But, isn’t this part of the interesting tasks we pursue in the field of media, that there are always new challenges and new chances to find the right answers to them?!

In this direction, I would like to finish by wishing you interesting and fruitful debates.

Thank you very much for your attention!

Saarbrücken, 2 October 2006