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## Traditional paradigms for new services? The Commission Proposal for a 'Audiovisual Media Services Directive'

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**Abstract:** For over 10 years the European Community has strived to develop suitable and proportionate answers to the phenomenon of convergence in its audiovisual regulatory policy. This article outlines the regulatory process at an EU level since the early 1980s as far as media, telecommunications and Information Society services are concerned, and analyses some of the most relevant policy papers specifically related to the adoption of the EC legal framework for the media in the digital age, before focusing on the preparatory phase leading up to the adoption of the Commission proposal for a Directive on "Audiovisual Media Services", issued in December 2005. In addition, the core of this proposal for a revised "Television without Frontiers" Directive, i.e. the extension of its scope to cover new media services provided in a non-linear manner and the introduction of a graduated regime of regulation with a lighter-touch approach in view of such services, is presented along with the main lines of debate among stakeholders.

**Key words:** Convergence, digital television, new audiovisual media services, EU media regulatory policy, revision of TWF Directive, electronic communications, broadcasting.

"Nul vent fait pour celui qui n'a point de port destiné."  
Michel de MONTAIGNE, *Les Essais – Livre II* (1580), Chapitre I,  
"De l'inconstance de nos actions"

"Lumos!"  
J.K. ROWLINGS, *Harry Potter*

**F**or the ICT industries, convergence has, for a number of years, not just meant something, but everything, an impression that was especially strong at the end of the 1990s. Today, we are finally witnessing the market launch of a number of new services in the audiovisual domain, or, at least, the establishing of new business models for services that were mostly already available. What makes such developments both interesting and important, not least from a media policy perspective, is the fact that they might be regarded as a point of crystallisation of different aspects of convergence. From a technological angle, the arrival of high-capacity broadband digital subscriber lines and the upgrading of mobile

networks to 2,5 G and 3,0 G have made it possible to use even more digital networks for a number of services, including audiovisual media, besides the existing networks, i.e. digital cable, satellite and terrestrial (van LOON, 2004). This, to a large extent, goes hand in hand with the availability of multi-functional terminal equipment that can be used for either of the traditionally separate activities, i.e. for communications/information and media purposes. The "e" and "m-families" can be taken as examples: eCommerce, eCinema, eLearning, mCommerce, mobile media, etc. For users in the UK, France or Italy, for instance, it is a reality that different providers of Video-on-Demand services (VoD) are available, offering digital films and series libraries and extending their offerings both in terms of quantity and genres (BERGER & SCHOENTHAL, 2005).

Against this background, the present article firstly aims to outline the starting point for the European Commission and how subsequent steps looked at the time they were taken, as well as the Commission's audiovisual regulatory policy and its approach to handling the phenomenon of convergence. The article will then move on to describe the actual Proposal for a Directive on "Audiovisual Media Services", particularly with a view to the rules foreseen for "new services."

## ■ European media, telecommunications and eCommerce law and policy

### General background

European media policy was born in the early 1980s, mainly in response to the imminent launch of cable and satellite broadcasting networks. As in a parallel process at the Council of Europe level, this development led to the adoption of a legal instrument enabling the transmission of television programmes on a pan-European scale, i.e. the Directive "Television without frontiers" (TWFD) of 1989 (EEC, 1989). Efforts by the European (Economic) Community to liberalise the telecommunications market took as a starting point the divergence of national standards regarding terminal equipment, namely the telephone, mainly supplied by state enterprises under their monopoly in the telecommunications and postal sector at the time. This led to the adoption, by the Commission of the European Communities, of Directive 88/301/EEC in 1988 (EEC, 1988). Steps aimed at liberalising

services were soon to follow, bringing an end to the monopolies of the incumbent providers, through the enactment of Directive 90/387/EEC by the Council (EEC, 1990). Subsequently, after this first wave of liberalising measures, taken in an "analogue environment", regulatory policy was faced with the advent of digital technologies such as ISDN (EC, 1994).

In the mid-1990s, when the first review of the TWFD was underway, the Commission prepared for the publication of a Green Paper on Convergence, adopted at the end of 1997 (Commission, 1997). New services already being a reality, particularly the internet and digital carriage media, which were both combining text, graphics, video and audio ("multimedia"), the need was felt to discuss the conclusions to be drawn from the technical convergence induced by digitalisation and, more specifically, its impact on regulatory policies. Since the results of this discussion process were not immediately apparent, not to mention new legislation, which was still to be prepared, we shall look at the key features of the current and subsequent legislation at that time, before returning to the next wave of essentially telecommunications-based legislation to be passed in 2002.

According to Directive 97/36/EC, which amended the TWFD in 1997 (EC, 1997), an approach was maintained which, in some ways, was seen as technologically neutral: both analogue and digital transmission of television broadcasting were covered and the provisions were applicable regardless of the transmission network used<sup>1</sup>. However, its scope of application was restricted to television programmes directed at the public, meaning that a point-to-multipoint transmission is essentially required to be underlying the conveyance of the service (ECJ, 2005), and communications services on individual demand were explicitly excluded. This distinction, however, was questioned during the legislative process, particularly by the European Parliament, which considered that Video-on-Demand services should also be covered by the Directive's rules; the question whether TWFD should apply to broadcasting over the internet was left without any explicit answer<sup>2</sup>.

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<sup>1</sup> Art. 1 lit. a) reads: "(a) 'television broadcasting' means the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services;"

<sup>2</sup> Similarly, at a later stage, the decision whether the TWFD or the eCommerce Directive should apply to "broadcasting over the Internet" has not been taken in a formal way: in the reasons of motivation accompanying the Commission's proposal for the eCommerce Directive it was stated that 'simulcast' was to be covered by TWFD.

Shortly afterwards, the differentiation between broadcasting and on-demand services was reinforced, when the so-called "Technical Standards Transparency" Directive was amended, in particular by Directive 98/48/EC (EC, 1998). This time, a definition of "Information Society services" was introduced, in Art. 1 point 2, which provides:

"service', any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

- 'at a distance' means that the service is provided without the parties being simultaneously present,
- 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
- 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

This Directive shall not apply to:

- radio broadcasting services,
- television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC."

See also Annex V 'Indicative list of services not covered by the second subparagraph of point 2 of Article 1':

"[...] 3. Services not supplied 'at the individual request of a recipient of services'

Services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission):

- (a) television broadcasting services (including near-video on-demand services), covered by point (a) of Article 1 of Directive 89/552/EEC;
- (b) radio broadcasting services;
- (c) (televised) teletext."

In this case, the respective services are characterised by the fact that they are provided at a distance, by electronic means and at the individual request of a recipient of services. This definition subsequently also formed the basis for determining the scope of application of the eCommerce Directive, to be enacted in 2000 (EC, 2000). In the telecommunications sector, liberalisation was then brought forward with the so-called "1998

package." This legislative framework was primarily designed to manage the transition from monopoly to competition and was therefore focused on the creation of a competitive market and the rights of new entrants.

The question to be raised in this context is: what was the motivation for the European Community to follow these regulatory paths? At this point, it is useful to come back to the "Convergence Green Paper" of 1997, and its successor, the Communication on the follow-up to the consultation process initiated by it, issued by the European Commission in 1999 (Commission, 1999a).

At the end of 1997, the same year the first revision of the TWFD had been finalised, the Commission presented a Green Paper proposing several ways of reacting to the challenges posed to regulatory policy by digitalisation and convergence at a European level. The first option consisted of building on current structures, i.e. developing future regulation along the existing instruments and extending them prudently to new services where required. The second option was to develop a separate regulatory model for new activities, to co-exist with existing telecommunications and broadcasting legislation; and the third was to progressively introduce a new regulatory model to cover the whole range of existing and new services. According to the Commission, the key messages emerging from the consultation held on the basis of the Green Paper, as summarised in the March 1999 Communication, included:

*"Separation of transport and content regulation, with recognition of the links between them for possible competition problems. This implies a more horizontal approach to regulation with:*

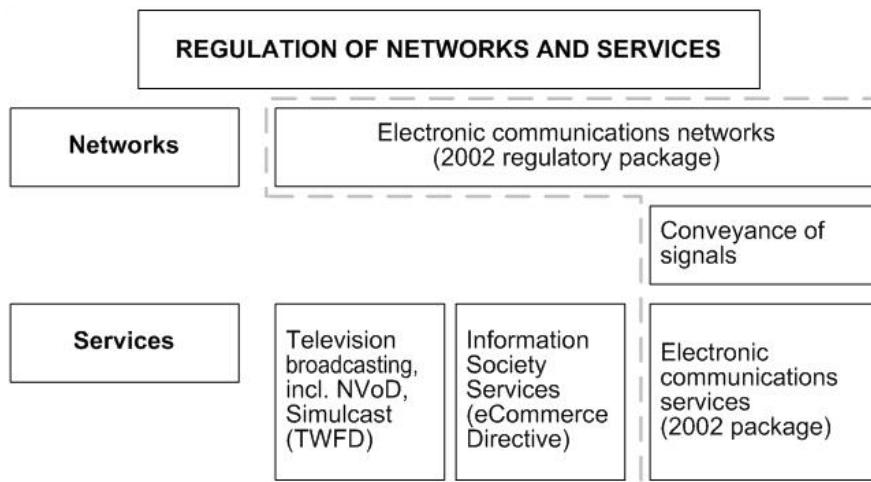
- Homogenous treatment of all transport network infrastructure and associated services, irrespective of the types of services carried;
- A need to ensure that content regulation is in accordance with the specific characteristics of given content services, and with the public policy objectives associated with those services;
- A need to ensure that content regulation addresses the specificity of the audiovisual sector, in particular through a vertical approach where necessary, building on current structures;
- *Application of an appropriate regulatory regime to new services, recognising the uncertainties of the marketplace and the need for the large initial investments involved in their launch while at the same time maintaining adequate consumer safeguard.*" (emphasis added)

The aforementioned eCommerce Directive, proposed by the Commission in February 1999, was the first concrete example of implementation of the

guidelines given in the Convergence Communication, as it opted for a sector-specific approach to Information Society services.

Afterwards, in view of rapidly changing technologies, convergence and the new challenges of liberalised markets, the need was perceived to enact a single, coherent new framework, that would cover the whole range of electronic communications. Building on the 1999 Review and intense debate among European institutions, Member States, regulatory authorities and stakeholders, the legislator adopted the so-called "2002 regulatory framework" covering electronic communications networks and services. This is concerned with the carriage and provision of signals, but is explicitly not applicable to the content conveyed via such services (EC, 2002)<sup>3</sup>. The package of Directives on electronic communications of 2002 is intended to ensure technological neutrality, i.e. irrespective of the former "nature" of a given network – in the past, the telephone lines used for voice telephony, the cable networks installed in order to convey broadcasting programmes, both on an exclusive basis – all networks and, accordingly, all services provided over them (except for those referred to above) should be treated identically.

Graph 1 – Regulation of networks and services according to EC law



<sup>3</sup> Art. 2 lit. c) reads: "electronic communications service' [...] exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;".

This leads to the current status of EC legislation in the media, electronic communications and Information Society sectors. There is a layer of regulation on infrastructure, applicable to electronic communications networks, and a layer of regulation covering services, across the different sectors. However, where content-related offers like broadcast programmes are at hand and in the case of Information Society services, the regulation on electronic communications services is not to be applied (graph 1).

**Graph 2 - Distinction between different "content" services according to EC law**

<b>'CONTENT' SERVICES</b>	
<b>Television broadcasting TWFD</b>	<b>Information Society services eCommerce Directive</b>
<ul style="list-style-type: none"> <li>■ television programmes;</li> <li>■ transmitted initially over a network;</li> <li>■ in encoded or unencoded form;</li> <li>■ intended for reception by the public</li> </ul> <p>incl. NVoD, Simulcast =&gt; "Push" / linear</p>	<ul style="list-style-type: none"> <li>■ any service provided for remuneration;</li> <li>■ at a distance;</li> <li>■ by electronic means;</li> <li>■ at the individual request of a recipient of services</li> </ul> <p>incl. VoD, Websites =&gt; "Pull" / on-demand</p>

After painting a picture of European regulation in the media and ICT sectors, and explaining the current differentiation, in the Community's acquis, between the regulation of electronic communications and content-based services, on the one hand, and the distinction made in the latter field between television broadcasting services and Information Society or eCommerce services, on the other (graph 2), we shall now focus on tracing the process that led to the Commission's proposal to amend the TWFD.

### **Specific**

In principle, as mentioned at the beginning of this paper, the last revision already involved a discussion, among other issues, of the necessity to broaden the TWFD's scope of application in view of the (then) "new services." Nevertheless, the compromise reached between the European Parliament and the Council (and the Commission), foresaw not to include webcasting or VoD in the Directive. It was deemed premature to regulate



such emerging markets as the impact of such regulation would be difficult to predict. However, the revision-clause in Art. 26 TWFD nevertheless stipulated that "the Commission shall [...], if necessary, make further proposals to adapt it [the Directive] to developments in the field of television broadcasting, in particular in the light of recent technological developments." At a Member State level, vigilance was also to be exercised to prepare for legislative initiatives made necessary by technological changes. According to Recital no. 8 TWFD, "it is essential that the Member States should take action with regard to *services comparable to television broadcasting* in order to prevent any breach of the fundamental principles which must govern information and the emergence of wide disparities as regards free movement and competition;" (emphasis added).

It has been said that the revision of a legal act starts, at the latest, with its adoption. This seems particularly true for the TWFD, not least when bearing in mind the aforementioned "review programme" already implemented in the text of the revised Directive. Later, in view of the Convergence Green Paper which was regarded by many as highly influenced by the Commissioner responsible for the Information Society at the time, , and as a certain counter-weight, the Commissioner responsible for Education and Culture nominated a High Level Group of professionals from the audiovisual sector to investigate into, and present proposals on, the impact of technological and business changes for the media industries and related Community policy. Their report, presented in October 1998 (HLG, 1998), argued that the regulatory framework should be coherent and clear, and that steps should be taken to avoid a situation whereby two different sets of rules with an entirely different purpose would apply to the same service. The Commission, in its Communication entitled "Principles and Guidelines for the Commission's audiovisual policy in the digital age", published in December 1999 (Commission, 1999b), and thus published after the Follow-up Communication on Convergence, stated that one principal of regulatory action is to target technological neutrality. This term is explained as follows:

"Technological convergence means that services that were previously carried over a limited number of communication networks can now be carried over several competing ones. This implies a need for technological neutrality in regulation: identical services should in principle be regulated in the same way, regardless of their means of transmission."

Apparently, the ground had been well-prepared to enter into a debate on the review of TWF. However, the pace of discussion slowed considerably mainly due to the end of the "internet hype" and the crisis in (television)

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advertising revenues in 2001. "Convergence", having been considered in all its implications for many years, suddenly no longer seemed an issue that required immediate action – due to a lack of concrete business models and the slowed-down or postponed market entry of service providers. Moreover, the Andersen study, dated June 2002 (ANDERSEN, 2002), which examined the different possible economic and technical developments in the media sector through 2010, had come to the conclusion that whatever trends would predominately characterise the audiovisual market in the next years, no immediate legislative measures were required. The three main trends identified by Andersen were – formulated as case scenarios – (1) business-as-usual, (2) interactivity and (3) personalisation. According to the study's authors, the different scenarios would lead to differences in the way market players like broadcasters, infrastructure operators, content providers etc. would participate in the value chain in the future. In scenario (2) and (3), traditional broadcasters as "content packagers" would be negatively affected to the greatest degree compared to other players. Interestingly, analysis and interpretation of the study focused on the prognosis that nothing fundamental would change until the year 2005. This was perceived as a "relief" in terms of the alleged pressure on politics to take action.

In March 2002, the Member of the European Commission responsible for Education and Culture (now: Information Society and Media), Viviane Reding, presented three options for addressing the relevant issues: (A) the comprehensive, complete overhaul of the Directive, (B) a moderate revision, which would be restricted to specific parts of TWFD only, and (C) the preparation of a Working Programme which, at a later stage, could lead to initiating a review process. The presentation of these options was to be seen in the context of the obligation, imposed on the Commission by Art. 26, to present a report on the application of TWFD at the end of 2002. Read between the lines, it transpired that the Commissioner was favouring option C. This, of course, was a position that put a significantly different emphasis on the approach to be followed than previously signalled, particularly in 2000 and at the beginning of 2001. At that time, reflecting the numerous calls by the European Parliament to extend the scope of a revised directive, the aim of a future EC audiovisual policy instrument was sketched as to embrace all forms of electronic media, hence the notion "Content Directive" was introduced into the debate.

When, on January 6<sup>th</sup> 2003 the Commission adopted the Fourth Report on the application of the "Television without Frontiers" Directive (Commission, 2002), it annexed a work programme for 2003 to it, which set out topics and initiatives including a public consultation, for the review.

Remarkably, the question of whether the Directive's scope of application should be extended, was not dealt with at all. As phrased by the former Chef of Cabinet of Commissioner Reding, this, of course, did not prevent a great number of stakeholders from submitting their opinion on this subject matter, with preferences almost equally distributed among those in favour and those against adapting the scope to cover new services.

The Commission's bilan of the 2003 Consultation was presented in its Communication entitled "The Future of European Regulatory Audiovisual Policy", published in December 2003 (Commission, 2003). There, the following conclusion is drawn:

"In the medium term, nevertheless, the Commission considers that a thorough revision of the Directive might be necessary to take account of technological developments and changes in the structure of the audiovisual market. The Commission will therefore reflect with the help of experts (in focus groups) whether any changes to content regulation for the different distribution channels for audiovisual content would be necessary at Community level in order to take account of media convergence at a technical level and any divergence of national regulation which affects the establishment and the functioning of the common market. The mandate of the group shall be based on the existing framework. Any intervention would have to ensure the proportionate application of content rules and the coherent application of relevant policies considered to be connected to this sector, such as competition, commercial communications, consumer protection and the internal market strategy for the services sector."

While the reference to "the medium term", understood as a self-restraint by the then acting Commission so as not to prejudice the political agenda of its successor nominated in 2004 shortly after the enlargement of the EU, and the approach formulated, i.e. to restart a reflection and consultation phase, are the most obvious reservations made; in substance, however, the moment seemed to have come to seriously consider revising TWFD. In autumn 2004, the so-called Focus Groups – convening under the presidency of the Commission and invited to be led, in their discussion, by working papers prepared by it – consequently started to debate the policy options eventually to be recommended for future regulatory action. On the basis of these reflections, the Commission drafted so-called "Issue Papers" in order to open up the 2005 Consultation to all stakeholders, and to be able to present the input received at the Audiovisual Conference "Between Culture and Commerce" under British EU presidency in autumn 2005 (the "Liverpool Conference").

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The new Commission also sought to set the above activities in a larger framework, having recourse to the Lisbon agenda. In its *i2010* initiative, adopted in June 2005 (Commission 2005a), the Commission outlined i.a. the following policy priority aiming at "A European information society for growth and jobs":

"- To create an open and competitive single market for information society and media services within the EU. To support technological convergence with "policy convergence", the Commission will propose: an efficient spectrum management policy in Europe (2005); a *modernisation of the rules on audiovisual media services* (end 2005); an updating of the regulatory framework for electronic communications (2006); a strategy for a secure information society (2006); and a comprehensive approach for effective and interoperable digital rights management (2006/2007). [...]" (emphasis added)

Before and after the Liverpool Conference, different versions of drafts, focusing on the definition component in a revised TWFD, were in circulation. These drafts were apparently, in first instance, mainly inspired by the work done by Focus Group 1, and foresaw an extension of the scope of a future instrument. A remarkable amendment, though, was made post-Liverpool, i.e. that the definition of services falling under a new Directive should be more strongly focused on services of a mass media character. We will come back to this point later on. It seemed that for all those involved in the discussion – both the stakeholders and the institutions competent in the upcoming legislative exercise – at this stage it was important, first, to verify whether some issues of perceived consensus were likely to be acceptable for the majority of interested persons, and, secondly, to test how big opposition might become in areas which could encounter a foreseeably intense debate. An example of the latter kind of debate, obviously most interesting in the present context, was the degree to which the scope of application would be extended in order to cover new services.

On December 13<sup>th</sup> 2005, the European Commission officially adopted the proposal for a Directive on Audiovisual Media Services (Commission, 2005b). Besides the Committee of the Regions and the European Economic and Social Committee who will be consulted, it is now up to the Union's organs European Parliament and Council<sup>4</sup> to take a position in the legislative process.

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<sup>4</sup> This contribution will not elaborate on past EP or Council positions. In essence, it shall suffice to recall that the Parliament has constantly renewed its request for enacting a new directive which should cover new media services, see e.g. Resolution of 6 September 2005, A6-

**Chronology of general and specific media and ICT policy developments**

1988	<i>Liberalisation of TTE</i>
1989	<i>Adoption of "Television without Frontiers" Directive</i>
1990	<i>Liberalisation of Telecommunications Services (ONP)</i>
1994	<i>Liberalisation of Satellite Communications</i>
1995	<i>Start of First Review of TWFD</i>
1995	<i>Use of Cable Networks for Liberalised TC Services</i>
1996	<i>Liberalisation of Mobile Communications</i>
1997	<i>Adoption of Amendment to TWFD</i>
1997	<i>Convergence Green Paper</i>
1998	<i>Full Liberalisation of Voice Telephony Services</i>
1998	<i>"Technical Standards Transparency" Directives</i>
1998	<i>High Level Group ("Oreja") Report</i>
1997-1999	<i>Telecommunications Package (i.a. Separate Legal Structures for Owners of TC and Cable Networks)</i>
1999	<i>Convergence Communication (Follow-up)</i>
1999	<i>Start of Telecommunications Review</i>
1999	<i>Communication "Principles and Guidelines for the Commission's Audiovisual Policy in the Digital Age"</i>
2000	<i>Adoption of eCommerce Directive</i>
2002	<i>Electronic Communications Package (i.a. Framework, Access, and Universal Services Directives; Frequency Decision)</i>
2002	<i>4<sup>th</sup> TWFD Application Report (incl. Working Programme)</i>
2003	<i>First Consultation on TWFD Review</i>
2003	<i>Communication "The Future of European Regulatory Audiovisual Policy"</i>
2004	<i>Focus Groups on TWFD Review</i>
2005	<i>Communication "i2010" (i.a. TWFD Review, 2006 Electronic Communications Review, Spectrum Management Policy)</i>
2005	<i>Second Consultation on TWFD Directive (Issue Papers and Liverpool Conference)</i>
2005	<i>Commission Proposal for a "Audiovisual Media Services" Directive (AMSD)</i>

## ■ Discussion of the draft Audiovisual Media Services Directive

### Primary objectives and definition of scope

According to the motivation put forward in the Commission's proposal, Member States rules applicable to activities such as on-demand audiovisual

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0202/2005 ("Weber Report"). The Council stressed the importance to have a technologically neutral approach when regulating content services, and underlined that the content of interactive media should be regarded a new audiovisual phenomenon. Consequently, the Commission was requested to consider possible adaptations of the regulatory framework in order to safeguard cultural diversity and a healthy development of the sector. For more information, see A. Roßnagel, [2005] EMR book series vol. 29, p. 35 (41).

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media services contain disparities, some of which may impede the free movement of these services within the EU and may distort competition within the Common Market. Reference is made, in this respect, to Art. 3 eCommerce Directive, which allows Member States to derogate from the country-of-origin principle – that is the general approach to regard a service, legally rendered in the Member State where the provider is established, to be freely circulated across the EU without interference by the receiving Member State – for specific public policy reasons. "Legal uncertainty and a non-level playing field exist for European companies delivering audiovisual media services as regards the legal regime governing emerging on-demand services, it is therefore necessary [...] to apply at least a *basic tier of coordinated rules to all audiovisual media services*." (emphasis added) Those arguments are triggered by the requirements laid down in Art. 49 in conjunction with Art. 55 EC, i.e. that the Directive will facilitate the free provision of services, and, thus, serve to demonstrate that a legal measure has to be adopted in order to overcome hindrances resulting from divergences in the national rules. The recitals go on to state that the importance of audiovisual media services for societies, democracy and culture should justify the application of specific rules to these services.

Further on, the Commission refers to two principles contained in Art. 5 EC. In accordance with the principle of proportionality, on the one hand, it proclaims that the measures provided for in the Directive represent the minimum needed to achieve the objective of the proper functioning of the internal market. The Commission thinks that non-linear audiovisual media services have the potential to partially replace linear services. Nevertheless, the recitals state, non-linear services are different from linear services with regard to the choice and control users can exercise and with regard to the impact they have on society. This would justify imposing lighter regulation on non-linear services, which only have to comply with the basic rules provided for. In view of the principle of subsidiarity, on the other hand, action at a Community level is seen as necessary in order to guarantee an area without internal frontiers as far as audiovisual media services are concerned.

The legislative proposal, according to its recitals, intends to ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity. The EC Treaty, in its Arts 151 and 153, stipulates the obligation of the Community to take into account, when acting, cultural aspects, in particular in order to preserve and enhance the diversity of cultures; in addition, it has to strive for a high level of consumer protection. With regards to the former, the Directive sets out that non-linear services should also promote the production and distribution of European

works, where practicable, and thus actively contribute to the promotion of cultural diversity. As far as the the latter is concerned, it is deemed both necessary and sufficient that a minimum set of harmonised obligations is introduced in order to prevent Member States from derogating from the country-of-origin principle with regard to protection of consumers in the areas harmonised in the Directive. The same kind of consideration is made when it comes to other public policy objectives, such as the protection of minors, the fight against incitement to any kind of hatred, and violation of human dignity concerning individual persons.

With regard to several objections, communicated for many years when the extension of scope was under debate, the following passages might be read:

"This Directive enhances compliance with fundamental rights and is fully in line with the principles recognised by the Charter of Fundamental Rights of the European Union, in particular Article 11 thereof. In this regard, this Directive does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. [...] No provision of this Directive should require or encourage Member States to impose new systems of licensing or administrative authorisation on any type of media. [...] None of the provisions of this Directive that concern the protection of minors and public order necessarily requires that the measures in question be implemented through prior control of audiovisual media services."

In short, the Commission intends a future Directive:

- To have a broader scope of application: the Directive should be formulated in such a way that all audiovisual media services are covered, whatever their mode of delivery ("regulatory convergence"; it is the content that matters when specific general interest objectives have to be attained, therefore the approach of technological neutrality is chosen);
- To lay down basic requirements that all of those services must respect while at the same time introducing a certain graduation, within the body of rules of the Directive, taking account of the character of different audiovisual media services, particularly their influence on the viewer or user ("lighter touch regulation" for television-like "non-linear" services, VoD for instance).

For present purposes it is important to clarify how the future scope of application shall be designed. Here, Art. 1 of the draft Audiovisual Media Services Directive (AMSD) is to be looked at, which contains the guiding definitions. According to Art. 1 lit. a), "audiovisual media service" means a

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service as defined by Arts 49, 50 EC 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 Art. 2 lit. a) of Directive 2002/21/EC (Framework Directive). This general definition is accompanied by definitions of "television broadcasting" and "non-linear service". The former means a linear audiovisual media service where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule. A non-linear service is defined as an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider.

It is clear that one also has to consider the definition of media service provider in order to identify the exact scope of application, both *ratione materiae* and *ratione personae*. The term "Media service provider" refers to the natural or legal person who has editorial responsibility for the choice of content of the audiovisual media service and determines the manner in which it is organised, Art. 1 lit. b). The notion of broadcaster is then defined, more narrowly, as the provider of linear audiovisual media services.

Thus, the Directive will be applicable to:

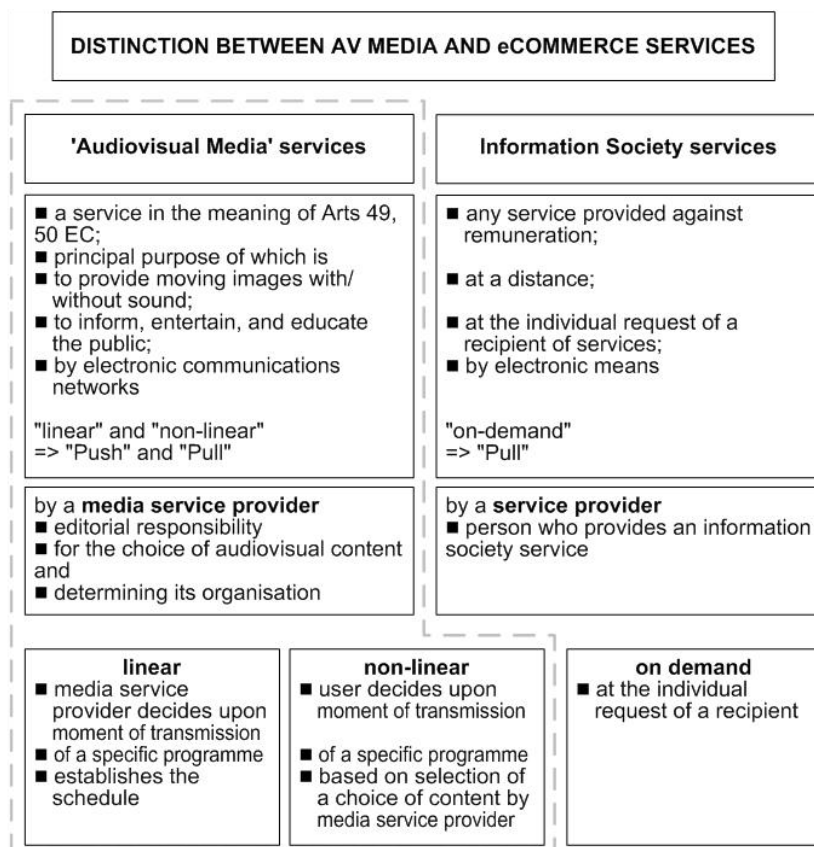
- audiovisual content (moving images) of a mass media character (to inform, entertain, or educate) being provided to a general audience (numerous participants of a non previously defined group) by any kind of network;
- where the activity is an economic one (service in the meaning of the treaty);
- where editorial responsibility over a specific programme is exercised (schedules; selection of choice of content) by a media services provider;
- irrespective of whether the moment in time when the programme is accessed is determined by the broadcaster (linear service) or the viewer (non-linear service).

Linear and non-linear services, on the one hand, are distinguished according to the degree in which the viewer exercises control over the moment in time and the kind of programme s/he is watching. In cases where s/he depends on a constant stream of programmes, arranged according to a schedule, by a provider, a linear service, i.e. a television broadcast, is at stake. Where the user is free to chose what specific content offer s/he is viewing, and when, the offer will be regarded a non-linear service.



Basically, the demarcation line follows the well-known models of NVoD and VoD, at least as long as the former is made available only at time slots that are not so short as to be negligible. On the other hand, in the case of non-linear services, it remains to be defined whether the AMSD or the eCommerce Directive should be applied. Relevant elements here are whether an audiovisual media service is rendered, which means that there have to be moving images of a mass media nature in the form of a programme that can be characterised as the principle or main content encountered. Therefore, in cases of the mere inclusion of a small number of audiovisual files on a webpage, where this is of an insignificant proportion compared to the rest of the content put online, where no editorial responsibility is exercised, or where it will not be intended to inform, entertain and educate, the regime of the eCommerce Directive will be applicable (graph 3).

**Graph 3 – Audiovisual media service vs. Information Society service**



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**Open debate within EC institutions, at Member State level  
and with stakeholders**

Following the publication of the Commission's proposal, a discussion recommenced over whether a future directive on audiovisual content really should cover "new services" – services that have only emerged in recent years or are still to be launched. Supposedly, there is some familiarity with related arguments: some claim that regulation would be premature, particularly when it comes to mobile media or internet services. Moreover, in a similar vein, it is argued that it would be disproportionate to apply the traditionally strict "broadcasting" regulation to new forms of audiovisual content distribution. Sometimes these arguments are a bit irritating, to say the least. The fact that a graduated level of detail in regulation has been foreseen is exactly the answer to concerns that new services would be regulated over-heavily. The fact that the service at hand must represent an economic activity that entails a certain mass media appeal ("television-like offer", "principal purpose") excludes both purely private initiatives, as well as non-media services from being covered by the proposed rules. On the contrary, it seems difficult to understand why minimum requirements regarding the protection of minors, consumers, and personal integrity should not be relevant, at least in principle, to any kind of audiovisual media service.

Critics also question whether the distinction between linear and non-linear services has been formulated adequately and whether this really is "future-proof". Here, the arguments will very much depend on the preconditions one might want to set for the future audiovisual landscape in Europe. Indeed, coming back to the interactivity and personalisation scenarios, forecast by Andersen in 2002, technical development appears to offer viewers an even wider range of possibilities to individually select the kind of media information they are interested in. So, the question is rather whether there will be many linear services left by 2010 (and especially beyond), by which point the Directive will have been implemented into national law in the majority of Member States. Presumably, in particular highly attractive commercial general interest channels and public service television broadcasts will remain as essentially linear services, which means that only the smaller part of the proposed provisions, i.e. the basic tier with reduced restrictions on the pursuit of the activity, will show relevance for the majority of services rendered in the audiovisual sector. In this respect, the draft directive is not technologically neutral when it differentiates, internally, between the two kind of services to be covered; therefore, it might be reassessed if future progress in technology could render it interesting for

some providers to switch from one level of regulation to another by adapting the underlying technical parameters accordingly.

Apparently, especially telecommunications operators and multimedia companies, and their respective associations or lobbying groups, are rather discontented with the Commission's proposal – the same holds true for newspaper and magazine publishers. This tendency could be observed as early as the Liverpool Conference. It is often argued that general law, acts on defamation, advertising standards in horizontal Community instruments (e.g. the Unfair Business Practices Directive of 2005), or legislation on the protection of minors in criminal law for instance, would be sufficient. Yet this still leaves open the question of whether operators/providers and users/viewers are better off with a clear legal framework based on the principle of country-of-origin control – or not.

By contrast, Member States and particularly the European Parliament, seem to be preparing for an early consensus on the fact that the Directive's scope will be expanded. In mid-May, the Council held an exchange of views on the draft text for the first time, and, in a most cautiously worded statement, said tendency was confirmed. However, the UK government has reiterated its preliminary negative position on several occasions, and it is difficult to predict how many other Member States might liase to this opposition.

From the European Parliament's committee on culture and education, having the lead for this dossier, there have been reported signs of a broad agreement to follow the Commission's approach. At the beginning of June, all competent committees held a joint hearing. The ambitious timetable of the EP foresees the following steps: a draft report will be presented at the Culture Committee meeting in July, the report presented at that meeting will be adopted in October and the EP Plenary will be called to vote on the proposed report in December in its first reading.

## ■ Résumé and outlook

The revision of the TWFD has finally become reality. After a decade of discussion on how European audiovisual policy should react on the convergence issue, a concrete proposal has been tabled by the Commission that largely follows the trends already indicated at the end of the 1990s. The aim is to ensure technological neutrality when adopting "convergent

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regulation" and to foresee graduation in the level of conditions set for linear and non-linear services through a differentiated regulatory approach. In such an environment as in the field of ICT and media – nowadays showing clear tendencies towards convergence both in terms of internal structures (vertical integration) and the extension of business activities across sectors, with a constant high pace of technological and economic changes –, any prognosis of future market conditions, on which the European legislator must also, to some extent, base its approaches, is generally suspected to be misguided. However, the Community must now decide whether it needs to play an active role in shaping the future of the audiovisual media landscape, not least in order to protect recognised standards of public interest objectives in all audiovisual media services.

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