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Converging Regulation for Convergent Media: an overview of the Audiovisual Media Services Directive

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Abstract

Convergence and the Internet have changed the way creative content is now watched, and forced the Television without Frontiers Directive 89/552/EC (the TWFD) to be reformed into the Audiovisual Media Services Directive 2007/65/EC (AVMSD). Historically, the key regulatory broadcasting issue was ensuring the provision of stipulated content and implementing public policy. By contrast, telecommunications regulation centered on ensuring the provision of affordable network access for consumers. However; convergence, the coming together of different technologies, which have distinct functions, to create one medium which performs each divergent function, has now intertwined these regulatory issues. The former distinct sectors of broadcasting and telecommunications have become one with regulators placing increasing weight on facilitating access to public service content across broadcasting platforms and regulating content within telecommunications platforms. This work argues that convergence has altered the broadcasting landscape almost beyond recognition, causing new market opportunities alongside downward economic pressures. Without an adequate change in how the law regulates the new resulting creative content industry, both in terms of supply and the substance of such content, further harm would also have ensued for the entire industry. Due to fears that too much regulation would be detrimental to the competitiveness of the Internet Protocol Television (IPTV) market and hinder development; some argue that the reformed Directive should not have had a wider scope to cover on-demand content. It is suggested that while having merit, this thinking ignores the extent to which convergence has changed the broadcasting environment thus, non-linear content delivery services have to be included in the AVMSD.

Keywords: convergence, IPTV, broadcasting, regulatory framework

1. The Impact of Convergence on the Broadcasting Industry

Arguably the epicentre of today's converged environment is the broadband internet network. This has led to broadband delivered broadcasting, or IPTV as it is more commonly known, as well as allowing the creation of broadcasting via mobile phones. Convergence means operators need to respond to the new environment in order to take advantage of new opportunities and avoid losing revenue. Forsyth and Heath (2007) have argued '[t]he era of scheduled TV channels is fast coming to an end' as on-demand programming becomes the norm as viewing trends follow the general shift to a 24/7 mobile society, evidenced by the rise of 24 hour news channels and uptake of services such as Sky+.¹ The impact of convergence has seen new opportunities, such as the more efficient distribution of services within a channel's existing capacity but most 'notably [Digital Terrestrial Television], and the delivery of audiovisual services through new technological platforms [which] have expanded the presence of such services on the market reinforcing the well-known phenomenon of fragmentation of supply.'² However, some business models have also faced hard tests from the resulting fragmentation of audience share. Although, it should be noted that, the impact of convergence has not only been limited to operators; there have also been major implications for how the industry is regulated.

1.1 Convergence and the implications for broadcasters

Convergence has created significant economic pressures as the audience fragmentation leads to a reconfiguration of the landscape. This is particularly so when coupled with the rise in ICT availability and usage by the European population. We now have a multi-channel environment, with a greater public use of videos and DVDs,³ and whereas traditional channels, such as ITV1, could regularly attract audience figures of 15m plus for some shows, now on a good night they might attract 9.2m viewers (Forsyth and Heath 2007). The effect of this competition is that advertisers will no longer pay the same amounts for restricted advertisement slots that yield less exposure. ITV1 saw advertising revenues fall 12.4 percent in 2006 (even with the Football World Cup on its schedule), while 2007 saw a further fall, albeit only 4.4 percent.⁴ Meanwhile European Internet advertising grew 40 percent to €7.2bn in 2007.⁵ As IPTV take up, particular on-demand services, grows so will this figure at the expense of traditional TV ad-spots.

These economic pressures, enhanced by the wave of new broadcasting entrants from the telecoms sector, combined with the ability to offer converged services have ‘challenge[d] the sustainability of traditional business models in the sector.’⁶ Traditional commercial broadcasters have responded by opting to launch on-demand services although approaches have varied. ITV, perhaps reflecting its current viewer/advertising problem has opted for a free service to attract viewers but charge higher rates for advertisements.⁷ Channel 4 however, launched its service with some charges. Latest shows, and the channel’s own ‘classic’ content can be viewed for free, other shows cost 99p while movies cost £1.99.⁸ The irony is that the broadcasters arguably in the direst positions now could well be in the strongest position in the future. Ofcom has predicted Channel 4 will operate at a loss by 2010 and out of money by 2012. However, as the channel is content rich, meaning it has an extensive archive of popular programmes which it own the rights to; they are better placed to benefit from the arrival of an on-demand environment. This is particularly the case when compared to rivals such as BskyB which, other than sport,⁹ produces very little of its own content (Forsyth and Heath 2007, p20).

This lack of own content could be behind BskyB’s different response to convergence. As the BBC reports, the one way nature of satellite broadcasting means it is harder to provide a ‘true on-demand service.’¹⁰ The Sky+ service does offer some on-demand services by placing a selection of programmes on the hard drive so they can be watched again;¹¹ the boxes also double as a Personal Video Recorder (PVR). Programmes are also available for download as part of subscription tie-ups with mobile phone operators such as Vodafone and O2. Overall, BskyB’s biggest change to its business model is its decision to become a telecoms player and take advantage of convergence by offering a combined triple play package.¹² While designed to prevent customer churn; it is perhaps also a recognition that Sky needs to diversify its customer base. Even with the ability to offer IPTV through its broadband service, the fact is Sky remains a content distributor as they have very little content of their own. This means its future as a broadcaster is still in some danger as people could cut out the middleman and download content directly from the producers.¹³

As noted, the other significant change in the sector has been the entry of vast numbers of new players entering the on-demand market, particularly from the telecoms sector. One way this has been done is through mobile phone operators signing content agreements with producers. Their long term plan is to broadcast channels live once the required spectrum is freed up by Ofcom. Alternatively, fixed line operators, notably BT, mirror BskyB’s move by offering package services including a broadband TV service, BT Vision which works similarly to Sky+. However, as the on-demand element does not feature advertisements this particular

service may not be a direct competitor to traditional broadcasters; it does however, illustrate how crowded the market is becoming due to convergence bringing non-broadcasting undertakings into the sector. However, with the sheer number of broadband customers BT has, if it was to introduce advertisements it could have a significant detrimental impact on traditional broadcasters.

This new, highly competitive ICT environment, with its emphasis on on-demand services, has meant power rests with the consumer as they determine what they watch and when. Resultantly business sustainability rests on having a supply of good, but low cost, content. Those without their own catalogue of self-made content have two options. They can, like BskyB, create their own on-demand delivery service combined with a diversified product range to make a more appealing package. However, this involves high development costs and may not be successful particularly as there is reliance on 3rd party content. Therefore, the alternative method is to merge with, or acquire, a content producer that fits with an existing platform provider. This has the attraction of strengthening the new company in light of the increased competition both face individually particularly in terms of advertising revenues. This has arguably been the more prevalent option thus far, with a 'trend towards concentration in the European communications and media sectors.'¹⁴ A prime example of this can be seen in Virgin Media's attempt to acquire ITV prior to launching their on-demand service.

1.2 The implications for regulators

There are also implications for regulators and not just in terms of the overall policy framework for regulating the ICT industry. Suggestions have been made that it would be better to 'converge' pre-existing regulators dealing with separate areas. The ITU feels that despite technological and market convergence; the decision to have regulatory convergence should be based on specific questions that relate to organisational development such as economies of regulation.¹⁵ They also point out the dangers of losing specialised sector-specific regulators. In essence, convergent regulators mean having a single body that overseeing the entire ICT sector. This combines economic aspects such as access, universal service and the overall financial health of the industry with cultural aspects such as the nature of the content provided and public service broadcasting stipulations. This idea has yet to fully take off within the EU; for example the French broadcast regulator does not wish to converge with the telecoms regulator through a fear it will be dominated by commercial considerations. Finland, Italy and the UK do have converged regulators which may explain why their ICT sectors are regarded as amongst the best performing in the EU¹⁶ however, this is debatable, and is more likely due to factors such as the individual governmental approach to competition issues and how effectively they have implemented the EU's regulatory framework for electronic communications networks and services. Although the UK has a 'converged' regulator in Ofcom, it is questionable whether it is converged in terms of its jurisdictional scope to sufficiently to deal with the new environment. Ofcom was created in 2002 when on-demand content provision and IPTV were not as prevalent as they are today, additionally, there were concerns about regulating the Internet. The consequence is that as Deputy Chairman, Richard Hooper has highlighted; Ofcom can deal with a complaint regarding a television programme but not when it relates to that programme's related website. This is clearly an issue when preview clips or the actual programme are placed for viewing on the website.¹⁷

The other regulatory question regards what should fall within the scope of universal service obligations. To answer this, it needs to be determined what we, as a society, expect in the way of Public Service Broadcasting (PSB). If, as Forsyth and Heath (2007) have suggested '[t]he era of scheduled TV channels is fast coming to an end' and being replaced by a non-linear environment; should PSB requirements be placed on these new services?¹⁸ What about linear IPTV channels? If these new media platforms are not required to contain a PSB element then it would be uncompetitive to force commercial terrestrial channels to continue providing PSB at a time when commercial terrestrial channels are suffering viewer fragmentation and a subsequent loss of advertising revenue. Having uncompetitive commercial channels could, in the longer term, in fact harm for PSB provision.¹⁹ However, if society's PSB provision is to come from broadband networks, or even if just that the future of broadcasting is IPTV; then regulators need to ensure quality, high-speed broadband networks are provided universally regardless of the economic inefficiencies of doing so in order that everyone has access. Therefore, the task facing regulators is to not only ensure that public policy goals are met, such as regarding the protection of minors, but also that any regulation is technology-neutral and able to adapt to future innovations. There must also be sufficient certainty to encourage investment in, while not stifling, the emerging audiovisual industry. In 2006, the UK television industry alone had total revenue of £10.8bn.²⁰ This will only grow as more ICT players are able, through convergence, to enter the broadcasting market. Regulation that has a detrimental effect by not allowing for easy access and expansion, or that undermines consumer confidence by leaving parts unregulated will also stifle growth negatively impacting on the overall economy.

1.3 Convergence and the TWFD

The biggest impact on the TWFD has been the creation of a new environment from that which was envisaged when it was created. The issue whether the TWFD was suitable to this environment and thus remained relevant. The primary problem was whether traditional definitions could be adapted so that content watched via IPTV could be safely classed as 'television broadcasting'. An additional concern was whether the situation differed if the content was watched at the choosing of the viewer. However, the use of the word 'unencoded' in the definition of 'television broadcasting' within the TWFD suggests the digital technology used in IPTV could fall within the definition. However, article 1(1)(a) TWFD explicitly excluded 'communication services providing items of information or other messages on individual demand.' Furthermore, the fact that the definition of a 'broadcaster' referred to schedules, clearly put those putting programmes on the Internet outside of the TWFD as by its very nature an on-demand service cannot be restricted to a schedule. Economic theory of the kind advocated by Friedman²¹ would suggest that this regulatory discrepancy does not matter and that non-linear services should be left to establish themselves with the market providing any necessary regulation. However, if this theory was applied it would have led to a strange situation whereby a broadcaster would need to comply with the TWFD in relation to their scheduled broadcasts but not for their on-demand broadcasts. Yet the programme involved may well have been the same. Clearly therefore, due to convergence, the TWFD needed reviewing to establish what the boundaries should be in this new environment. Additional problems were created as to which Member State exercised jurisdiction. Convergence has brought about the onset of user generated content such as that seen on YouTube. By its very nature the makers of these do not have head offices and 'significant' workforces as stipulated by article 2 TWFD to determine where the broadcaster is established – they are not established undertakings. Additionally, by basing jurisdiction on 'broadcasters' the influx of telecommunications companies, using convergence to enter the

content delivery market, were potentially excluded. Significant problems also arose in relation to the substantive provisions of the TWFD.

1.3.1 The Protection of minors and human dignity

A multi-channel environment makes monitoring compliance with programming standards difficult. Not only are there more accessible channels but services, such as on-demand, are harder to control. Chapter V of the TWFD provided for the protection of minors and public order, requiring measures to be taken to prevent children viewing harmful content on the one hand and also the prevention of broadcasts that may incite hatred. The former was dealt with by article 22 TWFD and distinguished between broadcasts that ‘might **seriously** impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence’ and those that ‘are **likely to** impair the physical, mental or moral development of minors’. Broadcasts within the first category are subject to an absolute ban whereas; the second category are permitted provided it can be ensured minors within the area of transmission will not ‘normally’ hear or see them by using a watershed or technical means. A programme that is usually broadcast after the UK’s watershed could be available for download on-demand which would make it available pre-watershed and outside parental control. Furthermore, the Internet brings more material into play from wider sources i.e. non EU countries which do not have the minimum standards of the TWFD. The problem is that if the new media platforms are to succeed there needs to be a sufficient level of trust and confidence amongst users regarding that the content that can be viewed is not detrimental to children and also, is not openly inciting hatred. While these concerns would appear hard to argue with they cannot be so easily resolved by simply transposing the framework to IPTV. The problem is heightened due to it encroaching on the global concern of Internet governance. Under the TWFD problems were encountered with diversity of opinions as to what could impair the development of a minor;²² while currently there is a global polarisation of views regarding internet content control.²³ An additional problem highlighted by Murray (2007) is that those making up ‘niche communities’ online have a different perspective on these issues than those in the ‘real world communities’. The Internet gives people control to express themselves as they please. It is this theory of user control which is at the heart of the new technologies providing a broadcasting platform for viewers. On-demand and the use of PVRs are all about giving the viewer freedom to control when they watch their content. The dilemma for regulators therefore, is how to balance the need for an enforceable minimum level of protection, with the idea of user control which is at the heart of the new media.

1.3.2 Advertising

Convergence did not directly affect the application of the TWFD’s advertising provisions. Instead, the effect has been to highlight the need for a relaxation of the advertising rules to allow commercial broadcaster greater flexibility to maximise potential revenues. Broadcasting is generally considered to provide an important social function, particularly PSB. However, broadcasting is largely funded by advertising and as noted this is in decline due to a fragmentation of audience share caused by the multi-channel environment. The problem is further exacerbated, and liable to increase, as PVRs become more widespread as they allow viewers to fast-forward adverts.²⁴ As advertisers get less exposure for their money their spending is rapidly shifting to alternative methods and media. One such method being practiced as an alternative is product placement. This is the prominent placing of branded products in broadcasts, so for example a character will be seen clearly drinking a well known brand of beverage. Greater viewer interactivity from convergence has led this to be

particularly attractive to advertisers as the product can be more easily integrated into programs while being unavoidable from a consumer perspective.²⁵ In 2006 TV product placement spending was \$2.40bn²⁶ and this was forecasted to increase by 33.9 percent in 2007. This might seem like a win-win situation; broadcasters get funding, viewers get broadcasts. However, product placements were prohibited by the TWFD as the EU sought to protect viewers against indiscriminate advertising.²⁷ The reason for this was the desire to keep separate advertising and editorial content and thus ensure that viewers are not misled as to what they are watching – adverts or actual programming - and as a result help to maintain broadcast integrity.

1.3.3 Promotion of European Works

The onset of digital TV, from the late 1990s, created problems with the application of these provisions. Digitalisation has created a host of new channels. As with any new undertaking, in the initial stages there tends to be a shortage of revenue. This is particularly so with broadcasters who will have to create an audience base from zero. As a result they could well be less able to afford more expensive European and independent works. However, under article 4 TWFD a majority proportion of the broadcasters' 'transmission time' must be set aside 'where practicable' for European works. Of this amount, article 5 states 10 percent must be from independent broadcasters. A lot of the new channels today are either specialist or pay TV channels. These are hit harder by the provisions as, with regards the former channels, there may be less programmes complying with the provisions, those that do comply may be more expensive due to scarcity. As for the latter channels, Aubrey (2000) notes, 'they are to a certain extent dependent on the films shown in cinemas: their scheduling mostly reflects box-office successes, out of which European films only account for a minority proportion of feature films shown in the cinemas of Member States.' On-demand services pose a different kind of problem to the quota provisions. BT's Vision service does not have any transmission time, merely a bank of programmes that can be watched. While a purposive judicial interpretation could be given to stipulate a majority proportion of the programme bank must be European works and then 10 percent of this must be independent; any move towards judicial interpretation is a move from the legislative certainty that is vital for the sector. Ultimately however, the biggest problem that these articles suffered from was regarding the enforceability of the provisions. Without effective enforcement the provisions fall into disrepute leading to 'sceptic[ism] about whether it makes sense to map broadcasting content quotas into the non-linear world.'²⁸

2. The New Framework

2.1 The arguments over scope expansion

It is widely agreed that the general principles behind the TWFD remained sound but, as they stood they were 'too broad and too ill-defined to operate without the risk of great harm to new businesses.'²⁹ It needed to be adapted to meet technological developments. This is in addition to problems in its application with regard to the scheduled broadcasting field particularly Member States applying stricter provisions than required.³⁰ Additionally, traditional broadcasters were facing increased competition with other scheduled services delivered on other platforms, as well as on-demand services which operated under different regulatory frameworks depending on the platform used to deliver the content in question. A look at the wider electronic communications networks and services sector illustrates that a level playing field encourages competition through new entrants, drives investment and increases economic growth and jobs (Geach, 2007). Further, from a policy perspective, to

regulate traditionally broadcasted content so as to protect minors and prevent incitement to hatred, but not content broadcasted via new platforms is illogical. Nevertheless, these justifications were disputed within the UK by the Audiovisual Stakeholders Group (ASG). They felt no ‘internal market, public policy or legal rationale exist[ed] for the extension.’³¹ They argued an uneven playing field is a competition issue; disparate national legislation does not justify per se harmonisation according to the ECJ;³² and the public policy goals over on-demand were already provided for by other legislation such as the E-Commerce Directive which governs all non-linear services falling outside the jurisdiction of the TWFD. There is some strength in this position but it ignored the fact that ‘television broadcasting’ as defined by the TWFD is outside of the scope of the E-Commerce Directive. Therefore, it could be argued the ASG are ignoring the implications for broadcasting from convergence which make it theoretically better, through increased certainty, to have one single all encompassing legislation. This can then be drafted in such a way to eradicate any uncompetitive functionality within the market.

The main concern however, was that the actual proposal would ‘stifle the nascent audiovisual content market. Unclear definitions and unnecessarily burdensome restrictions will create legal uncertainty with potentially harmful effects for the European economy in the key media sector.’³³ This view was supported by a study for the Commission which found that regulatory uncertainty in the ICT sector leads to downward investment.³⁴ The leading criticism centred over the definitional distinction between ‘linear’ and ‘non-linear’. The early draft defined ‘television broadcast’ as ‘a linear audiovisual media service where a media service provider decides upon the moment in time when a specific program is transmitted and establishes the program schedule.’³⁵ Whereas a ‘non-linear service’ was ‘an audiovisual media service where the user decides upon the moment in time when a specific program is transmitted on the basis of choice of content selected by the media service provider.’³⁶ Trade body ECCA believed that by distinguishing between the transmission characteristics of the two, the proposal contradicted the aim of having a technologically neutral framework and would eventually ‘render the current definitions both meaningless and unworkable.’³⁷ The Broadband Stakeholder Group (BSG) are reported as highlighting (Croft 2006), that companies such as BskyB already offer linear content distribution alongside on-demand content and viewer interactivity; therefore working out which rules apply will be difficult. The UK government had been a vociferous opponent stating the expansion in scope to be ‘neither desirable nor practical.’³⁸ Their concern was that too heavy a regulatory burden would lead to job losses as undertakings migrate out of the EU to circumvent the rules. Although this was supported by industry bodies, amongst EU governments they appeared alone in this position. One reason for the UK government’s viewpoint could be because an impact assessment by Ofcom came to this conclusion, whereas the European Commission’s impact assessment did not. It should be noted that the latter was criticised for ignoring the impact on new and emerging business models and concentrating on existing players in the market.³⁹ Ultimately, a conclusion that distinguishes content delivery platforms but does not regulate them the same, leaves the strange situation that a programme consisting of the same audiovisual content could be regulated in two separate ways. If it is broadcast as part of a scheduled transmission it falls within the more extensive provisions. However, if it is put on the channel’s website as part of a watch again system, it becomes non-linear and subject to a lighter regime. This perhaps best illustrates that a sufficient justification existed to cover non-linear content. However, the new framework as originally proposed admittedly did not execute this need to extend coverage to non-linear services as well as it could.

2.1.1 The resultant scope of the framework

The final document defines an ‘audiovisual media service’ differently although, the transmission distinction remains. Under article 1(a) of the AVMSD the essential nature of an ‘audiovisual media service’ is that it is a service under the editorial responsibility of a media service provider which has the principal purpose of providing programmes in order to inform, entertain or educate, the general public. Such services are will either be a television broadcast or an on-demand service.

The key terms that make up the overall definition are also individually defined in article 1. The most contentious of the previous definitions – ‘non-linear service’, due to its width of application⁴⁰ - has been replaced by ‘on-demand services’. This has been supported as reducing the scope of the new framework because the characteristic of an ‘on-demand’ service is, according to recital 17, the fact it is ‘television-like’. Although, a report by the European Committee of the House of Lords (The Committee) is concerned that the distinction between the two formats will be undermined as people may come to conclude that ‘[TV]-like services should be regulated in a like manner.’⁴¹ The justification for defining on-demand services on the basis that they are ‘television-like’ could also be said to be somewhat misconceived. It is based, in recital 17, on the belief that they ‘compete’ for the same audience as traditional television broadcasts. Yet currently the main on-demand services available, such as Channel 4’s on-demand service 4oD or the BBC’s iplayer, are supplied as a complement to the traditional broadcast service. Therefore, as the programmes on these services are in effect the same as those on traditional broadcasts, the on-demand service cannot really be said to be competing. Although, if more specialist providers do enter the market and solely offer on-demand services then the definition has more merit.

Further potential problems arise from the provided definitions. Firstly, there is an issue that arises by way of recital 30. This provides that the Directive will only apply to services ‘that can be received directly or indirectly by the public in one or more Member States with standard consumer equipment.’ It is left to the relevant national authorities to define, and thus determine, whether a service is received using ‘standard consumer equipment’. There is potential for states to work together to find a common position as to what this phrase means. However, until such a position is reached it does provide a loophole for states to permit certain services to operate outside the Directive’s scope by adopting a meaning that does not cover the service in question. Thus, potentially, a service originating from one Member State may be covered by the Directive but a similar service from another State may not be due to the definition adopted by that State. Therefore, it would have been better if the phrase was defined by the AVMSD.

Furthermore, the AVMSD stipulates, in recital 23, that the term ‘editorial responsibility’ is ‘essential for defining the role of the media service provider and thereby the definition of audio visual media services.’ This surely means that a clear and understandable definition is also essential for this term. A definition is provided in article 1(c) however, the AVMSD gives Member States the ability to implement more specific notions within the definition. If acted upon; potentially there could be 27 different definitions as to what amounts to ‘editorial responsibility’ and thus 27 different definitions of ‘audiovisual media services’. This has the potential to completely undermine the purpose of EU level intervention in this field, namely market certainty and the creation of a level playing field. The country of origin principle, whereby provided a broadcast complies with the law of the country where the broadcaster is established it is free to circulate throughout the EU, is stated in recital 27 to be the ‘core’ of the AVMSD. However, it could be brought into

disrepute by states using different definitions and thus, affecting the scope of the framework. This is significant, as recital 27 also states the principle is 'essential to the creation of the internal market' and also provides a strong degree of legal certainty needed by industry. Further, without it 'the rationale for retaining minimum standards across Europe would be undermined to the detriment of the growth of multi-channel 'linear' television'.⁴² The problem here arguably lies in the type of Directive that has been created. The Commission has sought to introduce a certain level of harmonisation; but only in order to ensure a more level playing field between different service providers regardless of the platform that their service operates over, and the state in which the service provider is established. Following the EU tradition of focussing on light touch reforms for economic issues, the AVMSD does not therefore, seek to impose a fully harmonised framework on the European broadcasting sector. The overall nature of the AVMSD is one of liberalisation; the main aim being to increase industry growth, investment and innovation by ensuring the sector is opened up and allowing the market and competition principles to regulate matters.

In fairness to the Commission, the sector which the AVMSD seeks to regulate has significant economic importance. The problem is confounded further as this is not just an economic sector but one with deep cultural implications and thus carries a high level of political sensitivity. It may well be the case that the Commission was aware that a more forthright harmonising document would not have been acceptable to Member States; and, appreciating the economic need for action in updating the TWFD, settled on an approach that could be successfully implemented. However, this does not solve the issue that without a sufficient level of harmonisation amongst Member States the necessary regulatory certainty required to encourage investment in the sector may not be present. As a result, the economic growth and innovation in new services may not be realised. Additionally, the policy goals within the AVMSD aimed at protecting viewers may also suffer which could feedback into negative economic results by causing a low uptake in such services. Therefore, if intervention is justified, which it is contended that it is, the EU should be more forthright and remove the discretion of Member States to implement the framework with their own variations; even if this does lead to accusations of an erosion of individual state sovereignty.

A further definitional problem that arises due to the recitals is that in attempting to clarify the definition of 'audiovisual media services' recital 16 provides that the services covered are only those 'which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public.' This is a ridiculously vague statement with no guidance as to what constitutes the phrases 'clear impact' and 'significant proportion of the general public'. It needs to be determined whether 'a significant proportion' is restricted to the population of the country where the provider is established, or if it is the combined population of all of the Member States in which the provider operates. The former would seem to be inadequate considering that one of the aims of the framework is to contribute to a pan-European broadcasting industry. Until this matter is resolved it is a further cause of uncertainty for industry players in terms of the regulations that they must abide by.

The final proposal has won over some of its critics with the UK government reportedly 'welcom[ing] the deal, saying it avoided too much regulation and would lead to more television and online services.'⁴³ However, there remains concerns amongst all sectors of the ICT industry and ironically even amongst those that have been the more prominent supporters of reforming the framework. While traditional broadcasters are largely supportive they have strong opposition to certain elements. The EBU have welcomed the extension of

the scope of the Directive and ‘support in principle’ the new definitions.⁴⁴ However, they are opposed to one significant area, namely the definition of ‘programme’ in article 1(b), defined as ‘a set of moving images ... whose form and content is comparable to the form and content of television broadcasting.’ Their concern is that limiting the extension of scope in this way runs ‘counter to the very objective of the revision, i.e. the creation of a modern, future-proof regulatory framework for the audiovisual sector where the functions of traditional television are gradually taken up by new audiovisual media.’ This should not be dismissed as a fear of a trade body scared of competition in a new environment. If we are in an age when the end of the scheduled television broadcast is nearing we will get to the stage when new audiovisual content will cease to be ‘television-like’ as we will no longer have ‘television’ as we know it today. Even today, as the EBU highlights, programmes for mobile television are different in form to traditional television.⁴⁵ Therefore, even if the content is the same it will be outside the scope of even the extended framework if it is not ‘comparable to the form ... of television broadcasting.’

It is suggested that the reason for extending the scope is justified despite the points raised by the BSG. However, the definitions used, while better than originally proposed, remain too uncertain and still do not have the full support of the relevant industry players. As the European Commission acknowledges in recital 36, this places a doubt on whether the objectives of the AVMSD can be achieved. This issue of uncertainty could lead to a negative economic impact in terms of investment and growth. The World Federation of Advertisers (WFA) highlights, service providers may abide by the linear service rules in order to ‘be on the safe side’ negating the ‘light touch’ approach for non-linear. Alternatively, non-linear services may ‘artificially limit the reach of, or access to, innovative services’ to ensure they are far enough removed so as to not comply with the linear rules.⁴⁶ If the WFA is correct, then it is suggested that consumers may suffer from a poorer quality service and innovation in services due to lack of investment caused by this uncertainty as to what rules apply. Additionally, it is suggested that this uncertainty may result in price increases as fewer players enter, or remain in, the market and thus reducing competition. The possibility exists that those that do remain may end up being from outside the EU and therefore, consumers will be exposed to the very things that the AVMSD seeks to protect them from.

Finally, it is possible that due to the overlap which has been created with the E-Commerce Directive the new framework in fact goes against the EU’s Better Regulation policy.⁴⁷ This overlap arises because recital 18 of the E-Commerce Directive provides that video on-demand services are information society services and thus within that regulatory framework. Therefore, these services are subject to provisions from two different Directives, when in terms of clarity and accessibility it could be said to be better to have just the one.

2.1.2 Establishment and jurisdiction

Member States must ensure services transmitted under their jurisdiction comply with their laws, including the AVMSD. The test for ascertaining jurisdiction is laid out in article 2; namely, the Member State where the provider is established; or those who use a satellite up-link or satellite capacity within a Member State. This now ensures that telecommunications companies are now encapsulated by the AVMSD.

The ultimate purpose of both the TWFD and the AVMSD was to introduce a freedom of reception principle, whereby content that complies with the laws of the Member State which has jurisdiction over the content provider, is free to be transmitted in any other

Member State. Derogation from this principle for television broadcasts has always been allowed and remains unchanged. However, provisions which replicate article 3, paragraphs (4), (5) and (6) of the E-Commerce Directive 2000/31/EC, for when information society services may be restricted, have been included to apply to on-demand services in article 2a(4). As these are for things such as public policy, the prevention of crime and protecting against racial hatred they may seem quite justified. However, it has been heavily criticised for ‘deviating’⁴⁸ from the country of origin principle on the basis providers of on-demand services must already give protection to minors and from incitement to hatred. The provision also ‘deviates’ from the provisions for television broadcasters which provide that derogation from the principle of freedom of reception can only come from infringing the protection of minors and prevention of incitement to hatred. This seems hard to justify, particularly when recital 27 states free movement as ‘essential in order to ensure the free flow of information and audiovisual programmes in the internal market.’

The country of origin principle is undermined further by article 3(1) which allows Member States to apply to providers under their jurisdiction, ‘more detailed or stricter rules’ of general public interest. These stricter requirements can also be applied to service providers under the jurisdiction of another Member State which it feels is ‘wholly or mostly directed towards its territory.’⁴⁹ While this has been said to be not ‘absolutely fatal to the country of origin principle’⁵⁰ it does potentially cause uncertainty. The entire industry feels the country of origin principle was fundamental to the success of the TWFD; while the Commission also espouses its importance. Viviane Reding, the European Commissioner with competence for the area, has claimed ‘[i]f you have 25 conflicting regulations in 25 countries, you can’t take advantage of the internal market. When the new rules are applied, [content providers] can get authorisation in Britain and spread into 25 countries.’⁵¹ However, to spread into another country means that you must be directed towards that territory. This means in effect the audiovisual content must be compatible with the laws of that territory, and therein lays the potential conflict as Member States have varying attitudes to different issues. By moving towards what has been called a ‘country of destination principle’⁵² a strong possibility exists for cross border transmissions being hindered and the internal market fragmenting. The workability of such a move is questionable as ‘it is impossible for a programme maker now anyway to imagine where a programme might be destined for in 20 years’ time and who might be watching it.’⁵³ The country of origin principle may in theory remain ‘the core’ of the AVMSD; but in practice the new provisions, even in revised form, could be used as cover for ‘economic protectionism’.⁵⁴

2.2 The new provisions

Nonetheless, the end result is still considered by Viviane Reding as ‘one of the most modern and flexible set of rules in the world’ that will, ‘open up multi-media opportunities, and boost competition and consumer choice, while promoting public interest objectives.’⁵⁵ The key issue is whether the substantive provisions will be effective in the new environment. The AVMSD comprises a new Chapter IIA to deal with provisions relating to all audiovisual media services and a Chapter IIB which applies only to on-demand services. The subsequent chapters deal with the same issues as the TWFD and apply to ‘television broadcasts’.

2.2.1 Provisions applicable to all audiovisual media services

Great importance continues to be placed on anti-discrimination measures and as such the provision on incitement to hatred remains the same as under the TWFD but is now article

3(b) within Chapter IIA in order to reflect the fact that this provision is so important that it should cover both types of service. Member States must ensure services provided under their jurisdiction do not incite hatred on the grounds of ‘race, sex, religion or nationality’. This is clearly positive, but it has a significant omission in that it does not prohibit hatred on the grounds of sexual orientation. This omission seems hard to justify, particularly in view of the fact that a person’s sexual orientation is listed as a factor that, advertisements under article 3a(c) cannot include or promote. It appears the provision of the audiovisual media service may incite hatred on the grounds of sexual orientation but any advertisements shown on that service cannot. The omission could simply be due to the article being a replica of the old measure in the TWFD. Member States must also ensure that services are also more accessible to those impaired visually or aurally.⁵⁶

Other than a provision on information regarding the service provider,⁵⁷ the rest of the chapter deals with advertising issues. The term advertising is replaced in article 1(h) with ‘audiovisual commercial communication’. This term is arguably easier to understand and flexible enough to clearly encapsulate modern developments in advertising methods. The term is defined as ‘images with or without sound which are designed to promote, directly or indirectly, the goods, service or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self promotional purposes’. The provisions from the TWFD in terms of advertising content and its nature, such as the prohibition on tobacco and advertising which is prejudicial to human dignity are also provided by the new article 3e. The main change is article 3g which allows product placements. Article 1(m) defines these as ‘the inclusion of, or reference to a product, a service or trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration.’ Although the starting position is one of prohibition, derogations are allowed for certain categories of programmes unless Member States decide otherwise.⁵⁸ Certain conditions under article 3g(2) must be satisfied⁵⁹ although, tobacco and prescription medicines cannot be ‘placed’. The BBC envisages some problems with these provisions; they note that editorial independence may end up being indirectly influenced. They suggest products will unlikely be placed on the basis of ‘editorial justification, but because of payment by advertisers.’⁶⁰ Therefore, ‘[e]ditorial decisions could be slanted by a wish to maximise opportunities.’⁶¹ However, by legitimising product placements all audiovisual service providers can explore new revenue opportunities. At the same time the conditions for permitting placements within article 3g(2), such as clearly informing viewers of the existence of a placement agreement and ensuring editorial independence, mean viewers should remain protected from overzealous marketing initiatives. This is particularly the case if all Member States take the approach of Ofcom and allow product placements on an incremental basis, with a limited number of genres at a time. This ensures any impact can be monitored, and if detrimental, countered. Therefore, overall it is suggested this is a move to be welcomed. The Committee felt while product placement is not currently ‘necessary to the viability of television companies’ it should be allowed but reviewed when it becomes a more important revenue stream.⁶²

2.2.2 Provisions applicable to on-demand services

There are only two additional provisions specifically aimed on-demand services. The first, under article 3h, is that Member States should ensure that the services under their jurisdiction ‘which might *seriously impair* the physical, mental or moral development of minors are only made available in such a way that ensures that *minors will not normally hear or see such on-demand services.*’ [Emphasis added] This is significant in that it is less stringent than the

TWFD, the original proposal and the provisions for 'television broadcasting' later in the AVMS. Whether this is a reflection of enforceability issues or acknowledgement of the sensitivity in seeking to regulate internet content is to be determined. While most content sites have a facility of reporting for removal such content, it would not have been unreasonable for the new framework to stipulate Member States must ensure, providers within their jurisdiction, do this as a legal requirement of the site. This may only amount to lip paying service to the framework as enforceability and workability would be major issues; but it would at least serve as notice that the principle is just as important with on-demand services as it is with television broadcasting.

Reflecting the need for a light touch approach to these emerging services, no quota has been placed on providers with respect to production and access to European works and independent productions. Instead Member States, under article 3i, shall ensure providers 'under their jurisdiction promote, where practicable ... production of and access to European works.' Besides financial support, it appears from recital 48 this could be satisfied by merely presenting works attractively within Electronic Programme Guides or having a category with a minimum amount of European works available on-demand. Overall, the provision seems to have achieved consensus and gained industry support. Some such as ECCA argued that a quota system would particularly hit niche channels whose target audiences are already tightly define.⁶³ It is felt that this 'flexible approach' will allow these new services to 'flourish'.⁶⁴ It is unlikely that the lack of a definite quota will have a negative implication for the production of European works. It is unlikely that states with a history of strong cultural protectionism such as France will insist on minimal measures of promotion. Additionally, it is unlikely that the domestic market will tolerate the widespread importation on overseas programmes thus ensuring their continued production.

2.2.3 Provisions applicable to television broadcasters

The provisions are largely identical to the TWFD with no changes to the measures in relation to European works and independent broadcasts. The old Chapter V has been altered slightly in that the provisions regarding incitement to hatred, as noted, have moved to be applicable to all audiovisual media services. In relation to the protection of minors the provisions remain as they were.

However, the provisions in relation to television advertising have seen some significant changes. Article 18 retains the hourly transmission time limit of 20 percent but the daily transmission time limit of 15 percent of total transmission output is removed. Coupled with the allowance for product placements this would seem to indicate a departure from the previously staunch view of the Commission of protecting viewers from incessant advertising. However, recital 57 states this shift is justified due to the availability of PVRs and increased channel options. This is a fair assessment and provides consistency with the way the market is heading; i.e. placing consumer choice at the heart of business models. If providers have too many advertisement spots for viewer's taste, market forces will see those viewers migrate to different providers.

Further, the transmission of television films and cinematographic works may be interrupted by advertising once for each scheduled 30 minutes whereas it was 45 minutes. The allowance of a second interruption, if the scheduled duration was at least 20 minutes longer than two complete periods of 45 minutes, under article 11 TWFD, has also been removed. This has caused concern within the television broadcaster FilmFour. During negotiations over the AVMSD in 2006 when the proposal was once every 35 minutes,

Jonathan Simon of the channel commented that they would have to alter their output to show more commercial Hollywood films to make up for lost revenues.⁶⁵ This may not seem like a problem for a film channel however, FilmFour has an output commitment of 40 percent European films.⁶⁶ He felt these changes will force them to drop that to 10-15 percent as foreign language films do not bring in as much advertising revenue.⁶⁷ If this occurs it would be a setback for the Commission's aims of furthering the distribution of European works.

The other potential consequence of the changes to these provisions is in relation to children's programmes. Previously these could have an advertising spots provided they were at 20 minute intervals. Now, article 11 provides, the programme must be at least 30 minutes in length before it qualifies for an advertisement spot within each 30 minute scheduling period. This has led ITV and Five to warn their output may suffer as '[t]he economics of children's programming is fairly fragile already.'⁶⁸ The danger in the UK is that we will see a diminution of quality children's programmes or, alternatively replacement by 'cheap imports'.⁶⁹ This would appear to be detrimental to children and as such contrary to some of the principles behind the framework. However, the arguments by ITV and Five could be said to be somewhat disingenuous. The problem only arises because children's programmes on these channels, by their own admission, last less than 30 minutes. There is nothing to prevent investment in longer programmes, of sufficient quality that children will then want to watch. In turn this will attract advertising which can contribute towards the extra production costs. A look at the BBC's output indicates that a market exists for such programmes.

3. Conclusion

The AVMSD is undoubtedly needed, without reform the TWFD would eventually have become redundant. Technological change is happening at a rapid pace and is giving rise to a fundamental shake-up of the broadcasting environment. However, the success of any legislative attempt, such as this, can be determined by the legal certainty it creates within the industry and by the amount of innovation, investment and growth that flows from the certainty of understanding that the legislation provides. The key contribution that audiovisual media services make towards the overall economy means that not only should the success of the AVMSD be hoped for, it is arguably vital. While the TWFD could have led to detrimental effects for the industry through outdated and overly restricted provisions; equally detrimental effects could occur from poorly implemented reforms.

Unfortunately, while the AVMSD is well founded, it is mired by uncertainty. Key definitional terms such as 'editorial responsibility' and 'standard consumer equipment', which underpin the entire framework through their importance in determining what an audiovisual media services is, are either vaguely defined or leave discretion for Member States to determine the definition. This leaves scope for wide interpretation, and adds to the potential weakening of the country of origin principle. This is worrying as without the principle arguably there is no internal market and no free movement. In the borderless world of IPTV this will be problematic and could prevent the widespread distribution of content. This uncertainty may, as the WFA has suggested, lead to caution and inaction in what is currently a dynamic and innovative sector. Ultimately, this problem is not unique to this sector, but is part of a wider issue for the EU to resolve. If there is a sector, such as this, that would benefit from intervention, the EU needs to be bolder and implement a fully harmonised framework and ignore nationalist sentiments about maintaining sovereign control.

However, even without these flaws the audiovisual media services industry may well be harmed regardless. It is perhaps telling that the excitement over the future potential for IPTV and on-demand services is taking place at the same time as the longstanding debate on 'network neutrality'. The debate is whether ISPs should be able to discriminate when carrying data traffic on the basis of the type, and size, of data and thus exercise a level of control over what content is accessed by consumers. Several US ISPs have led calls to create what will be in effect a two-tier internet by charging consumers more for carrying larger content.⁷⁰ This concept of network neutrality is particularly important for video files which are usually large, particularly feature length films. It has been argued a neutral network is needed 'to stimulate investment and innovation.'⁷¹ Crucially, these calls have been backed by a US Department of Justice submission to the Federal Communication Commission which is current investigating Internet access in the US. The Department feels imposing requirements to ensure the neutrality of the network 'could limit consumer choice and investment in broadband facilities.'⁷² Additionally, they feel the maintenance of a neutral network will move the 'burden of implementing costly network expansions and improvements onto consumers.'⁷³ This is disingenuous; it is consumers who will lose out by having to pay higher costs for downloading on-demand content. The ISPs maintain discrimination is needed in the carrying of content, as the level of traffic increases due to activities such as wider on-demand use. Arguably it could well be more the case of them seeking to gain financially as broadcasting transmissions become ever more prevalent on the Internet's infrastructure, which of course they control. In one stroke the benefits of lower production and distribution costs of audiovisual media services will be lost. Therefore, not only could consumer demand be hit, so could supply, particularly by small independent providers. Regulatory certainty may be essential for investment and growth but, as seen with the slow uptake in mobile phone television, legal certainty will be worthless if there is insufficient consumer demand. A dilution of network neutrality may mean that ultimately, the aims of the AVMSD will be hindered by sections of the very industry that it is seeking to help and promote.

Notes

¹ As of the start of this year 2 million of Sky 8.5 million customers were reported to have Sky+ boxes according to research by Sky. Holmwood, L, 'Has Sky+ changed your life?' Guardian Unlimited Organ Grinder Media Blog 2nd January 2007 available at

http://blogs.guardian.co.uk/organgrinder/2007/01/is_the_sky_future_really_a_goo.html

² 'Fifth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers" COM (2006) 49 final' at p3

³ This latter point means traditional channels cannot attract large audiences with the latest Hollywood blockbuster.

⁴ Official ITV plc Trading Update for 12 months ending 31st December 2007 available at <http://production.investis.com/itv/news/releases/pr2007/2007-12-13/>

⁵ Interactive Advertising Bureau Europe Press release (2007) 'Online advertising in Europe surges 40% to €11.2bn in 2007', available at

http://www.iab europe.ws/Documents/IABEuropeOnlineAdvertisingMarket2007_020608.pdf. Meanwhile global TV advertising revenue grew only 3.5% in the same period. Holten, K (2008) 'TV ad revenue seen growing despite economic woes' Reuters News Agency 11th March 2008 available at <http://uk.reuters.com/article/businessNews/idUKL1185646420080311>

⁶ Speech by Viviane Reding at the 36th Annual Conference of IIC and Chatham House, 10th October 2005 available at

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/590&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁷ There will be a brief clip at the start and then banner ads on the web pages. Mesure, S (2007) 'ITV poaches digital chief to mastermind UK first free video on-demand service' The Independent 3rd January 2007 available at <http://news.independent.co.uk/business/news/articles2121717.ece>

⁸ See <http://www.channel4.com/4od/index.html> for full details

⁹ This may be why the sums paid for live Premiership football rights has increased significantly each time it is renewed.

¹⁰ BBC News Report 'What does on-demand TV offer?' 24th July 2007 available at

<http://news.bbc.co.uk/1/low/entertainment/6318625.stm>

¹¹ For example before the new series of 'Lost' began the finale of the previous series was stored so viewers could 'catch up' with events. While Sky Anytime allows for free movie downloads to a customer's PC.

¹² Sky's 'See, Speak and Surf' Package offers customers satellite TV, fixed line telephony and broadband for a set monthly price.

¹³ This is particularly a danger if it ever lost its live football rights.

¹⁴ Phillip Lowe, Director General for Competition for the European Commission, speaking at the Oxford Media Convention 2004, 13th January 2004. Available at

<http://www.ippr.org.uk/uploadedFiles/events/Philip%20Lowe%20speech.doc>

¹⁵ ITU ICT Regulation Toolkit available at <http://www.ictregulationtoolkit.org/en/Section.1839.html>

¹⁶ European Commission Communication on Market Reviews under the EU Regulatory Framework 'Consolidating the internal market for electronic communications' COMM (2006) 28 final 8th February 2006

¹⁷ In his speech to ACMA Annual Conference in Canberra, 10th November 2005 available at

<http://www.ofcom.org.uk/media/speeches/2005/11/regulation#top>

¹⁸ A requirement could be for example, that amongst the content available for download is regular, updated news bulletins.

¹⁹ This point has been recognised by Ofcom as part of its PSB Review 2004. Ultimately a channel could be forced to close if its financial situation was that severe as they would be a less attractive acquisition for another company if hampered by uncompetitive regulations.

²⁰ The Communications Market 2007 Report by Ofcom available at

<http://www.ofcom.org.uk/research/cm/cmr07/>

²¹ Milton Friedman, the Nobel Prize winning economist.

²² See R v Secretary of State for National Heritage, ex parte Continental Television BV and Others [1993] 2 CMLR 333

²³ For a prime illustration one need only look to the furore surrounding the proposed .xxx domain name.

²⁴ Research suggests 50% do, 'Product Placement in the DVR era' ARS Technica 19/03/06 available at <http://arstechnica.com/articles/culture/productplacement.ars>. The problem being that this gives the viewer the chance to skip the advertisements meaning there is less incentive for advertisers to pay a premium for popular shows.

²⁵ In many ways it could also be said to be more effective than simple sponsorship as the character is actually using that product. The report by ARS Technica highlights how Burger King, Sony, Verizon and Visa paid \$2m dollars an episode to feature in the US version of The Apprentice. Ibid

²⁶ PQ Media Press Release for their research paper 'Global Product Placement Forecast 2006-2010' available at www.pqmedia.com/about-press-20070314-gppf.html

²⁷ Article 10(4) prohibits 'surreptitious advertising', the definition of which, in article 1(d), is sufficient to cover the activity.

²⁸ Mark Thomson Director-General of the BBC speaking at the European Broadcasting Conference Liverpool 2005. Available at www.bbc.co.uk/print/pressoffice/speeches/thompson_presidential.shtml

²⁹ House of Lords European Union Committee: 3rd report of session 2006-07 'Television Without Frontiers?' p31. The report looks at the merits of criticism of the Commission's impact assessment. Available at <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/27/27.pdf>

³⁰ For a good example see Commission v France Case C-262/02 in relation to the French law prohibiting all advertisements for alcohol on public health grounds. The law was deemed to be a restriction on the freedom to provide services was upheld as a proportionate result. Arguably it undermined the principal aim of the TWFD as the Commission had the option to apply a blanket ban as with tobacco but chose not to. This indicates that alcohol does not carry the same danger and therefore, should not be subject to the same treatment. An additional effect was that French broadcasters must refuse to retransmit sports events that contain alcoholic advertising. More importantly, the decision permits the interference in legitimate contractual dealings between two enterprises that have no day-to-day French dealings.

³¹ 'Audiovisual Services Draft Directive: Opinions and Recommendations from Stakeholders in the UK' April 2006, at p5, available at www.audiovisualstakeholders.org

³² In Germany v Parliament and Council Case C-376/98

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- ³³ EICTA ‘Comments on the proposed revision of the Television without Frontiers Directive’, 19th May 2006 available at http://www.eicta.org/index.php?id=242&id_article=46 EICTA is the industry association for the European ICT sector.
- ³⁴ ‘An Assessment of the Regulatory Framework For Electronic Communications – Growth and Investment in the EU e-Communications Sector’ by London Economics in association with PricewaterhouseCooper July 2006
- ³⁵ Explanatory memorandum of the ‘Proposal for a Directive of the European Parliament and of the Council Amending Directive on the coordination of certain provisions laid down by law, regulation or administration action in Member States concerning the pursuit of television broadcasting activities’ COM(2005) 646 Final 13th December 2005 at article 1(c)
- ³⁶ Ibid at article 1(e)
- ³⁷ In their position paper on the Commission’s proposal COM (2005) 646; ref.4741, 23rd May 2006
- ³⁸ Zdnet news report ‘TV without frontiers, lawmakers in tears’ 11th July 2007 available at <http://news.zdnet.co.uk/internet/0,1000000097,39278500,00.htm>
- ³⁹ Simon Persoff of Orange UK giving evidence to the European Committee of the House of Lords for its 3rd Report of session 2006-07 ‘Television Without Frontiers?’ supra note 29
- ⁴⁰ It was felt by Alex Blowers, the Head of Policy Development at Ofcom ‘that many internet-type services, weblogs containing video content, online gaming, for instance would be caught’ in his evidence to the European Committee of the House of Lords for its 3rd Report of Session 2006-07 ‘Television Without Frontiers?’ supra note 29 at p96
- ⁴¹ Supra note 29 at p17
- ⁴² Supra note 31 at p4
- ⁴³ BBC News report ‘EU sets new digital media rules’ 25th May 2007 available at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/6690655.stm>
- ⁴⁴ ‘EBU Briefing Paper on the draft Audiovisual Media Services Directive after submission of the amended Commission proposal’ 5th April 2007 available at http://www.ebu.ch/CMSimages/en/leg_pp_amsd_050407_tcm6-50590.pdf
- ⁴⁵ Ibid at p5
- ⁴⁶ WFA Position Paper on the proposed Directive available at www.wfa.be/docfiles/A1619D1257.pdf
- ⁴⁷ ‘Better Regulation for Growth and Jobs in the European Union’ COM(2005) 97
- ⁴⁸ Supra note 44 at p8
- ⁴⁹ Article 3(2)(b)
- ⁵⁰ Chris Dawes of the Department of Culture, Media and Sport, in his evidence to the House of Lords European Union Committee: 3rd report of session 2006-07 ‘Television Without Frontiers?’ supra note 29 at p130
- ⁵¹ Reported by Zdnet News supra note 38
- ⁵² Shaun Woodward giving evidence to the House of Lords European Union Committee: 3rd report of session 2006-07 ‘Television Without Frontiers?’ supra note 29 at p129
- ⁵³ Ibid
- ⁵⁴ Supra note 29 at p20
- ⁵⁵ European Commission Press Release ‘TV without Frontiers: Commission proposes modern rules for digital era TV and TV-like services’ IP/05/1573 13th December 2005
- ⁵⁶ Article 3c
- ⁵⁷ Article 3a, the provider must ensure recipients of its services have access to its name, address, contact details and any regulatory body who supervises its conduct.
- ⁵⁸ These are cinematographic works, films and series, sports and light entertainment programmes but not those for children.
- ⁵⁹ These are ‘(a) their content and, in the case of television broadcasting, their scheduling is in no circumstances influenced in such a way as to affect the responsibility and editorial independence of the media service provider; (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services; (c) they shall not give undue prominence to the product in question; (d) viewers are clearly informed of the existence of product placement. Programmes containing product placement are appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.’
- ⁶⁰ ‘Response from the BBC to Ofcom Consultation on Product Placement’, p1 7th March 2006 available at http://www.ofcom.org.uk/consult/condocs/product_placement/responses/bbc.pdf
- ⁶¹ Ibid
- ⁶² Supra not 29 at p32

⁶³ ECCA ‘Short reaction to Commission’s amended proposal and consolidated draft for an AMS Directive’. 16th April 2007 available at http://www.cableeurope.eu/uploads/documents/pub-37_en-4805_-_cable_europe_on_ams_com_rev_prop_final.pdf

⁶⁴ Supra note 33

⁶⁵ Tyhorne, C (2006) ‘Ad rules threaten FilmFour’s European output’ The Guardian 29th June 2006 available at <http://film.guardian.co.uk/news/story/0,,1808921,00.html>

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Martin Stott, Five’s Deputy Head of Corporate Affairs. BBC News Report ‘Ad ban ‘threatens TV shows’ 5th February 2007 available at <http://news.bbc.co.uk/1/hi/entertainment/6331781.stm>

⁶⁹ Ibid

⁷⁰ Although the recent merger of AT & T with Bell South included a commitment to network neutrality there was a significant loophole in that IPTV was not covered.

⁷¹ In a letter to the Chair of the Federal Communications Commission re: Ex parte submission in CS Docket No.02-52 22/08/2003 available at www.timwu.org/wu_lessig_fcc.pdf

⁷² Thomas Barnett, antitrust chief for the Department of Justice report. Quoted in BBC News Report ‘US backing for two-tier internet’ 7th September 2007 available at <http://news.bbc.co.uk/go/fr/-/1/hi/technology/6983375.stm>

⁷³ Ibid

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