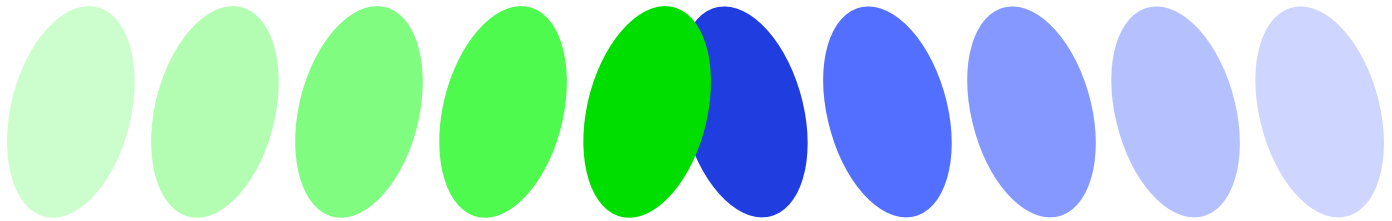


# Settling the frontiers:

debating the EU's Audiovisual  
Media Services Directive



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# Introduction: information society policy grows up

*Richard Berry*

In recent years, we have seen a steady stream of news announcements on the latest developments in non-traditional broadcasting. Every few months, a mobile network launches a television service, or a broadcaster makes programmes available for download on their website. These very developments are the subject of the controversial new EU Directive - the proposed Audiovisual Media Services (AMS) Directive - issued by the European Commission, which purports to regulate these new forms of audiovisual provision.

The AMS Directive aims to update the 1989 Television Without Frontiers Directive (TVWF), which was introduced to reduce the barriers to cross-border television broadcasting while stipulating some minimum standards for advertising, protection of minors, and so on. Effectively, the AMS Directive extends the sphere of EU broadcasting regulation into the internet, although without placing internet-based services under the same requirements as traditional television broadcasting.

These proposals are the latest stage in the development of a distinct 'information society' policy at the European level, which itself pre-dates the emergence of the internet as the widespread phenomenon it is today. The 1993 White Paper, 'Growth, Competitiveness and Employment' and the 1994 follow-up report, 'Europe and the Global Information Society' heralded the first steps by the European Commission towards defining the shape of this new policy area.

Of course, there are still many questions about what this new policy area is actually 'about'. The targets of the many initiatives given the information society branding by the Commission have ranged from telecommunications, internet governance, education, regional policy, research and development, and more. It is clear that a common thread to policy is how new technologies are helping to forge new networks of communication, and how these might be exploited – although the overriding feeling one gets from observing the EU's information society policy is a simple allegiance to the concept itself, it whatever form it happens to come.

Despite the somewhat neo-Keynesian tone of the 1993 White Paper – reflecting the input of the Jacques Delors, the French socialist President of the European Commission – it is clear that the direction of EU information society policy from the beginning was decidedly neo-liberal. This was made plain in the 1994 report – led by the German conservative Industry Commissioner, Martin Bangemann – which states that market mechanisms will be the motivation behind the creation of an information

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society, with no more public money to support the endeavour and a call for the information industries to be relieved of burdensome regulation (such as ‘universal service’).

This agenda was challenged by some European-level actors. The Social Affairs Directorate-General set about re-defining the entire scope of information society policy with a 1997 report on the issue – calling especially for education and skills to be the focus of policy – but this agenda made little progress. More substantial was the adoption of the information society concept in the EU’s Regional Policy initiatives. Despite Bangemann’s rejection of the need for public spending, the Regional Information Society Initiatives did begin to do this. Of course, the amounts involved were small.

This is a familiar pattern for EU policy. Calls for national industries to be liberalised come first – often with the backing of major corporate interests – and the EU finds it relatively pain-free to meet these calls. But although the Commission expects that a natural consequence of such a move is that Brussels should assume responsibility for ‘re-regulating’ an industry at the supranational level, bureaucrats find it much more difficult to negotiate this second stage of the Europeanization process.

The internet is not a straightforward case of this, given that it is new industry that has not been subject to decades of national state intervention, but the pattern does fit. Those who expected information society policy to move from its initial economic and technological focus to a wider focus on the social aspects of the information society have been left disappointed. Despite Commission rhetoric about human capital and the digital divide, action in these areas is limited. The landmark initiative under the information society banner of recent years was in fact the 2000 E-Commerce Directive, containing another batch of de-regulatory measures.

The Audiovisual Media Services Directive is probably the Commission’s most successful effort to date to move the agenda onto new territory. Some are sceptical of the utility of this, while others think it is a necessary response to a changing media landscape. In this pamphlet, you will read both perspectives, considering differing views on why the Directive is needed or why it is not.

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# The economic-cultural regulatory approach of the AMS Directive

*Michael Holoubek*

This opening chapter gives a brief outline of the broader context of European content regulation and draws from this some conclusions regarding the scope, the basic features and the regulatory approach of the proposal of the European Commission's future 'Audiovisual Media Services Directive' (AMS Directive).

## **The broader context: the EC network regulation system for audiovisual media services**

Audiovisual media services are in many respects subject to Community level policy-making. There are a number of interconnected regulation areas. Together they form a network of regulation systems that determines the framework under which the content industry has to act. This network system is built of: firstly, numerous funding programmes established under the Community policies focusing on the content industry and in particular the audiovisual media industry (i.e. Media 2007, Culture 2007, eContentplus etc); secondly, the European Community (EC) Treaty, and here especially the fundamental freedoms, the culture exemption clause [Article 87 (3) (d) EC] and the EC general competition rules, which constitute in a horizontal way essential guidelines and rules for the sector. So do the tax law measures and the law of copyrights and related rights. And finally, there are also provisions which regulate the audiovisual media industry, on the one hand at the infrastructure level (the 2002 regulatory package for the communication infrastructures) and on the other hand at the content level in a sector-specific way. Besides the AMS Directive, which shall constitute in future a coherent sector-specific regulatory framework for all audiovisual media services (currently the TVWF Directive covers only broadcast services in a narrow sense), the E-Commerce Directive, too, contains such content related sector-specific rules, namely for the so called information society services, which the 'non linear audiovisual media services' form a subcategory of.

## **The realisation of cultural, democratic and social policy goals within this network regulation system**

It is important to realise that within this network of regulations (apart from the funding programmes as soft law measures, i.e. subsidies) only the AMS Directive as hard structure regulation formulates interventions in the audiovisual sector at EC level that also aim at the realisation of certain cultural, democratic and social policy goals connected with these services. By providing the necessity for standards with regard to the protection of i.e. minors or hate speech by the Member States and by providing

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minimum standards in the field of programming quotas or advertising it constitutes a special ‘economic-cultural’ regulatory approach at European level for the audiovisual media services. In contrast, all the other above mentioned regulatory areas governing the audiovisual industry and in particular also the E-Commerce Directive follow a purely ‘economic’ regulatory approach; i.e. they focus on the establishment of an ‘economic’ market model for the audiovisual media industry by providing only rules safeguarding functioning market structures in this industry sector. Objectives of a cultural, democratic or social nature are merely seen as external objectives left (via specific exceptions from the economic market structure regulation at EC level) to the discretion of the Member States.

The fact that Community law enables the Member States – via specific exceptions and authorizations – to lay down structural rules of a cultural and democratic policy nature, but fails to define them even in the form of minimum standards, has one consequence well-known from the application of the dogma of fundamental freedoms: due to the country-of-origin principle governing large parts of the EC market structure regulations, MS regulations motivated by cultural and other public interest objectives get under pressure by the economic principles of the single market. The consequence is that uncoordinated cultural and public interest structural regulations on the part of Member States and the relevant political decisions typically finally either have no effect at all or become subject to such economic pressure that their special cultural or social regulatory approach loses its persuasiveness. From this it follows, if we assume that audiovisual media services shall not be regulated only by economic criteria, that structural regulatory interventions aimed at giving the market model a certain cultural, democratic and social policy dimension will have to be defined and coordinated at EC level. In particular under globalized competitive conditions, de facto only a European cultural policy model, but not isolated steps taken by individual Member States will stand a chance of success and assert itself in global competition.

### **The ‘economic-cultural’ regulatory approach of the AMS Directive**

Before this background the special importance that attaches to the Commission’s proposal for a revised TVWF-Directive, according to which all audiovisual media services shall be subjected to a combined specific ‘economic-cultural’ regulatory approach becomes clear: first, at European level, its specific cultural regulatory approach is capable of asserting itself against the purely economic orientated regulatory approaches of the other relevant measures for this industry. Second, regarding the relation of European law and Member States law, by defining criteria for an appropriate balance between economic and cultural aspects to be followed European-wide while leaving at the same time an adequate margin of appreciation to the Member States, it also provides the right basis, i.e., the necessary back up provisions, on which Member States regulations motivated by cultural and other public interest objectives in this sector can stand a chance against the economic principles pursued by European economic integration. To put it short, of all the measures relevant for the audiovisual media industry, at EC level, only the specific regulatory approach of the future AMS Directive ensures and allows for an *effective* realisation of cultural and other public interest objectives with regard to audiovisual media services in Europe.

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## The scope of the AMS Directive

Whether the specific combined economic-cultural regulatory approach of the AMS Directive or the purely economic approach of the E-Commerce Directive, respectively the relevant horizontal EC-measures applies to a specific audiovisual media service, very much depends on the scope of the definition of the AMS Directive. Here it has to be stressed: not including a service in the scope of the AMS Directive does not mean that they are left unregulated at European level and thus fall in the exclusive competence of the Member States; rather they are subjected under the economic regulatory regime of the E-Commerce Directive and the other horizontal measures at EC level relevant for the audiovisual industry. In light of these considerations the extension of the scope of the planned AMS Directive to cover all audiovisual media services and thus to opt for a special cultural approach for all of these services has to be seen as an appropriate step.

With this extension, audiovisual media services that are currently excluded from the strict country-of-origin principle of the E-Commerce Directive will in future be subjected to the country-of-origin principle of the AMS Directive. This principle has on the one hand a deregulatory effect on the sector, as it narrows the margin for the Member States to intervene with transboundary audiovisual media services. On the other hand, at the same time, the application of the country-of-origin principle of the AMS Directive is backed up by arguments in favour of the promotion of democracy and cultural policy including the explicitly laid down authorization of Member States to provide for further measures in regard of media service providers subject to their jurisdiction, which in turn guarantees the Member States competences in this field. In this context it is also to stress that the current regulatory structure of the AMS Directive to define as with regard to cultural matters the essential goals and guidelines but to leave the definition of the instruments by which these goals are to be achieved to the Member States is an appropriate one. For example, it's better to decide at Member States level whether a co-regulation system for, e.g. the protection of minors, shall be implemented than at EC level, as it very much depends on the specific national regulatory tradition whether such a system will work or not.

For the lack of alternatives there are also good reasons to apply technology-neutral functional criteria that focus on the cultural and democratic importance of the audiovisual media services to define the scope of the directive and especially to draw the line between linear and non-linear services. It fits the entire regulatory environment for the audiovisual media services: it harmonizes with the same functional, technology-neutral approach that is used regarding the European communications infrastructure regulation. Furthermore it is in accordance with the specific economic-cultural regulatory approach of the AMS Directive European regulation at content level and its cultural and democratic market regulatory model. Backed up with a catalogue of examples of linear, respectively non-linear services, which could be provided by e.g. recommendations or guidelines of the Commission, the Member States' legislators, their courts and the European Court will also be capable to deal with such a definition of the scope of the AMS Directive.

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# Changing channels: Europe's broadcasting legislation

*Mary Honeyball MEP*

The way in which we watch television is fundamentally changing. We are no longer confined to watching TV when the broadcaster dictates. With the advent of personal hard-disk-based video recorders like "Sky Plus" and new on video-on-demand services, we are starting to watch TV in new different ways and on our own terms. With increasing use of online technology, mobile television and internet services like YouTube, the boundaries between traditional television and the internet will continue to become more and more blurred.

As the pace of change in technology increases - almost exponentially - our existing broadcasting legislation is beginning to look out of date. The current EU legislation on television broadcasting - The Television Without Frontiers Directive (TVWF) - was introduced in 1989, long before the sweeping changes of the internet, and only covered traditional linear or scheduled television programmes.

## **Scope**

In its attempt to bring the current legislation in line with recent changes the European Commission proposed thoroughly revising the existing directive into a new Audiovisual Media Services Directive (AVMS).

There was initially a lot of concern that the European Commission's proposal was attempting to regulate vast swathes of the internet. The worry was that in its current form, user generated content and personal website that contained video or video blogs (vlogs) would be governed by the same style of legislation as the large broadcasters. This was patently an absurd position.

On the other hand many argued that the pace of change in the area of broadcasting was so great and the market moving so quickly, that any form of legislation was impossible.

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I agree that legislation, of a rapidly changing market is difficult. But the pace of change in the field of broadcasting is actually speeding up not slowing down. If we agree to wait until the market is stable before updating our legislation - we would be waiting an awfully long time. In the meantime viewers would be left without any protection - certainly less protection than for current television viewing. There would be no protection at all against unfair advertising, including that designed for children.

During the progress of the legislation through the European Parliament it became clear that there were significant differences of opinion between Member States. Some countries were of the opinion that anything that moves should be regulated. I and my colleagues took the view that consumers would expect marginally less regulation and protection where they had elected to watch a programme via an on demand service. We also took a much broader view that television-like regulation should be restricted to television-like services. That's to say that viewers would not expect the same level of protection for watching a video on YouTube as they would whilst watching a programme over dinner with their children.

The true test of the legislation should be to apply the question - what level of regulation would the consumer reasonably expect?

## **Advertising**

Whilst the scope of the legislation has proved contentious, other more emotive issues like product placement, advertising of alcohol and unhealthy food have also proved difficult.

Product placement - where advertisers pay producers for products or services to feature in their productions - is already a big business in the United States. It often appears on television in the UK through acquired programming - programming brought in from other countries. There are big differences between Member States on whether to allow product placement. To a certain extent it is already an academic argument. If we already receive product placement through acquired programming, why restrict our broadcaster from benefiting from it?

Viewers are increasingly able to skip adverts by time-shifting their viewing. With a growing shift away from a scattergun approach of television advertising to more targeted online adverts, we must be careful that we do not overly restrict the income of free-to-air broadcasters. We should explore ways of allowing our broadcaster to explore new revenue streams, but we must be cautious.

Paradoxically, at the other end of the market we may also be seeing a move away from advertising all together. Viewers are increasingly able to buy and download advert free television programmes from the internet. This divergence is surely good for viewers as it offers more choice between paid-for and free to air television.

## **Country of Origin**

Europe is perhaps a unique market in television broadcasting. There is a real European dimension required in our broadcasting legislation. Whilst Britain may receive a lot of programming from the United States, the same is not true for all

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Member States. Multilingualism in Europe means that French broadcasters are transmitting programmes across borders in French to Belgians. Likewise German broadcasters are transmitting programmes in German to Austrians. The list of cross-border transmissions is endless.

The principles of the Common Market traditionally means that a product that is good enough for one Member State is good enough for all. But approaches towards what is acceptable on television differ widely between Member States. What if Belgian authorities do not like the content of a French broadcaster? What happens if a British broadcaster, broadcasting to Sweden, advertises alcohol, when a domestic Swedish broadcaster would not be permitted to?

The country of origin principle gets more complicated still. Now that television can be streamed over the internet, what is to stop a broadcaster establishing themselves outside the EU, say in Switzerland, thus exempting themselves from the legislation? Would the EU really want to be in a position of blocking television channels over the internet?

### **The Challenge**

When the Directive returns to the European Parliament for its second reading later this year we must again consider these and other issues. The pace of change in broadcasting may seem fast now, but we have seen nothing yet. Europe must prove to its citizens that it can take a proportionate response to a difficult challenge. We must simultaneously provide consumers with a level of protection they would expect whilst allowing our creative industries to thrive.

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# Regulating the push and pull medium

*Richard Collins*

Once upon a time, in 1957 to be precise, six countries in search of a single market signed the Treaty of Rome and created the European Economic Community. At this time broadcasting and telecommunication services (almost) everywhere in Europe were provided by national monopolies – services were not traded across borders and it seems unlikely that anyone then imagined that the Treaty would one day drive creation of single markets in television or telephony – let alone unimagined services such as e-commerce and the Internet.

Years later a few gnomes, labouring deep in the European Commission, thought the Treaty could and should apply to television: in 1984 they proposed a “Television without Frontiers” (TVWF) sneaking in a single market in television under the cloak of a shared European culture. Technological change (satellite and cable) plus the TVWF Directive in 1989 led to an explosion in the number of European television channels and, particularly in small countries, a de-nationalisation of broadcasting manifested in high levels of consumption of services from outside national borders (often regulated under non-traditional norms), foreign ownership and much higher levels of imported programmes (especially from the USA).

The story so far is thus one of unintended and unanticipated consequences – rather than acting as “the decisive factor in European integration”, as the European Parliament’s 1982 Resolution on broadcasting envisaged, TVWF opened the television markets of small European countries to large countries, increased non-European programming and, especially in Luxembourg and the UK, established channels directed to other Member States but which did not adhere to the regulations of the receiving countries. The advent of high bandwidth Internet providing streamed video has only reinforced concerns arising from the effects of the 1989 Directive and so the recent EU negotiations on TVWF2, now named the Audiovisual Media Services Directive (AMSD), has re-opened intense debates on the issues of single market v cultural sovereignty, freedom of expression v protection from harm, *ex ante* v *ex post* regulation which underpin both TVWF and AMSD.

Disagreement on the provisions of the AMSD focused on two issues – the **scope** of the Directive (would it extend television regulatory requirements to the Internet?) and the **country of origin** principle (which provided that adherence to the regulations extant in the country of origin of a television service was sufficient to ensure free circulation of the service throughout the EU - whether or not the country of origin regulations matched those of the country of reception). A “gang of 13” (made up of small countries plus Poland) strongly, but ultimately unsuccessfully, advocated reversion to country of reception regulation a policy which, if successful, would have

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significantly resiled from the single market principle embodied in the EU's founding Treaty and would also have given rise to concerns about the extent to which a country of reception policy was compatible with the freedom of expression principles prescribed in the (as yet unadopted) European Constitution (and in the EU's e-commerce Directive).

In respect of “**scope**”, drafts distinguished between “linear” and “non-linear” services and proposed that the provisions of the TVWF Directive should apply to “non-linear” online services thereby extending the scope of the new, AMSD. Essentially, the proposal was to establish technologically neutral regulation by treating online services in the same way as television services. This proposition conflicted with the provisions of the e-commerce Directive, in particular those of Article 12 which defined the provider as a “mere conduit” and also made clear that “the service provider is not liable for the information transmitted”. Moreover, Article 15 of the e-commerce Directive specifically exempts service providers from monitoring “the information which they transmit or store”. Both these provisions of the e-commerce Directive contradicted established TVWF (and draft AMSD) requirements respecting European and independent content quotas and aligned the regulatory regime for online services more closely with freedom of expression principles than EU (and Member State) broadcasting regulation has thus far customarily been. This Gordian knot was cut by extending broadcasting regulation (and the scope of the AMSD) only to “television like” services such as video on demand. Further important issues came into question - including regulation of product placement and the imposition of stronger duties of protection on service providers notably in respect of protection of minors, hate speech and the right to reply.

Much debate arose from the difficulties of managing the transition of broadcasting from a “push” medium, in which the content, sequence and time of consumption were controlled by the broadcaster and where governments were able to control entry to broadcasting “markets”, to a “pull” medium, in which users are able to select their preferred content, and the time at which it is consumed, from a host of potential providers across the globe working under different regulatory regimes. These changes may be regarded positively, as enhancing freedom of choice and expression, diversity of sources of information etc, or negatively, as increasing user vulnerability to fraud and exposure to harm. These factors point towards a new regulatory order that guards against harm and provides users with effective redress without compromising their enhanced choices and freedoms. But which will be based increasingly on general provisions of law (eg on competition, defamation, indecent display and so on) rather than dedicated sector specific agencies, on self and co-regulation (designed to secure voluntary pro-social behaviour by content and service providers) and on public subsidy and support, rather than imposed conditions of licence, to secure social and cultural goals. However, such an order puts in question both the interests of established media players and the desire of governments to keep on governing and regulators to keep on regulating – hence the clashes between the principles embodied in the e-commerce and AMS Directives.

The AMSD is based explicitly on the premise that clear distinctions **can** be made between “linear” and “non-linear” services and has (modestly) extended the scope of the TVWF Directive to include video on demand services as broadcasting like services. However, the application of old practices in new circumstances, where it will

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be more and more difficult to distinguish between traditional broadcasting (linear) and new forms of delivery (non-linear) may suppress choice, diversity and competition. The freedom of expression pressure group, Article XIX has made the well founded comments that:

“It has become trite to note that the Internet is unlike any other form of mass communication and cannot be regulated in the same manner as the broadcast sector or the print media... the scope of the right to reply with regard to Internet publications would be analogous to granting a right of reply in relation to every published book, and even to pamphlets... the administrator of the website of a human rights organisation would have to grant space to the spokesperson of a military dictatorship or any undemocratic government to respond to alleged factual inaccuracies that may be impossible to verify. Or a government representative would be able to post a mandatory reply on the site of a political opposition party, to refute allegations of corruption. In the latter case, a refusal to comply might lead to reprisals being taken against the website, including it being ordered to shut down... The scope for abuse of a right of reply, thus formulated, is significant. Governments or other powerful figures in society would be able to crack down on critical websites by launching abusive requests, using up the limited resources of such organisations”.<sup>1</sup>

At the time of writing, the AMSD had not been finalised but it's expected that the final version will be close to the Finnish Presidency Draft<sup>2</sup> of November 2006 (despite the lack of support for the Finnish text from Sweden, Ireland, Latvia, Belgium, Lithuania, Luxemburg and Austria). As well as extending the scope of the Directive the draft reaffirms the country of origin principle (but provides for mandatory co-operation between national regulators when a service in one Member State “targets” viewers in another), categorically prohibits product placement (but allows individual Member States to authorise product placement in some types of programme but not including children's programmes) and makes minor changes to advertising regulation.

Overall, the AMSD points towards a relaxing of regulation across the audio-visual sector as non-linear services grow in importance relative to linear and to the growing importance of fostering “media literacy”, whereby users are supported in their ability to control at the point of reception, rather than the point of origin, their audio-visual consumption, to a strengthening of self and co-regulation and to recourse to general principles of law (competition, defamation, fraud etc) rather than to sector specific rules. Nothing will be neat and tidy, linear and non-linear services will co-exist for a considerable time under rather different regulatory regimes, even though they may be hard for users to distinguish at the point of reception, and regulation will become much “leakier” with increased access to and consumption of material which does not conform to local regulatory requirements or social values and expectations.

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<sup>1</sup> See <http://www.article19.org/>

<sup>2</sup> View this version of the Directive at [http://www.consilium.europa.eu/cms3\\_applications/applications/openDebates/openDebates-PREVIEW.ASP?id=171&lang=en&cmsID=1105](http://www.consilium.europa.eu/cms3_applications/applications/openDebates/openDebates-PREVIEW.ASP?id=171&lang=en&cmsID=1105)

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# The review of the Television without Frontiers Directive: a case study of the challenge of regulating the media in a converged world

*Vicky Read*

The convergence of the broadcasting, telecoms and technology sectors means that, as consumers, we can now access content on multiple devices, interact with it, share it with our friends, and even create and distribute it ourselves. Consequently, the traditional ways of regulating the media are being severely challenged. How do you regulate in way which balances public policy objectives, such as the protection of minors, with the right to free speech and the need promote the UK as fertile ground for new media companies? The revision of the Television without Frontiers Directive to become the Audiovisual Media Services (AMS) Directive, which is currently taking place in Brussels, represents perhaps the first time that these challenges have been debated on the European stage in the new converged world. The heated debate that has surrounded it is testament both to the difficulty and importance of getting that balance right.

Throughout the review the Broadband Stakeholder Group (BSG), which plays a unique role in the UK in gathering together players from across the converging marketplace (from telcos and technology companies, through to aggregators, content companies and rights holders) has played a prominent role in facilitating a cross industry response to AMS. We have focused primarily on communicating common concerns about the proposed broad scope of the directive and the suggested mechanisms for implementing it. These arguments appear to have gained traction in Brussels, and the current AMS text is closer to what we believe to be a workable directive. However, this pamphlet offers an opportunity remind ourselves of the point that AMS case study illustrates: regulating the media to ensure that users are well informed and safe in today's converged world requires a new and different approach, and one which will require industry, governments and regulators to continue to work together even once the AMS Directive has been signed off.

The BSG argument about AMS has always been based on practicalities and not principles. We have consistently supported the Commission's overarching objectives for the review – to promote the single market and the economic welfare of the EU's audiovisual sector, and to pursue public policy interests – because they are both socially responsible and represent commercial best practice. Of course children should be protected from inappropriate media, consumers should not be inadvertently exposed to offensive content, and we naturally support a vibrant and competitive EU audiovisual industry. We also accept that the notion of what

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constitutes ‘television’ needs to be revised in light of technological developments. However, the directive has to be able to deliver on the promises it makes in practice. This is why we have argued for a tight and clear definition of the new services to be covered and suggested that the mechanisms for effectively implementing these rules are different from the traditional ‘command and control’ style of regulation.

First, to deal with scope. In seeking to create a future proof directive, the original Commission proposal suggested that the scope be extended to cover all audiovisual services where there was an economic activity. In reality this would have meant extending broadcasting rules to cover a broad swathe of new services, such as videoblogs and user generated content sites. The majority of services which would fall into this category in 2010 (when the directive will be implemented) do not yet exist and when they do they are likely to have little to connect them to television as we know it today. Not only would this move have stifled a fledgling market with unsuitable regulation, but, according to the UK regulator Ofcom, it would also have proved impractical to implement. In a market where the creators of content are increasingly numerous and often amateur, regulation would have been a case of trying to pin the proverbial tail on an infinite number of elusive donkeys. The promises of consumer protection would not therefore have been delivered. After much debate, the directive now looks as if it will regulate a much tighter category of ‘TV-like’ services, in effect the video on demand services which are now coming to market, and we have been very supportive of this development in the text.

While the heat of the scope debate has cooled, it is worth re-iterating the above point to illustrate that new audiovisual services are fundamentally different from those we are currently used to, and that they consequently demand a different regulatory approach if consumers are to access them in a safe and informed way. Central state regulation may have been effective with a handful of media companies who broadcast to the mass public on a published schedule, but it is no longer appropriate in regulating an infinite number of (often amateur) service providers, who offer non-linear, on-demand content.

Increasingly, debate between relevant stakeholders, as well as academics (in particular the Hans Bredow Institute) suggests that self- and co-regulatory schemes are the best way to monitor these services. Self-regulatory schemes already exists in many guises in the UK. They work because they can directly and promptly respond to the industry to which they relate, and because their members have a market incentive to ensure that the services that they provide conform with social standards and public policy. This type of regulation is particularly effective for non-linear services because of the close transactional relationship that suppliers have with consumers, allowing companies to identify their concerns and protect them through filtering and labelling for example. New services also tend to be global instead of national, again meaning that industry is better placed to regulate content than EU or national laws. Finally, self-regulation is far more flexible than statutory regulation, making it the most effective approach for such a rapidly evolving industry. Self-regulation does not therefore represent an easy option for industry, but an approach which, when taken with the agreement of government, and where a ‘legal link’ of accountability exists, provides the best chance of delivering on the promises of consumer protection.

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But that's only half the story. Industry self-regulation allows regulation to sit closer to the consumer than state regulation, but media service providers cannot act as their customers' nannies, watching over them everywhere they go in the digital world, and neither would customers want this. That is why the third strand of the BSG's argument has been that media literacy is the essential companion of self-regulation, where consumers play a crucial role in regulating their own behaviour. For us media literacy means, among other things, increasing citizens and consumers' ability to:

- access, use and manipulate media technologies
- assess whether what they are accessing is appropriate for them or their children
- actively participate in media
- understand and respect the legal parameters in which they operate
- take full part in using public services, as they migrate online, and in other civic and democratic processes

Improving the media literacy of UK citizens is a huge challenge, involving a wide circle of stakeholders from the education and voluntary sectors, government, industry and consumer organisations, and it is something that needs to be a long term priority. This, combined with the task of developing a fit for purpose self-regulatory landscape means that even as the AMS debate comes to a conclusion in Brussels, the challenge of regulating the media is only just beginning.

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# The evidence base for harm and offence: implications for the proposed AMS Directive

Sonia Livingstone and Andrea Millwood Hargrave<sup>1</sup>

Regulators are seeking to understand the changing parameters of the possible with the convergence of media delivery platforms which offer faster, easier access to material that was hitherto difficult to find. In this process, the concepts of ‘harm’ and ‘offence’ are gaining prominence. The 2003 Communications Act changed the media content debate in the UK, moving from the previously held concepts of ‘good taste and decency’ to offering ‘adequate protection... from the inclusion of offensive and harmful material’.<sup>2</sup> These concepts echo those in the EU’s Television without Frontiers Directive, currently being debated in a revised form as the Audio Visual Media Services Directive. One dimension of the debate centres on the exposure of minors to potentially harmful or offensive material, although there are other sensibilities considered such as offence or harm caused to those from minority groups.

While the proposed Directive argues that transfrontier communications should remain unrestricted, it is recognised that nation states will have to interpret the Directive’s principles according to their own systems. One key issue is the protection of minors from violence and pornography, which raises difficulties insofar as “*there are no European standards of public decency which would allow the terms “pornography” or “gratuitous violence” to be defined at European level. It therefore should be left to the Member States to define these notions*”.<sup>3</sup> Importantly, the newer technologies such as IPTV remove geographical obstacles, rendering the ability of Member States to regulate for national cultural sensitivities uncertain when material crosses geographical boundaries. It is not clear that the suggested revisions take adequate account of this.

While harmful and offensive material is, in principle, distinguished from that which is illegal (obscenity, child abuse images, incitement to racial hatred, etc), it is not easy

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<sup>1</sup> This article is adapted from A. Millwood Hargrave and S. Livingstone (2006) *Harm and Offence in Media Content: A review of the evidence*. Bristol: Intellect Press.

<sup>2</sup> Previous broadcasting acts in the UK referred to ‘good taste and decency’, addressing the offence that any breaches of these might cause. Issues of taste and decency are fluid and arguably subjective, especially taste. The European Union’s TVWF Directive, in contrast, focuses on the protection of minors from (television) programmes that ‘*might seriously*’ or are ‘*likely to*’ impair the physical, mental or moral development of minors. In particular, it refers to programmes that involve pornography or gratuitous violence. The Communications Act 2003 moved towards the EU’s stance, requiring a test of harm and offence. In addition the Act requires (Section 319) that ‘generally accepted standards’ are applied to programme content in broadcasting. There is also a specific requirement within the Act (319 (2)(a)) which states that people under eighteen must be protected.

<sup>3</sup> See [http://europa.eu.int/comm/avpolicy/revision-tvfw2005/ispa\\_scope\\_en.pdf](http://europa.eu.int/comm/avpolicy/revision-tvfw2005/ispa_scope_en.pdf)

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to define the boundaries in a robust and consensual fashion. What content is considered acceptable by today's standards, norms and values, and by whom? Borderline and unacceptable material may include a range of contents, most prominently though not exclusively 'adult content' of various kinds, and these may lead to considerable public concern. Norms of taste and decency can be tracked, with some reliability, through standard opinion measurement techniques. Methods for assessing harm, by contrast, are more contested and difficult. In a recent literature review, Millwood Hargrave and Livingstone reviewed the empirical evidence regarding harm and offence, identifying the evidence that exists for each medium, the methodological problems and gaps in the evidence base, and the implications for evidence-based regulation.<sup>4</sup>

One finding was that the linking of the terms 'harm and offence' is causing confusion. It is not clear how the difference between them is understood in legal or regulatory contexts. Nor are these terms distinguished in the research literature. Further, while there is an extensive literature on harm (usually labelled 'media effects'), there is little academic research on offence.<sup>5</sup> Generally, harm is widely conceived in objective terms; it is observable by others (irrespective of whether harm is acknowledged by the individual concerned), and hence as measurable in a reliable fashion. By contrast, offence is widely conceived in subjective terms; it is that experienced by and reported on by the individual, and hence is difficult to measure reliably (and, equally, difficult to deny in the face of claimed offence).

Our literature review identifies a considerable body of evidence of both media harm and offence. The evidence is generally contingent – harm and offence vary according to content, context and audience. It is also the case that the evidence is often modest though far from negligible. Thus, the media are but one among several influences when it comes to explaining social ills – from aggression to consumerism, from obesity and bullying to the sexualization of youth. But they are far from uninfluential. This leads us to advocate a risk-based approach that encompasses the range of relevant factors, in order to understand the contribution of media exposure, in terms of the nature and extent of media influence under particular conditions. Such an approach can then inform judgements of whether content regulation is proportionate.

Some forms of media harm affect much of the population. For example, the way in which a news story is framed may affect the attitudes of its readers; negative attitudes towards segments of the population may be created or sustained through the way the news about them is reported; the presentation of partial information (in the area of science, for example) can lead to a misinformed public; and there are many other instances of harmful influence. However, much content does not affect all audiences equally. Research suggests that there can be greater negative influences on those who are 'vulnerable'. Findings suggest that vulnerable audiences/users may include children and young people, especially boys in relation to violence, and girls in relation to body image, together with a range of other groups among the adult

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<sup>4</sup> Millwood Hargrave and Livingstone (2006) op cit.

<sup>5</sup> This may be a methodological bias on the part of researchers or it may be a political bias, based on a concern that research on offence opens the door to censorship. What research there is in the area of offence has mainly been conducted by the regulators or by industry.

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population (including psychologically disturbed individuals, people who are depressed, sexual offenders, young offenders, etc).

The role of cultural mediators also matters: viewing in different contexts, including different national traditions of content regulation, expectations of a media platform, social practices of parenting, and moral frames for judging content or determining offence, all influence the harm and offence that may occur. These complexities of culture and context place significant demands on the evidence base, for there is often a considerable inferential leap between the specific context under which media harm has been demonstrated and a particular national regulatory context under consideration.

There is also a range of gaps in the evidence base. These include a lack of evidence regarding the impact of certain media – either because they are too ‘old’ and little researched now (such as print), or because they are too ‘new’ to have a body of evidence behind them, such as mobile telephony. However, there is clear evidence that the older media still exert significant influence, and there are many concerns about newer media. Although the public continues to treat different media differently, being more or less media literate about different media, much recent regulatory debate has talked of technology-neutral regulation.

Our review of the evidence had hoped to look across content-delivery platforms and evaluate the likelihood for harm and offence in terms of a content rather than technology. Would equivalent content have a similar effect or influence on individuals, regardless of the method of delivery? In fact, the review found a minimal amount of cross-platform research, and this is a yawning gap as regulators and others base current policy decisions on incomplete or sparse data. Given convergence in technologies, media content and, indeed, content regulation, we are particularly concerned at the lack of investigation into media influence (harm or offence) when content is encountered on differing platforms.



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