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# Connected TV

## Jurisdictional challenges in a converged media environment

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**Acknowledgments**

This thesis is written as a completion to the Master of Laws in Intellectual Property Rights (with track ICT law), pursued at the Hogeschool-Universiteit Brussel (HUB). Although the main focus of the programme was on intellectual property rights, I have chosen a subject within the field of European media law, as I wanted to get as much as possible out of the programme.

The purpose of this research is to study the impact of connected television on the existing regulatory framework, in particular its impact on the determination of territorial jurisdiction, under Directive 2010/13/EU on Audiovisual Media Services, in an environment characterised by the convergence of television and Internet.

Connected television caught my attention after I attended the annual symposium of the Flemish media regulator in December 2012, during which the influence of connected television on the Flemish media industry was discussed. From that point on, the research and drafting of this thesis can be compared to a thrilling rollercoaster ride: a slow but steady start, followed by an intense period of ups and downs, eventually leading to a more than satisfactory end result.

I would like to thank my promoter Professor Peggy VALCKE for her inspiring suggestions and constructive feedback. Without her guidance, the end result would not have been of the same quality as it is now.

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## 1 The rise of connected television

1. The aim of this thesis is to analyse the implications of 'connected television' on determining jurisdiction under Directive 2010/13/EU on Audiovisual Media Services (hereafter 'AVMSD').[1] The transformation in the audiovisual media landscape has the potential to create a new viewing experience for audiences and new opportunities for businesses. However, many questions arise and a lot of pressure is put on the current regulatory framework.[2] In order to open a public discussion on media convergence, the European Commission published a Green paper on this topic in April 2013.[3] Addressing all issues highlighted in that Green Paper would be undesirable and even impossible within the scope of this thesis. Therefore we will only focus on the jurisdictional challenges.[4] In the first section we will analyse whether providers of connected services can be regarded as media service providers within the meaning of the AVMSD. In the second section the focus will be on determining the competent territorial jurisdiction in a connected media environment.

2. Connected TV, sometimes referred to as 'smart TV' or 'hybrid TV', is often described as the integration of internet services into television sets and set-top boxes, allowing users to consume a variety of services simultaneously on one screen. Connected TV is however a broader concept that should be understood in light of the convergence between television and Internet. Therefore it is better to refer to connected TV as "*a means by which multiple sources of audiovisual content, services and applications can be delivered to, and consumed via, a multitude of different devices and platforms, in many different ways.*"[5]

As it is becoming possible for linear and non-linear audiovisual services and numerous other communications services to be consumed on one and the same screen, lines are blurring quickly between the familiar twentieth century consumption patterns of linear broadcasting received by TV sets and the on-

[1] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services ('Audiovisual Media Services Directive'), *Oj.L.* 95, 15 April 2010, 1-24.

[2] M.A. TROJETTE (reporter), "La télévision connectée, Rapport au ministre de la culture et de la communication et au ministre chargé de l'industrie, de l'énergie et de l'économie numérique", November 2011, http://www.dgmic.culture.gouv.fr/.

[3] European Commission, Green paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", 24 April 2013, COM(2013) 231 final, 1-17.

[4] Pursuant to its Green Paper, the European Commission wants to open a broad and public discussion on the implications of the on-going transformation of the audiovisual media landscape, which is characterised by a steady increase in the convergence of media services and the way in which these services are consumed and delivered.

[5] Cable Europe, "Cable delivers Connected TV", 7 June 2012, www.cable-europa.eu; For more information about the applied technologies and business opportunities we refer to the several (position) papers on connected television of the European Broadcasting Union, the association of television and radio sales houses (EGTA) and the Networked and Electronic Media Initiative (NEM).

demand services delivered to computers.[6] As a consequence of this convergence, it is now barely apparent to the user what kind of service is being consumed, which in its turn leads to legal uncertainty as to the level of protection that can be expected.[7]

3. The main rationale for the regulation of audiovisual media services at EU level has been the internal market, with the country of origin principle at its core. Hence a minimum set of common rules covering aspects such as advertising, the protection of minors and promotion of European audiovisual works has been laid down in the AVMSD. The AVMSD currently does make a distinction between linear (television broadcasts) and non-linear (on-demand) services, but does not yet take into account the convergence between television and Internet (in particular 'information society services'). The aforementioned distinction made sense in 2007, but seems less appropriate in a converged media environment with a focus on Internet TV and automated selections tools.

4. Hybrid (or connected) services offered via a connected TV constitute a new generation of media services that are difficult to grasp in legal terms. With these services, not all elements of the definition of an audiovisual media service[8] may be fulfilled for the overall service. Moreover the criterion of 'editorial responsibility', which is currently applied to designate the responsible media service provider, becomes problematic in a converged environment characterised by a variety of new players, such as device manufacturers, platform operators and aggregators. Therefore we will analyse the concept of 'editorial responsibility' in order to see whether or not there is a need to adapt the definition of 'audiovisual media provider' to increase the level of protection and to restore fair competition and the level playing field by making those currently outside the AVMSD subject to part or all of the obligations of the AVMSD.

5. Once the issue of editorial responsibility has been clarified and consequently the audiovisual media service provider has been identified, we will analyse the impact of connected TV on the determination of the competent territorial jurisdiction. The AVMSD is drafted in such a way that only one Member State should have jurisdiction over an audiovisual media service

[6] European Commission, Green paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", 24 April 2013, COM(2013) 231 final, 3; European Commission, First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU "Audiovisual Media Service Directive" - Audiovisual Media Services and Connected Devices: Past and Future Perspectives. 4 April 2012, COM(2012) 203 final, 9-11.

[7] IPSOS MORI, "Protecting audiences in the era of convergence and connected TV: Ofcom Research, Deliberative Research Report", 25 January 2012, www.ofcom.org.uk.

[8] Article 1(a) AVMSD defines an '*audiovisual media service*' as follows: "*a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph*".

provider. That objective has been accomplished through the country of origin principle. Pursuant to this principle, content only needs to be checked once by the authorities of the home country, rather than in multiple countries, which makes it easier for service providers to develop a cross-border business.

Although the wording of the country of origin principle, which is laid down in article 2 AVMSD, is clear, it often remains difficult to determine the national applicable law. In particular for non-linear services that are not offered by a traditional broadcaster it proves to be difficult to determine the competent national jurisdiction. Moreover it should be recalled that the AVMSD only applies to providers under EU jurisdiction. While media services provided by non-EU based providers making use of satellite up-links in a Member State still need to comply with the AVMSD, this is not necessarily true for media services delivered over the Internet from countries outside the EU, but providing services targeting the EU.[9] Therefore we deem it relevant to analyse more into detail whether or not the country of origin principle in its current form is still appropriate to determine jurisdiction in a converged world where media services are increasingly provided over the Internet.

## 2 The criterion of editorial responsibility under pressure

### 2.1 Editorial responsibility

6. The concept of editorial responsibility is key in determining which natural or legal person is the media service provider, and therefore responsible for adhering to the rules laid down in the AVMSD. Moreover the concept is crucial for determining the competent national jurisdiction as the criteria in article 2(3) AVMSD are to be applied to the media service provider only, and not to any other person who may be involved in the content delivery value chain.[10]

According to the AVMSD, a 'media service provider' is the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.[11] Explicitly excluded are the natural or legal persons who merely transmit programmes for which the editorial responsibility lays with a third party.[12] Examples of media service providers include traditional linear broadcasters such as BBC One or the National Geographic Channel as well as providers of non-linear services such as Channel 4's on-demand service '4OD', which may include catch-up and archive content.

[9] European Commission, Green paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", 24 April 2013, COM(2013) 231 final, 11.
[10] J.F. FURNÉMONT, "Establishment: editorial responsibility and effective control" in S. NIKOLTCHEV (ed.), *IRIS Special: Ready, set... Go? – The audiovisual media services directive*, Strasbourg, European Audiovisual Observatory, 2009, 47-53.
[11] Article 1(d) AVMSD.
[12] Recital 26 AVMSD.

The concept of 'editorial responsibility' is in its turn defined as "*the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services*".[13] Moreover it needs to be emphasised that editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided, and that Member States retain the possibility to further specify aspects of the definition of editorial responsibility (e.g. the concept of 'effective control').[14] Key in identifying the media service provider is knowing who has effective control over both the selection and organisation of the audiovisual content.

## 2.2 New players entering the content delivery value chain

7. The definitions of 'media service provider' and 'editorial responsibility' have been drafted in an era dominated by traditional linear television broadcasting. Video-on-demand (VOD) services only started developing recently, and a large part of the available VOD services consisted and still consists of traditional catch-up services, via which television broadcasters offer content they have previously broadcasted through their linear services to be viewed at individual request.[15] In such cases it is quite obvious that the broadcaster will bear the editorial responsibility for the linear as well as the non-linear service.[16]

However, not only the consumption but also the delivery and distribution of audiovisual content is changing significantly.[17] Up until a few years ago, the content provider (e.g. the broadcasting organisation) was solely responsible for all content broadcasted, and the operator transmitting the content (via terrestrial, cable or satellite) did not bear any content obligations. Nowadays, those network operators are no longer merely transmitting the television signals

[13] Article 1(c) AVMSD.

[14] Recital 25 AVMSD. Diverging national interpretations of 'effective control' can lead to distortions on the internal market. Most national regulators qualify catch-up TV services as a traditional VOD service within the scope of the AVMSD, but the Italian regulator does not share this opinion. According to the Italian AGCOM internet providers offering "*non-linear services with catalogues consisting exclusively of programmes previously broadcast in linear mode (e.g. catch-up TV or archive services)*" are not to be considered as media service providers: GOP (2011), "The new resolutions of the Italian media authority on the audiovisual media services via the Internet", www.gop.it.

[15] The approach taken in the AVMSD has however been considered as incomplete and premature since it was still impossible to predict with any certainty what the impact of technical, economic and user-related developments would be on on-demand services; See O. HERMANNS and P. MATZNELLER, "Whose boots are made for walking? Regulations of on-demand audiovisual services" in S. NIKOLTCHEV (ed.), *IRIS Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 13.

[16] O. HERMANNS and P. MATZNELLER, "Whose boots are made for walking? Regulations of on-demand audiovisual services" in S. NIKOLTCHEV (ed.), *IRIS Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 12.

[17] S. ARTYMIAK, "Introduction to different forms of on-demand audiovisual services" in S. NIKOLTCHEV (ed.), *IRIS Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 31-34.

of the broadcasting organisation, but they are increasingly 'distributing' the television signals, which means that they are making arrangements to capture the television channels they offer (into packages) to their subscribers.[18] In such a case it has become more difficult to determine who is editorially responsible for the content.

8. Applying the criterion of editorial responsibility in a connected media environment is even more problematic as many new and very diverse services and 'intermediaries' or 'gatekeepers', who all want to have a slice of the cake, are entering the value chain.

First of all we observed that telecom operators are offering their subscribers their own bundles of themed channels and their own VOD catalogues of movies and series. Moreover they often put an own user interface and electronic program guide in place via which the programmes or channels of the broadcasters can be accessed. To the extent that these players package and market linear programmes of others we can refer to them as 'aggregators'.[19] Manufacturers of smart devices (such as smart TV's or game consoles) are also operating own portals and/or widgets through which 'over-the-top content' (OTT) can be consumed.[20] Next to the linear and non-linear content supplied by traditional broadcasters, nearly every manufacturer has its own offer of internet-based applications and VOD services.

Since the rise of Connected TV, User-Generated Content (UGC) platforms such as YouTube or DailyMotion are also easily accessible on the same screen as traditional broadcasts. These players consider themselves only as 'hosts' in the sense of article 14 of the E-Commerce directive (hereafter 'ECD'), who are not responsible for the content hosted.[21] The European Commission seems to have shared that opinion as UGC platforms have been excluded from the scope of the AVMSD.[22] At the time of adoption of the AVMSD in 2007 and of its revision in 2010, the European legislator could hardly have foreseen the steadily growing popularity of those platforms. Over the past years however, it has become clear that an actor such as YouTube plays a crucial role in offering users access to

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[18] Cullen International, "Study on the regulation of broadcasting issues under the new regulatory framework prepared for the European Commission (Information Society and Media Directorate-General)", 22 December 2006, 11-14, ec.europa.eu.

[19] W. SCHULZ and S. HEILMAN, "Editorial responsibility: notes on a key concept in the regulation of audiovisual media services", in S. NIKOLTCHEV (ed.), *IRIS Special: Editorial responsibility*, Strasbourg, European Audiovisual Observatory, 2008, 24.

[20] 'OTT' can be described as the delivery of video, voice and data services without the intervention of a cable or telecom operator.

[21] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('E-Commerce Directive'), *OJ.L.* 178, 17 July 2000, 1-16; The provider of an information society service cannot be held liable for content unless he becomes aware of the unlawful character of the content: ECJ, C-236/08 - C-238/08, *Google France*, 23 March 2010; and ECJ, C-324/09, *eBay v. L'Oreal*, 12 July 2011, wwww.curia.eu.

[22] Recital 21 of the AVMSD excludes from its field of application activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.

professional and non-professional audiovisual content. YouTube hosts a massive amount of content and to optimise the user experience it 'organises' all content within different categories depending on the topic of the uploaded video (e.g. 'most popular', 'recommended channels', etc).

Another category of new players consisting of providers of information society services is starting to focus on 'television-like' services.[23] One example is Apple TV, which allows the user to stream music and videos from iTunes to his TV for a fee. It should be emphasised that Apple's closed ecosystem can put a lot of pressure on the content providers.[24] Another large player entering the TV market is Google with its Google TV, which allows a user to retrieve audiovisual content (also content only available for a fee) from different sources as well as related information in a way similar to how he would use the Google search engine.[25]

9. All these players stand between content providers and users and carry out tasks that are to a certain extent similar to those of a content editor. Hence these actors should at least be held liable for their own activities and accept certain liability rules.[26] Moreover, they determine to a certain extent the content that will be visible on the screen of the user, as they make a preselection of the content and/or determine how it is prioritised. As a result, the platform operator, portal operator or device manufacturer (all three functions may also be combined by one and the same entity) has significant control over the diversity of content and opinions reaching the user. This control gives these actors a gatekeeper position that 'as such' is currently not covered by any media regulation.[27] Consequently the main question is if and how all these gatekeepers, in all their different forms, fit into the existing regulatory framework.

## 2.3 Effective control

10. The aforementioned gatekeepers will only fall within the scope of the AVMSD and will consequently only need to adhere to the AVMSD rules if they

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[23] Pursuant to recital 24 AVMSD, 'television-like' services should be understood as services that compete for the same audience as television broadcasts, and that the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of the AVMSD.

[24] E. SCARAMOZZINO, *La télévision européenne: face à la TV.2.0 ?*, Brussels, Larcier, 2012, 24-25 ; It should be stressed and equally not surprise that Apple is eager to control the content delivery chain from A tot Z.

[25] S. ARTYMIAK, "Introduction to different forms of on-demand audiovisual services" in S. NIKOLTCHEV (ed.), *IRIS Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 33.

[26] O. HERMANNS and P. MATZNELLER, "Whose boots are made for walking? Regulations of on-demand audiovisual services" in S. NIKOLTCHEV (ed.), *IRIS Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 24.

[27] European Parliament (Committee on Culture and Education), "Draft report on connected TV" (2012/2300(INI)), 31 January 2013, 9; Dutch concept response to the Green Paper Connected TV: "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", 8-9 www.rijksoverheid.nl.

have 'effective control' over both the selection of the programmes and the organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services.

In order to assess what type of control is necessary and sufficient to be regarded as a media service provider, a clear definition of the terms 'selection' and 'organisation' is required. In its literal sense, the former refers to *whether* audiovisual content is included in the service, while the latter refers to *how* content is placed in the service.[28]

### 2.3.1 The selection of the programmes

11. A first question that needs to be raised is whether it is sufficient for a provider to have the possibility *de jure* and *de facto* of *ex post* excluding content from its service (when not in conformity with its terms of use) to assume that he has effective control over the selection of the content. Or is it necessary to take positive *ex ante* decisions to include content in order to be qualified as a media service provider having effective control?

Some scholars are of the opinion that the AVMSD does not require an *ex ante* selection of content but that editorial responsibility can equally result from an *ex post* removal and the stimulation of users to upload audiovisual content (the so-called 'guided self-selection' model).[29] Such broad interpretation of 'effective control', allowing *ex post* control, would offer a great protection for the public but imposes regulatory costs on operators who consider themselves only as 'hosts' within the meaning of article 14 ECD. Consequently it should not come as a surprise that such interpretation has already been rejected in the context of linear broadcasting,[30] and that recently a number of media regulators also explicitly rejected such interpretation in the context of non-linear services.[31] With regard to UGC platforms, such as YouTube or DailyMotion, the CSA, the media regulator of the French Community of Belgium, is of the opinion that there is neither any selection of the videos (everyone can upload), nor any organisation of the videos in function of their content by the platform operator. Furthermore the CSA deems that a secondary control cannot be considered as editorial responsibility when the intervention takes place *ex post* (on the basis of complaints) and when it does not imply any active selection *ex ante*.[32] In a

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[28] W. SCHULZ and S. HEILMAN, "Editorial responsibility: notes on a key concept in the regulation of audiovisual media services", in S. NIKOLTCHEV (ed.), *IRIS Special: Editorial responsibility*, Strasbourg, European Audiovisual Observatory, 2008, 18.

[29] *Ibid.*, 21; J. VERWEIJ, "YouTube en de Richtlijn audiovisuele mediadiensten", *Mediaforum* 2011, nr. 4, 111.

[30] W. SCHULZ and S. HEILMAN, "Editorial responsibility: notes on a key concept in the regulation of audiovisual media services", in S. NIKOLTCHEV (ed.), *IRIS Special: Editorial responsibility*, Strasbourg, European Audiovisual Observatory, 2008, 20.

[31] R. CHAVANNES and O. CASTENDYK, "Article 1 AVMSD" in O. CASTENDYK, E.J. DOMMERING and A. SCHEUER (eds.), *European Media Law*, Alphen a/d Rijn, Kluwer Law International, 2008, 825.

[32] CSA (Collège d'autorisation et de contrôle), "Recommandation relative au périmètre de la régulation des services de medias audiovisuels", 29 March 2012, 11-14, www.csa.be.

similar way the Italian regulator AGCOM stated that websites which do not provide for *ex ante* selection of user generated content, but only provide an indexing activity of the content uploaded by users, do not fall under the scope of the AVMSD and are not editorially responsible for the uploaded content.[33] Finally the UK Authority For Television On Demand (hereafter 'ATVOD') also shares this view.[34]

12. The foregoing however does not mean that the provider of a video platform can never be subject to the AVMSD. In a decision regarding the video platform 'BNP TV' operated by the British National Party, ATVOD judged that the catalogue of programmes had been clearly selected from a coherent and distinct editorial proposition, and emphasised that this did not entirely exclude 'reactive' editorial control as the viewers were encouraged to send in short videos of their local areas. In determining that BNP TV was editorially responsible, ATVOD found it relevant that viewers could not upload videos directly to the platform, like on YouTube, but they had to submit them via an administrative e-mail address.[35]

13. Although it follows from the foregoing that the providers of a UGC platform will in most cases not be subject to the AVMSD, it does not imply that all content available on UGC platforms falls outside the scope of the AVMSD. More and more professional content and channels for instance are appearing on the YouTube platform.[36] One example is BBC's Top Gear YouTube channel of which the ATVOD judged that it constitutes a VOD service for which BBC bears the editorial responsibility, and which consequently needs to comply with the AVMSD rules.[37] Also in a number of other Member States professional channels on video platforms are regarded as media providers in the sense of the AVMSD.[38]

The assessment becomes more complex when own content is combined with UGC content. In such cases the Dutch media regulator makes a clear distinction: on the one hand it states that the platform provider is only editorially responsible for its own content, whereas the third party content on its platform should comply with the AVMSD if the responsible 'channel' can be considered as

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[33] AGCOM, "Web-radio and Web-TV: F.A.Q.", www.agcom.it.

[34] ATVOD, "Guidance on who needs to notify", Edition 3.1, Originally published on 19 October 2010, republished on 21 March 2011, para. 2.19, www.atvod.co.uk; ATVOD is the independent co-regulator for the editorial content of UK video-on-demand services that fall within the statutory definition of On Demand Programme Services.

[35] ATVOD (BNP TV), Scope determination, 29 November 2010, www.atvod.co.uk.

[36] P. VALCKE and J. AUSLOOS, "Audiovisual Media Services 3.0: (Re)Defining the scope of European broadcasting law in a converging and connected media environment" in K. DONDERS, C. PAUWELS and J. LOISEN, *Handbook on European media policy*, Palgrave (forthcoming,), 11.

[37] ATVOD (Top Gear YouTube), Scope determination, 3 May 2011, www.atvod.co.uk; The decision has been appealed to OFCOM, which consequently upheld the appeal and quashed the decision of ATVOD. In the appeal decision of 18 January 2013 OFCOM decided that not all elements of an 'On-Demand Programme Service' were met. The question of editorial responsibility was however not analysed by OFCOM.

[38] E. MACHET, "New media & regulation: towards a paradigm shift? New services and scope: What's in, what's out revisited", Comparative background document to 35th EPRA meeting, Portoroz, 31 May 2012, 15, www.epra.org: Austria, Belgium, Finland, Italy, The Netherlands and Slovenia.

editorially responsible (and if the other six conditions of an audiovisual media service are met).[39]

14. Secondly we observe that UGC platform providers are increasingly profiling their audience and applying algorithms to offer them personalised video selections. Hence, a second question that needs to be addressed is whether the use of automated selection tools and algorithms by operators of UGC platforms can be qualified as effective control over the selection of the content in the meaning of the AVMSD.[40] In this respect YouTube has put in place a search-ranking algorithm allowing the platform to highlight and suggest videos to keep users engaged, and allowing the users to view the UGC content in an automated playlist, which sometimes may be interrupted by a commercial break. Moreover, automated selection tools have been implemented to categorise the UGC content into auto-generated themed channels (e.g. popular, music, sports and gaming).

As has been pointed out by the European Commission, filtering and personalisation mechanisms have a clear potential to empower citizens by allowing them to navigate efficiently through the information overload that characterises the digital environment and to receive tailor-made services corresponding to their individual needs. The increasing use of automated selection tools and algorithms may also decrease the role of the media as editors in the public sphere and strengthen the role of platform providers. The latter may not only determine what content is accessible but can also impact choices (e.g. by varying the prominence with which certain content is displayed), which could influence the *de facto* choice for users to access media offerings representing a plurality of opinions.[41]

15. As the selection aspect of the editorial responsibility criterion refers to whether or not audiovisual content is included in the service, it remains uncertain whether the use of an algorithm by a platform operator would be sufficient to lead to editorial responsibility. As long as the algorithm does not have a decisive influence on the content to be included in the service, and it merely determines which content is granted a prominent place on the platform, while all other content uploaded by users remains accessible on the platform, a service implementing such algorithm may still fall outside the scope of the AVMSD. This, however, does not imply that a media provider can never be held editorially responsible for using an algorithm. Assuming that a media service provider would offer (a package of) themed linear channels on which non-stop video clips of a specific genre (e.g. pop or rock) are broadcasted, and that the choice and sequence of the clips would be determined on the basis of an algorithm, it would be more easy to qualify such comportment as the selection of audiovisual content. The main difference with the video platform is that in the latter example a real selection of content would take place on the basis of the

[39] CvdM, "Veelgestelde vragen over (aanmelding van) commerciële mediadiensten op aanvraag", www.cvdm.nl.

[40] As we will discuss further on, the automated organisation of content in categories, such as 'most viewed' or 'recently added', can be sufficient to meet the criterion of 'organisation'.

[41] European Commission, Green paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", 24 April 2013, COM(2013) 231 final, 13.

algorithm and that only the selected content will be broadcasted, while the YouTube algorithm merely focuses on the presentation and organisation of the most relevant videos for a specific user. Nevertheless lines are blurring, and as OFCOM admits, the difference between a linear television programme and an automated playlist on YouTube becomes less clear.[42]

Although the criterion of editorial responsibility in its current form is not adapted to the growing use of algorithms and automated selection tools, it is quite obvious that those instruments have a significant impact on the content available and accessible to users, and that this issue should be borne in mind when revising the AVMSD.

### 2.3.2 The organisation of the programmes

16. The meaning of 'organisation' of the programmes is rather clear in the context of linear services as it refers to placing the programmes in a chronological schedule. The criterion is less clear however with regard to non-linear services. In that case the time element plays a less important role, although it remains present for example in determining for how long a programme will be available for retrieval. Organising the programmes "*in a catalogue"* should however be understood as an editorial arrangement comparable to linear television. Therefore it is assumed that the criterion of organisation is met as soon as a VOD catalogue is organised according to specific themes or other organisational features.[43] Pursuant to the case law of the Dutch media regulator, organising the content into categories such as 'most viewed', 'recently added', 'top 10' and 'promotions' is sufficient to meet the 'organisation' criterion. [44] Then again, merely organising content in alphabetical or chronological order does not seem to be sufficient. The same applies for making content more easily accessible through a search engine.[45]

Article 1 (c) AVMSD refers to the organisation of 'programmes', and not of channels. One could deduct from this wording that a platform operator or aggregator who only organises other providers' entire 'channels' into a 'bouquet' of channels would not qualify as an audiovisual media service provider within the terms of the AVMSD.[46]

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[42] P. VALCKE and J. AUSLOOS, "Television on the Internet: challenges for audiovisual media policy in a converging media environment" (unpublished draft), 12.

[43] W. SCHULZ and S. HEILMAN, "Editorial responsibility: notes on a key concept in the regulation of audiovisual media services", in S. NIKOLTCHEV (ed.), *IRIS Special: Editorial responsibility*, Strasbourg, European Audiovisual Observatory, 2008, 22; CvdM, 5 June 2012 (ximon.nl), www.cvdm.nl.

[44] CvdM, 28 October 2011 (Ziggo On Demand) and 8 May 2012 (smulweb.tv), www.cvdm.nl; CSA (Collège d'autorisation et de contrôle), "Recommandation relative au périmètre de la régulation des services de medias audiovisuels", 29 March 2012, 11-14, www.csa.be.

[45] E. MACHET, "Content regulation and new media: exploring regulatory boundaries between traditional and new media", Background document to 33rd EPRA meeting of May 2011, Ohrid, 11, www.epra.org.

[46] R. CRAUFURD SMITH, "Determining regulatory competence for audiovisual media services in the European Union", *Journal of Media Law* 2011, 3(2), 266.

17. The answer is more complex when different services, such as television, Internet and other supplementary services are assembled: does the provider create and organise a catalogue of programmes in such a case? Recital 27 of the AVMSD states that where different kinds of services are offered in parallel, but are clearly separate services, the AVMSD should apply to each of the concerned services. However, how the AVMSD should be applied to the different elements of the overall service remains questionable. That approach would not only create confusion among consumers as to what services fall under the AVMSD, it also seems incorrect to apply the AVMSD to every single element of a combined service as soon as it would contain a television element. Moreover such approach would again be hard to reconcile with the safe harbour principles laid down in the ECD.[47]

For the TV channels included in the offer of the platform of portal operator, it would be more appropriate if the broadcaster would retain the editorial responsibility instead of the platform of portal operator. After all it is the broadcaster, who has effective control over the broadcasted content included, since the television broadcasts are only available in the order they are integrated by the broadcaster. In my opinion the same is true for the VOD catalogues offered by the broadcasters. However if it would be the platform or portal operator who offers catch-up services of missed television programmes, he would need to adhere to those rules of the AVMSD governing non-linear services.[48] A related question concerns the responsibility for the electronic program guide (EPG), as it helps to organise the content. In some jurisdictions EPG's are considered as an audiovisual media service.[49] A consensus on how to assess EPG's however does not yet exist, since a qualification as an audiovisual media service heavily depends on the definition of the EPG. There is for instance a significant difference between traditional EPG's and enhanced EPG's that allow viewers to go back and forth and to navigate to additional services and features.[50]

The internet access service and the additional applications offered by the gatekeeper can be qualified as 'information society services' in the meaning of the ECD. They are services provided for remuneration, at a distance, by means of electronic equipment for the processing and storage of data, and at the individual request of a recipient of a service.[51] It would be difficult, not to say impossible, to argue that these services would be television-like and could be

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[47] M. COLE, "The European legal framework for on-demand services: what directive for which services?" in S. NIKOLTCHEV (ed.), *IRIS Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 44.

[48] *Ibid.,* 44; M. ARINO, "Online video content: Regulation 2.0? An analysis in the context of the new Audiovisual Media Services Directive", *Quaderns del CAC* 2007, Issue 29, 10; E. SCARAMOZZINO, *La télévision européenne: face à la TV.2.0 ?*, Brussels, Larcier, 2012, 37.

[49] E. MACHET, "New media & regulation: towards a paradigm shift? New services and scope: What's in, what's out revisited", Comparative background document to 35th EPRA meeting, Portoroz, 31 May 2012, 14, www.epra.org.

[50] P. VALCKE and J. AUSLOOS, "Television on the Internet: challenges for audiovisual media policy in a converging media environment" (unpublished draft), 7.

[51] Recital 17 and article 2(a) ECD.

qualified as non-linear services within the meaning of the AVMSD. This would only be different when the additional applications would be very closely linked to the television broadcast in such a way that the AVMSD could be applied to the combination.[52] In any event, the decisive question is whether the elements that combined constitute the hybrid service can be regarded separately, in which case the difficulty is to assess whether or not the gatekeeper merely adds his own service to the broadcast of another provider, or whether the combination of the different services makes it a new separate service. [53]

### 2.3.3 Split control

18. The AVMSD refers to a media service provider in the singular, which often leads to the conclusion that there can only be one provider with editorial responsibility. This automatically implies that only one entity can exercise effective control over the programming of a service.[54] From a theoretical point of view this makes sense and it facilitates the determination of the competent national jurisdiction, as there can only be one responsible. [55]

19. In practice however, the effective control over the selection and organisation of programmes may be exercised by different legal entities, which leads to legal uncertainty: the provider deciding on the organisation of the content may not be the same as the provider selecting the programmes. [56] A broadcaster for instance can select content from its linear channel that it provides to a third party platform operator for inclusion in a VOD service, in which case the latter could decide on the content to effectively include or exclude in its offer and on how he would like to organise that content.

According to the Dutch media regulator, in such a case the provider, having the decisive influence on the choice of a media offer, is exclusively editorially responsible, thus more importance is attached to the selection of the content than to the organisation of the content.[57] Surprisingly and contrary to this, the

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[52] E. SCARAMOZZINO, *La télévision européenne: face à la TV.2.0 ?,* Brussels, Larcier, 2012, 37-38.

[53] M. COLE, "The European legal framework for on-demand services: what directive for which services?" in S. NIKOLTCHEV (ed.), *IRIS Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 44-45.

[54] W. SCHULZ and S. HEILMAN, "Editorial responsibility: notes on a key concept in the regulation of audiovisual media services", in S. NIKOLTCHEV (ed.), *IRIS Special: Editorial responsibility*, Strasbourg, European Audiovisual Observatory, 2008, 9;

[55] Recital 35 AVMSD.

[56] To overcome this uncertainty the European Audiovisual Observatory and the French DDM state that the one whose brand appears in the service is presumed to be editorially responsible for the service. They however immediately add that this is only a presumption based on economic realities and does not have any binding legal value: European Audiovisual Observatory and Direction du Développement des Médias (France), *Vidéo à la demande et télévision de rattrapage en Europe*, 113, www.ddm.gouv.fr.

[57] CvdM, "Regeling van het Commissariaat voor de Media van 22 september 2011 houdende beleidsregels omtrent de classificatie van commerciële mediadiensten op aanvraag zoals bedoeld in artikel 1.1, eerste lid, van de Mediawet 2008 (Beleidsregels classificatie commerciële mediadiensten op aanvraag 2011)", www.cvdm.nl; M. BETZEL, "Finetuning classification criteria for on-demand audiovisual media services: the Dutch approach" in S. NIKOLTCHEV (ed.), *IRIS*

Belgian CSA states exactly the opposite and attaches more importance to the 'organisation' of the content than to its selection.[58] The Belgian CSA is of the opinion that the one organising the content is in the best position to implement parental control, age verification and time limit requirements.[59]

In the UK a more detailed guidance has been adopted. According to ATVOD, a platform operator will normally not be assumed to have control over the selection of the programmes unless he has a power or veto over individual programmes.[60] Furthermore ATVOD takes into account who controls the advertising and branding around a service and who determines the relevant viewing information provided alongside the VOD programme. Such information might include the programme synopsis, rating information and other content warnings. Typically this will be the person who selects the individual programme to be included within a service.[61] Then again techniques used by platform operators to facilitate the location of content (such as alphabetical or genre indexing) would not constitute 'selection and organisation' of programmes as these are merely presentation techniques.[62]

20. Actors in the value chain who are operating in a 'grey area' can always conclude commercial agreements in which they identify the entity with editorial responsibility. In its assessments ATVOD will attach importance to such agreements, and considers them to be strongly persuasive as they provide useful evidence, but they are not necessarily determinative.[63] If for example it would be crystal clear that the media provider designated in the agreement does not have any control over the selection and organisation of programmes, the contract may be overridden by ATVOD.

The three following decisions confirm the above. On 18 January 2012 OFCOM upheld the decision of ATVOD regarding the Viacom Channels (Comedy Central, MTV and Nickelodeon) offered on the Virgin Media (VOD) platform.[64] Both parties had contractually agreed that Viacom would provide a list of available content to Virgin Media, which subsequently had the final say, as it was free to include programmes in its offer at its own discretion. The agreement however

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*Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 53-62.

[58] CSA (Collège d'autorisation et de contrôle), "Recommandation relative au périmètre de la régulation des services de medias audiovisuels", 29 March 2012, 13, www.csa.be.

[59] It should also be emphasised that according to the Belgian CSA the effective control does not need to be practised permanently. Consequently when several persons would exercise this control successively, the last one is considered to bear the editorial responsibility; See M. JANSSEN, "New services and scope: what's in, what's out revisited – The Belgian CSA recommendation", 35th EPRA meeting, Portoroz, 31 May 2012,www.epra.org; P. VALCKE and J. AUSLOOS, "Television on the Internet: challenges for audiovisual media policy in a converging media environment" (unpublished draft), 6.

[60] ATVOD, "Guidance on who needs to notify", Edition 3.1, Originally published on 19 October 2010, republished on 21 March 2011, para. 4.5, www.atvod.co.uk.

[61] *Ibid.*, para 4.6.

[62] *Ibid.*, para 4.7.

[63] *Ibid*., para 4.9.

[64] OFCOM is the independent regulator and competition authority for the UK communications industries, and acts as the appeal body for appeals against ATVOD's Scope determinations.

explicitly stated that the Viacom companies were the providers of the on-demand programme service and that those Viacom companies had editorial responsibility over the service. Given the degree of ambiguity in determining the exercise of general control over selection and organisation of programmes, ATVOD as well as OFCOM did not believe that there was a good reason to disregard the clear contractual agreements stating that the Viacom companies were the providers of the service.[65]

In a second decision of 27 April 2012 OFCOM upheld an appeal by BBC Worldwide against an ATVOD Scope Determination stating that it would be editorially responsible for an on-demand service offered on the Italian Mediaset platform.[66] Although the way of selecting and organising the content was similar to the process applied in the Viacom/Virgin Media case, the outcome was not the same due to two important differences. On the one hand the agreement did not provide expressly and unambiguously for an allocation of editorial responsibility. On the other hand Mediaset notified itself to the Italian media regulator as being the responsible provider, which implied that Mediaset was accepting editorial responsibility for the service.

In a third similar case concerning the Viacom Channels, but this time on the Sky Anytime (VOD) platform, OFCOM quashed ATVOD's scope determination on 9 July 2012 and instructed ATVOD to reconsider its decisions.[67] In its subsequent scope determinations of 3 October 2012 ATVOD stated that there was no contractual wording in the agreements that explicitly contemplated editorial responsibility. However, there were other clauses in the agreements that appeared to disclose the intentions of the parties with regard to the allocation of regulatory responsibilities between the parties. As these terms, which did not expressly refer to the 'selection' and 'organisation' of content, settled the position sufficiently clearly, it was not required or appropriate to draw closer focus on any agreed conduct and practice between parties, other than to consider whether any contractual provisions and/or agreed conduct sought to allocate editorial responsibility where it plainly did not lie in reality.[68]

21. ATVOD applies its criteria in such a way that there will always be one organisation bearing the editorial responsibility for the service. In other words ATVOD will not accept that content and/or service providers argue that the content they make available or the service they provide falls outside the scope of the Communications Act when the responsibility for selection and organisation

[65] OFCOM (Nickelodeon, Comedy Central and MTV v. Virgin Media), appeal against ATVOD Scope Determination, 18 January 2012, www.ofcom.org.uk; ATVOD issued its three scope determinations in the three respective cases on 6 July 2011, www.atvod.co.uk .

[66] OFCOM (BBCW on Italian Mediaset), appeal against ATVOD scope determination, 27 April 2012, www.ofcom.org.uk; ATVOD (BBCW on Italian Mediaset), Scope determination, 11 May 2011, www.atvod.co.uk.

[67] As OFCOM already judged on two appeals addressing the same issue, it was of the opinion that it had provided the appropriate guidance; OFCOM (Nickelodeon, Comedy Central and MTV v. Sky Anytime), appeal against ATVOD scope determination, 9 July 2012, www.ofcom.org.uk.

[68] ATVOD (Nickelodeon, Comedy Central and MTV v. Sky Anytime), Scope determinations (reconsiderations), 3 October 2012, www.atvod.co.uk.

is divided between two or more persons.[69] The AVMSD itself however does neither provide for any guidance nor any solution for this issue. On the basis of the text of the AVMSD one could even argue that there is simply no media service provider when the effective control over the selection of the programmes on the one hand and the organisation on the other hand is divided between two or more actors. In such case the ECD would apply on both actors resulting in a lower level of protection for the user and creating legal uncertainty.[70] The initiative of ATVOD has been a step in the right direction, but in order to ensure a consistent application of the AVMSD throughout the European Union, it is recommended to resolve the issue at a European level, and not merely at national level.

### 2.4 The way forward

22. The AVMSD is based on the concept of editorial responsibility that may have worked (well) for the audiovisual landscape of the past, but it is not at all adapted to a connected media environment. As we have demonstrated, the concept of editorial responsibility does not reflect today's and tomorrow's economic realities and is not capable of catching all new (hybrid) actors within the scope of the AVMSD, while it is quite clear that those new actors take up a crucial role in the delivery of audiovisual content, and that they should be subject to at least a part of the AVMSD rules.[71]

*Take the Samsung smart hub for example. This portal operated by the South Korean device manufacturer consists of different tabs.*

- *Through the 'On TV' tab, users can watch live TV: linear content subject to the stringent content obligations of the AVMSD and whereby every single broadcaster is editorially responsible for its own channel;*
- *Through the 'Movies & TV Shows' tab, users can select and watch video on demand (for a fee): non-linear content subject to the less stringent content obligations of the AVMSD for which Samsung would be editorially responsible;*
- *Through the 'Apps' tab, users can get access to applications such as Netflix, YouTube, Hulu, Facebook, Skype, and many more: the content available in this grey area may or may not be regulated and if the content would be regulated it is not always clear who bears the editorial responsibility.*

Without a modification of the legislative framework, unfair competition can be expected between the usual suspects, such as broadcasters who bear editorial responsibility and need to comply with the provisions of the AVMSD, and new actors, such as platform or portal operators who do not bear any editorial

[69] ATVOD, "Guidance on who needs to notify", Edition 3.1, Originally published on 19 October 2010, republished on 21 March 2011, para. 4.8, www.atvod.co.uk.
[70] R. CRAUFURD SMITH, "Determining regulatory competence for audiovisual media services in the European Union", *Journal of Media Law* 2011, 3(2), 268.
[71] J.B. MIR, "Legislators' and regulators' expectations in the field of on-demand audiovisual media services" in S. NIKOLTCHEV. (ed.), *IRIS Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 99.

responsibility in the sense of the AVMSD. Although they are competing for the same audience, they do not need to comply with the same rules. Moreover users do no longer know what kind of protection they may expect when 'watching' TV.[72]

23. In respect of the key position of the gatekeepers in the content delivery value chain the inevitable question needs to be raised as to whether or not the definition of 'editorial responsibility' should be revised or enlarged in order to restore the balance and to oblige all new actors to comply with the same obligations that are imposed upon the audiovisual media service providers.[73] An enlargement of the definition of editorial responsibility has been previously proposed.[74] Although the creation of a level playing field between all audiovisual media service providers should be ensured, a modification of the definition of editorial responsibility may be one step too far and impose disproportionate obligations on the gatekeepers. While they certainly have a degree of responsibility, that responsibility cannot be assimilated with the degree of responsibility in respect to the broadcasters. For instance it would not be unreasonable to hold a gatekeeper liable for the distribution of content that is harmful for minors, while it is impractical and not recommended to hold that provider liable for distributing a movie containing unlawful product placements via its platform.[75] As the current situation creates legal uncertainty, legislative action is required. Nevertheless the policy goals of the AVMSD should be realised in an efficient way, and overregulation of this intermediary layer should be avoided. Therefore instead of imposing identical obligations on content providers and gatekeepers by merely modifying the definition of editorial responsibility, a better solution seems to be the introduction of new and different headings and definitions in which the gatekeepers will only be subject to a reduced set of core obligations.[76]

24. Inspiration can be found in Belgium, where the Flemish and French Communities have already introduced a third category of actors in their respective media legislation[77], that of 'content distributors'.[78] The 'content

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[72] IPSOS MORI, "Protecting audiences in the era of convergence and connected TV: Ofcom Research, Deliberative Research Report", 25 January 2012, www.ofcom.org.uk.

[73] One could go from 'selection' to 'search and navigation' and/or from 'ex ante' control to 'ex post' control of content.

[74] T. GIBBONS, "Jurisdiction over (television) broadcasters: criteria for defining 'broadcaster' and 'content service provider'" in EMR (ed.), *The future of the television without frontiers directive*, Vol. 29, EMR Series, Baden-Baden, Nomos, 2005, 58-60.

[75] M. ARINO, "Online video content: Regulation 2.0? An analysis in the context of the new Audiovisual Media Services Directive", *Quaderns del CAC*, Issue 29, 10; O. HERMANNS and P. MATZNELLER, "Whose boots are made for walking? Regulations of on-demand audiovisual services" in S. NIKOLTCHEV (ed.), *IRIS Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 27.

[76] P. VALCKE and D. STEVENS, "Graduated regulation of 'regulatable' content and the European Audiovisual Media Services Directive: One small step for the industry and one giant leap for the legislator?", *Telematics and Informatics* 2007, 299-300.

[77] Decreet betreffende de radio-omroep en de televisie van 27 maart 2009, *BS* 30 April 2009 (hereafter: 'Flemish Media Decree'); Décret coordonné sur les services de media audiovisuels du 26 mars 2009, *BS* 24 July 2009; For reasons of simplicity we will hereafter only refer to the Flemish Media Decree.

distributor' has been defined as the legal entity offering one or more audiovisual media service (usually edited by third parties).[79] Typical examples are operators of digital TV or IPTV platforms that offer packages of channels and services provided by broadcasters, production houses or other media companies.[80] Those actors are not subject to the same (content-related) obligations as the audiovisual media service providers, but have been subjected to a specific regime. First of all they are obliged to notify the start of their service beforehand to the media regulator and file an annual report.[81] In addition to these formal obligations the content distributors in the Flemish Community are equally subject to a number of substantive obligations. First of all, content distributors need to comply with a number of information obligations.[82] Furthermore commercial communication provided by a content distributor needs to be readily recognisable as such and needs to comply with the minimum rules applicable to all audiovisual media service providers.[83] Moreover content distributors should take all reasonable technical measures (e.g. parental control) in order to ensure the protection of minors.[84] When necessary for the access to specific digital media services the content distributor can be obliged to grant access to its electronic programme guide under fair, reasonable and non-discriminatory conditions. In addition, conditions can be imposed for the implementation, access and presentation of an EPG.[85] Of great importance for the content distributors is the special liability regime that has been put in place, and that is similar to the regime of the ECD. A content distributor cannot be held liable for the content transmitted by the broadcasters when the content distributor does not modify the information (in the case of linear and non-linear services), when he does not initiate the transmission (in the case of non-linear services) and when he does not select the recipient of the transmission (in the case of non-linear services).[86] Finally, *must carry* and *may carry* obligations can be imposed on certain content distributors.[87]

25. The role of the content distributors as defined in the Belgian media legislation is similar to the role of gatekeepers: they are both to be considered as important intermediaries that can determine to a large extent which information will reach the end user. Hence there is no reason why similar obligations could and should not be imposed on these new actors. Applying similar obligations on

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[78] Next to the media service providers who need to comply with the legislation on audiovisual content, and the network operators who need to comply with the regulatory framework for electronic communication.
[79] Article 1 (7) of the Flemish Media Decree.
[80] Other examples include actors which fulfil the role of a portal providing a forum for users to make audiovisual content publicly available and guiding people with a specific profile to content of possible interest: P. VALCKE and D. STEVENS, "Graduated regulation of 'regulatable' content and the European Audiovisual Media Services Directive: One small step for the industry and one giant leap for the legislator?", *Telematics and Informatics* 2007, 299-300.
[81] Articles 177 and 182 of the Flemish Media Decree.
[82] Article 179 Flemish Media decree: name, place of establishment, other contact details (including email address), VAT number and the nature and content of the offered service.
[83] Article 180 para 1 of the Flemish Media Decree.
[84] Article 180 para 2 of the Flemish Media Decree.
[85] Article 181 of the Flemish Media Decree.
[86] Article 183 of the Flemish Media Decree.
[87] Article 185-188 of the Flemish Media Decree.

gatekeepers would already be a proper first step to meet several of the issues highlighted in the Green Paper on the convergence of media services.[88] In our opinion the introduction of the concept of 'content distributor' would in any event clarify the position of the traditional distributors of audiovisual content as well as of portal operators (such as the Samsung Smart TV hub, Google TV or Apple TV) and platform operators (such as YouTube).[89]

When issuing new rules, attention should be paid to the different kinds of services, as such a thing as 'the' intermediary or 'the' gatekeeper does not exist. Moreover one should be careful not to focus too heavily on the existing services today, as tomorrow's services may be different.[90] For that reason and in order to preserve the technology neutral character of the AVMSD it seems better to adopt rather general rules and principles that do not only cover today's services but that will still be relevant for new services, even if that would require a clarification of the provisions by the Court of Justice of the European Union afterwards.[91]

26. The introduction of a new category of actors would prove to be very useful but would not resolve the problem of split control in all cases. Since the position of the gatekeepers will be more clear than before, the currently existing 'grey zone' will be significantly reduced, but would not be excluded entirely. In order to create legal certainty in cases where indeed two actors have an important role in selecting and organising content, it might be a good idea to further specify the concept of editorial responsibility without adapting it in such a way that all intermediaries would be covered by it.

## 3 The country of origin principle under pressure

27. In the first section we have identified who can be considered as a media service provider and equally who should take up some of the obligations of the AVMSD. The second question that deserves our attention is where the media service provider and the gatekeepers are established. In other words: which Member State has jurisdiction over an audiovisual media service. In particular the aim is to identify the problems that may arise in determining jurisdiction

[88] European Commission, Green paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", 24 April 2013, COM(2013) 231 final: e.g. the protection of minors, media freedom, pluralism and commercial communications.

[89] It must be stressed that via iTunes Apple TV also offers its own catalogue of VOD content for which it obviously holds the editorial responsibility. Apart from this it also offers access to catalogues of third parties such as Netflix, Hulu and HBO and live broadcasts from ESPN and Sky News.

[90] In this respect can be referred to the discussions on the draft Regulation on data protection that heavily focus on the existing business models (in particular on social networks).

[91] It should be observed that there is currently a lack of relevant case law dealing with the scope of the AVMSD. Under the Television Without Frontiers Directive can be referred to the *Mediakabel* case (ECJ C-89/04, *Mediakabel*, 2 June 2005, www.curia.eu), and under the AVMSD can only be referred to a referral that was held inadmissible (ECJ C-517/09, *RTL Belgium*, 22 December 2010, www.curia.eu).

over gatekeepers on the one hand, and over media service providers established outside the European Union on the other hand.

## 3.1 Determining the competent jurisdiction within the EU

### 3.1.1 The country of origin principle and its derogations

28. The country of origin principle entails that content only needs to be checked once in the home county, rather than in multiple countries. As there can only be one Member State that is competent over an audiovisual media service provider, the authorities of that Member State must ensure that all audiovisual media services originating there comply with their national rules implementing the AVMSD. The main objective of this principle is to avoid cases where there would be a vacuum of jurisdiction or double jurisdiction.[92]

The jurisdiction criteria covering linear and non-linear audiovisual media services are laid down in article 2 AVMSD.[93] As a general rule a media service provider shall be deemed to be established in a Member State when the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that same Member State.[94] Secondly, when a media service provider has its head office in one Member State but the editorial decisions on the audiovisual media service are taken in another Member State, preference is given to the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If the workforce is divided equally between both Member States, jurisdiction is granted to the Member State where the provider has its head office. When a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State.[95] Thirdly, when decisions on the audiovisual

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[92] For a detailed commentary of article 2, see E.J. DOMMERING, "[TWF Directive] Article 2 (Country of Origin Principle)" and "[AVMS Directive] Article 2 (Country of Origin Principle)" in O. CASTENDYK, E.J. DOMMERING, and A. SCHEUER (eds.), *European Media Law*, Alphen a/d Rijn, Kluwer Law International, 2008, 337-357 and 847-850; B. DRIJBER, "Jurisdictie in de Richtlijn audiovisuele mediadiensten", *Mediaforum* (NL) 2008, afl. 2, 62-67; A. HEROLD, "Country of Origin principle in the EU market for audiovisual media services: consumer's friend or foe?", *J. Consum. Policy* 2008, nr. 31, 5-24; J. HÖRNLE, "Country of origin regulation in cross-border media: One step beyond the freedom to provide services?', *International and comparative law quarterly,* Vol. 54, January 2005, 89-126; T. MCGONAGLE and A. VAN LOON, "Jurisdiction over broadcasters in Europe: Report on a round-table discussion", in S. NIKOLTCHEV (ed.), *IRIS Special: Jurisdiction over broadcasters in Europe*, Strasbourg, European Audiovisual Observatory, 2002, 1-21.

[93] For a schematic overview of all hypotheses, see C. DUMONT and E. MACHET, *Background document plenary session "Content Regulation and New Media: Jurisdiction challenges in a VOD environment"*, Brussels, 34th EPRA meeting, Brussels 5-7 October 2011, 2, www.epra.org; It must be emphasised that the AVMSD does not make a distinction between linear and non-linear media services for the determination of the competent jurisdiction, as one and the same provider may provide both type of services.

[94] Article 2.3(a) AVMSD.

[95] Article 2.3(b) AVMSD.

media service are taken in a third country but the media service provider has its head office in a Member State (or vice versa), jurisdiction is given to the concerned Member State.[96] Fourthly, for media service providers who do not have an establishment in the EU and when decisions on the audiovisual media service are also taken outside the EU, jurisdiction can be determined through the use of a satellite up-link in a Member State or the use of Member State's satellite capacity.[97] Fifthly and finally, if jurisdiction cannot be determined in accordance with the foregoing, the competent Member State shall be that in which the media service provider is established within the meaning of articles 49 to 55 of the Treaty on the Functioning of the European Union (TFEU).[98]

29. The county of origin principle as laid down in article 2 AVMSD contains a clear set of rules for linear media services. It however often remains difficult to determine the applicable law for non-linear media services. While traditional broadcasters often have a close link with one culture or one jurisdiction, this is not always true for non-linear media services. Moreover we are often confronted with virtual organisations that are distributed all over Europe, or even all over the world, which makes it unclear which national law should apply. Additionally nowadays providers make use of delocalised technologies such as cloud computing, peer-to-peer networks or the Internet in general, making it even more difficult to determine the competent jurisdiction.[99]

30. In accordance with article 3(1) AVMSD Member States shall in principle ensure the freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services originating from other Member States. They can however adopt national rules that are stricter than the AVMSD, but such rules can only be applied to providers in that jurisdiction. In exceptional cases Member States may derogate from the freedom of reception when there are serious public policy concerns. Article 3 AVMSD contains a different set of conditions for linear services and for non-linear services.[100]

### 3.1.2 Jurisdiction over gatekeepers

31. The country of origin principle in its current form is good but certainly not perfect and could be clarified on certain points in order to facilitate the determination of the competent jurisdiction for linear and non-linear media

[96] Article 2.3(c) AVMSD.
[97] Article 2(4) AVMSD.
[98] Article 2(5) AVMSD; It must be observed that the concept of establishment within the meaning of Article 52 et seq. TFEU involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; ECJ, C-221/89, 25 July 1991, *Factortame*, para 20, www.curia.eu.
[99] L. LEITNER and E. VALGAEREN, "The new audiovisual media services directive and its addressees: how will the industry tackle its new challenges?" in S. NIKOLTCHEV (ed.), *IRIS Special: The regulation of on-demand audiovisual services: chaos or coherence?*, Strasbourg, European Audiovisual Observatory, 2011, 82.
[100] ECJ C-244/10 and C-245/10, *Mesopotamia Broadcast A/S METV and Roj TV A/S v. Bundesrepublik Deutschland*, 22 September 2011, para 45; ECJ E-8/97, *TV1000 Sverige AB v. The Norwegian Government,* 12 June 1998 (advisory opinion), para 24; ECJ C-34-36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Forlag AV and TV-shop I Sverige AB*, 9 July 1997, paras 55-62; ECJ C-11/95, *Commission v. Belgium*, 10 September 1996, paras 34 and 86-93.

services. As the principle refers back to the concept of 'audiovisual media service provider' and consequently to the concept of 'editorial responsibility', it becomes problematic to apply this principle to gatekeepers. As we have already demonstrated, not all elements of the concept of editorial responsibility are fulfilled in respect of gatekeepers.

As we proposed to include gatekeepers in the regulatory framework, another connection factor needs to be put in place to determine the competent jurisdiction. In the first place this new connection factor needs to be able to realise the core objective of the country of origin principle, which is to ensure that content only needs to be checked once. Secondly, in the search for an appropriate connection factor we should also take into account the degree of diversity within the group of gatekeepers. There does not exist such thing as 'the' gatekeeper. As a consequence the criterion cannot be too detailed. Furthermore the connection factor should be future proof and cannot focus too much on today's business model, as the media landscape may be totally different ten years from now. Finally also the technology neutral character of the AVMSD should be respected and therefore we should not construe a new regulation only around one specific technology.[101]

32. A good alternative connection factor can be found in the fifth paragraph of article 2 AVMSD, which provides for a fall-back solution when it would be impossible to designate the competent jurisdiction over an audiovisual media service provider on the basis of the rules laid down in paragraph 3 or 4 of article 2 AVMSD. Article 2(5) AVMSD determines the competent jurisdiction on the basis of the establishment of the provider within the meaning of articles 49 to 55 TFEU. This implies that the Member State where the provider pursues an actual economic activity through a fixed establishment for an indefinite period is competent over that provider.[102]

The criterion of establishment is also applied in the ECD to determine the competent jurisdiction over the provider of an information society service. In accordance with article 3 ECD, each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in that Member State.[103] In cases of service providers distributed over several Member States it might not be easy to determine the country of origin. Therefore recital 19 ECD further specifies that where a provider has several places of establishment, jurisdiction is given to the Member State where the provider has the centre of his activities

[101] In view of the technology neutral character it would not be a good idea to allocate jurisdiction, for example on the basis of the location where the set-top box is offered for sale. Nowadays set-top boxes are still the gateway via which users need to enter the platform or portal of the digital TV provider, this however might not necessarily be the case within a number of years. Moreover such connection factor would also not prove to be useful to regulate online video platforms such as YouTube, which are not directly linked to a closed ecosystem.

[102] ECJ C-221/89, 25 July 1991, *Factortame*, para 20, www.curia.eu.

[103] Article 2(c) ECD clarifies that this is the place where the service provider effectively pursues an economic activity using a fixed establishment. Furthermore this provision clarifies that the presence and use of technical means and technologies required to provide the services do not in themselves constitute an establishment of the provider.

relating to that particular service. Similar to the AVMSD, factors such as where the management decisions are taken, where the content is produced and where the workforce is located are relevant.[104] Secondly, if an information society service provider established in several Member States offers several services, one could designate different countries of origin for different services, or for particular aspects of those services (e.g. advertising, selling and provision of content) as each service or aspect of a service can be provided from a different establishment.[105]

Furthermore it should be emphasised that the ECD contains a specific list of derogations to the country of origin principle. The ECD explicitly excludes copyright and consumer protection from the scope of this principle, allowing Member States to apply their respective national copyright and consumer protection laws on cross-border information society services.[106]

33. Compared to the detailed rules set out in article 2(3) AVMSD, the concept of establishment, as applied in the ECD, is rather general. Nevertheless it seems a practical criterion to allocate the jurisdiction over gatekeepers while respecting the country of origin principle.

Traditionally content distributors, such as Telenet or Sky, have a close link with the Member States in which they operate. With the rise of internet-based platforms such as YouTube or DailyMotion that close link is disappearing as they target the entire European Union. Hence, application of the 'establishment' criterion to these players, in the assumption that they have an establishment in the EU, might be a good idea. Member States might however be reluctant to apply the same criterion to the more traditional content distributors, as this would imply that those players could automatically provide their hybrid services in all other Member States.[107]

Another point of attention concerns the level of consumer protection. A consequence of applying the 'establishment' criterion and more generally of bringing gatekeepers under the scope of the AVMSD, is that the hybrid services offered by those players and which are currently situated in a grey area, will no longer be subject to the ECD as the AVMSD relates to the ECD as a '*lex specialis*'.[108] While the country of origin principle as established in the ECD does

[104] J. HÖRNLE, "Country of origin regulation in cross-border media: One step beyond the freedom to provide services?', *International and comparative law quarterly,* Vol. 54, January 2005, 114-115.
[105] *Ibid.,* 114-115.
[106] Article 3 (3) ECD (+ its annex).
[107] From a theoretical point of view this is certainly true. It should however be emphasised that those actors still need to find a local network operator via which they can distribute their own services. Given the fact that the role of content distributor and network operator is often fulfilled by one entity, it will not be easy to acquire the permission to offer a 'competing' service on the same network. For those reasons an expansion of Telenet to a neighbouring country will not happen in the near future. The foregoing however does not apply to the Internet, via which every provider can offer its services.
[108] P. VALCKE and E.J. DOMMERING, "Commentary on the E-Commerce Directive", in O. CASTENDYK, E.J. DOMMERING and A. SCHEUER (ed.), European Media Law, Alphen a/d Rijn, Kluwer Law International, 2008, 1088.

not apply to consumer protection, such exemption cannot be found in the AVMSD.

### 3.1.3 Measures against the circumvention of national legislation

34. In addition to the possible derogations to the 'freedom of reception' principle, Member States can in certain circumstances also take measures against the circumvention of national legislation. While the rules governing the derogations are still viable in a connected media environment, this does not seem to be the case for the rules governing the circumvention of national legislation.

On the one hand Member States are free to require media service providers under their jurisdiction to comply with more detailed or stricter rules[109] On the other hand Member States are in such a case allowed to adopt appropriate measures against the broadcaster established under the jurisdiction of another Member State but providing a television broadcast which is wholly or mostly directed towards its territory, in order to circumvent the stricter rules (article 4(2) and 4(3) AVMSD).[110] Factors determining whether or not a country is targeted include the origin of advertising or subscription revenues, the main language, the targeted advertising, etc.[111]

In order to resolve disputes between different Member States regarding linear media services the articles 4(2)-4(5) AVMSD contain a twofold procedure. As a first step the authorities of the country of destination can request the authorities in the country of origin to issue a non-binding request for the broadcaster to comply with the rules of the targeted country. As a second step the authorities in the country of destination can unilaterally impose binding restrictions when no satisfactory solution can be reached. The restrictions need to be objectively necessary and proportionate to the pursued objectives, and subject to the Commission's prior approval.[112]

35. For one reason or another the AVMSD only contains such procedure for linear media services, but not for non-linear services. Taking into account the rise of VOD and connected TV, a similar procedure for those services would be desirable. Consequently two proactive Member States have adopted their own procedure to tackle the circumvention of their national legislation. In France the law on freedom of communication states that when a television service or a on-

[109] Article 4(1) AVMSD.
[110] ECJ C-23/93, *TV10 v. Commissariaat Voor de Media*, 5 October 1994, para. 16 and 20-22; ECJ C-33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging*, 3 December 1974, para 13.
[111] Recital 42 AVMSD.
[112] Binding measures could include the banning of: retransmission (cable, terrestrial, IPTV), advertising for the broadcasts or programmes, advertising of local companies (under own jurisdiction), publication in printed or electronic programme guides and the sale of subscriptions/smart cards for pay-TV; These provisions are a mere codification of the U-turn doctrine of the CJEU as established in the following cases: ECJ C-23/93, *TV10 v. Commissariaat Voor de Media*, 5 October 1994; ECJ C-33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging*, 3 December 1974.

demand audiovisual media service whose programmes are wholly or mostly directed at the French public is established on the territory of another Member State of the European Community or part of the European Economic Area, with the main objective to escape the application of French regulation, it is considered to be subject to the rules applicable to services established in France, in conditions set by a Decree of the Conseil d'Etat.[113] Also the French Community of Belgium provides for the possibility to intervene against an on-demand media service whose provider is established in another Member State with the aim to circumvent the rules applicable to the services falling under its jurisdiction.[114] Contrary to France, it is not a full extension of article 4(2) AVMSD as a consultation of the European Commission is not required.

The question arises whether Member States can take such initiatives, as the AVMSD does not provide for a legal basis. It can be hardly claimed that the European legislator would have overseen non-linear media services when adopting an anti-circumvention procedure. On the one hand such interpretation would however lead to a gap in the level of protection offered to Member States against providers of on-demand services who circumvent their national law. On the other hand that gap could be filled on the basis of the general abuse of law principle, which would permit the aforementioned Belgian and French initiatives.[115]

### 3.2 Jurisdiction over content delivered over the Internet from countries outside the EU but targeting the EU

36. The country of origin principle in its current form aims to ensure that only one EU country is competent over a media service provider. The AVMSD however mainly focuses on media service providers that are established in the European Union. With media services from outside the EU becoming increasingly accessible via the Internet and satellite, the application of the country of origin principle becomes inadequate.[116] Providers of services such as Google TV, Apple TV or Netflix, which are all operated from the United States, can at the moment offer their services to European consumers without being subject to the AVMSD. Given the ease of offering media services over the Internet targeted to European consumers and the fear of intrusion by the large American media companies a revision of the country of origin principle should be borne in mind when amending the AVMSD. A mere revision of the current content-related obligations will not prove to be very efficient when the rules governing the determination of jurisdiction remain unchanged. Quite the contrary, European players will always

[113] Article 43-10 of the French law of 30 September 1986 on Freedom of communication; Article 4 of the Decree of 17 December 2010 on television services and on-demand audiovisual media services retransmitted from other Member States sets identical conditions for linear and non-linear services, and extends as such the scope of article 4(2) AVMDS to non-linear services.
[114] Article 159 para. 6 of the coordinated Decree on audiovisual media services.
[115] R. CRAUFURD SMITH, "Determining regulatory competence for audiovisual media services in the European Union", *Journal of Media Law* 2011, 3(2), 281-282.
[116] European Commission, Green paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", 24 April 2013, COM(2013) 231 final, 11.

be subject to even more stringent rules, while the non-EU based providers are not, resulting in an even bigger *un*level playing field. [117]

37. The idea of the AVMSD is to ensure that not only European broadcasters but also broadcasters, who are not established in the EU but who have an impact on EU audiences are covered by the AVMSD. For that reason article 2(4) AVMSD stipulates that audiovisual media services fall under the jurisdiction of a EU Member State if the satellite up-link is located in that Member State or the satellite capacity used is appertaining to that Member State.[118]

As stated in the Green Paper the AVMSD rules cannot be extended to content delivered over the Internet from countries outside the EU, but targeting the EU. This is true, yet that statement should be nuanced. As the AVMSD remains silent on this issue, every Member State would be free to apply its own national rules, which are to a large extent an implementation of the minimum rules set out in the AVMSD, to providers established outside the EU.[119] On the one hand, this imposes a significant burden upon the non-EU based providers, but on the other hand this would equally create an incentive for non-EU based providers to establish themselves in the European Union. Nevertheless it is recommended to regulate those players within the European regulatory framework. With a move from the use of satellites to the use of the Internet to broadcast audiovisual content, it is quite clear that providers using these new technologies have an impact on EU audiences.

38. The first question that comes to mind is whether the location of the servers would be a viable criterion to determine the competent national jurisdiction for non-EU based players. The answer to that question should be no for at least the following three reasons. Firstly, in a decision of 12 July 2011 the ATVOD stated that the location of the servers is irrelevant for determining who is editorially responsible for a VOD service.[120] Secondly, also in the context of the

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[117] As an example we can refer to the ATVOD Playboy case. A Playboy company has been fined £100,000 for breaches of ATVOD rules in relation to two adult on-demand television services. Consequently the services have been transferred to a non-UK company and may now escape UK jurisdiction. See T. BALLARD, "Remote gambling and online TV: can regulation work on a point of consumption basis?", 1 February 2013, blog.harbottle.com.

[118] T. KRIEPS, "Jurisdiction and co-operation: the example of Luxembourg", in S. NIKOLTCHEV, (ed.), *IRIS Special: Ready, set… Go? – The audiovisual media services directive*, Strasbourg, European Audiovisual Observatory, 2009, 97-101.

[119] C. BRON, "Accompanying the transposition of the audiovisual media services directive", in S. NIKOLTCHEV (ed.), *IRIS Special: Ready, set… Go? – The audiovisual media services directive*, Strasbourg, European Audiovisual Observatory, 2009, 9-28; In their respective national legislation, most Member States however merely refer to the country of origin principle as laid down in article 2 of the AVMSD, leaving the non-EU based providers unregulated. In this respect we can refer to article 1 of the Dutch Media Act, which in its turn merely refers to article 2 AVMSD.

[120] ATVOD (Coffee Shorts), Scope determination, 12 July 2011, www.atvod.co.uk: "*The programmes on Coffeeshorts appear to have been selected and organised into a coherent catalogue of viewing options with a distinct editorial proposition. In your representations you suggest that you may not be the 'media service provider', as every aspect of the video serving comes from a US company. However, in terms of the Act you do appear to hold 'editorial responsibility' for the service and are therefore the provider of that service, as you exercise general control over both selection and organisation of the programmes. The location of the server is irrelevant. S368A(4) of*

ECD, the location of the servers is considered to be irrelevant for determining the establishment of, and thus jurisdiction over, the service provider. Article 2(c) ECD explicitly states that the presence and use of technical means and technologies required to provide the (information society) service do not, in themselves, constitute an establishment of the provider.[121] And thirdly, on 25 June 2013 the Advocate-General of the Court of Justice of the European Union issued an Opinion in the *Google Spain* case, in which he implicitly stated that the location of the servers is not relevant for determining the applicability of the Data Protection Directive [122] on search engines containing data about EU citizens.[123]

As the location of the servers does not prove to be a valuable connection factor, we will analyse how the problem has been addressed in other areas of law.

### 3.2.1 The extraterritorial application of EU law: Old Wine…

39. Due to the rise of the Internet, the issue of the extraterritorial application of EU law might seem new. However it is not. The topic has already been discussed within the fields of VAT law and EU competition law.

In 2005 the European Commission already reflected on the question of applying the rules of the Television without Frontiers Directive (the predecessor of the AVMSD) to media providers without an establishment in the EU.[124] Back then the proposed solution consisted of setting up a specific registration procedure, similar to the procedure established by the VAT Directive.[125] In line with this procedure any media service provider not established within the EU could opt for registration in one Member State, and accordingly he would have to comply with the relevant existing provisions in that Member State. As a result of the registration in a Member State, the said media provider would have the possibility of benefiting from the country of origin principle without being

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*the Act makes clear that editorial control over a service is possible regardless of editorial control over the content of individual programmes or of the broadcasting or distribution of the service.*"; After a reassessment of the service, the ATVOD withdrew its previous decision, which had been at appeal, on 2 February 2012.

[121] Also recital 19 ECD stipulates that "*the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity*".

[122] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ.L* 281, 23 November 1995, 31-50.

[123] ECJ C-131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*, Opinion of AG Jaaskinen of 25 June 2013, para. 67: "*processing of personal data takes place within the context of a controller's establishment if that establishment acts as the bridge for the referencing service to the advertising market of that Member State, even if the technical data processing operations are situated in other Member States or third countries*."

[124] European Commission, Issues Paper for the Liverpool Audiovisual Conference: "Rules applicable to Audiovisual Content Services", July 2005, 7-8, ec.europa.eu.

[125] Council Directive 2002/38/EC of 7 May 2002 amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services, *Oj.L.* 128, 15 May 2002, 41-44.

obliged to have an establishment within the EU. On the other hand, if a non-established service provider would choose not to register in a Member State, any of the Member States where the service was available would be entitled to regulate, and as a result the service in question would be subject to the jurisdiction of several Member States.[126]

40. The same question has been raised in the field of European competition law. The European Commission and European Courts have adopted a broad view on the territorial scope of European competition law. Articles 101 and 102 of the Treaty on the Functioning of the European market apply to practices that "*may affect trade between Member States*",[127] while the EC Merger Regulation applies to "*all concentrations with a Community dimension*". [128] In the context of competition law infringements, any country is authorised to apply its competition rules to anticompetitive practices occurring within its borders or where part of the offences takes place. [129] After some reluctance, the European courts have embraced the '*effects doctrine'*. In accordance with this doctrine EU jurisdiction can apply when a direct, substantial and foreseeable effect exists within the Union.[130]

Applying the effects doctrine to media providers established outside the EU implies that they would need to comply with the rules of the AVMSD as soon as their media services have a direct, substantial and foreseeable effect on EU audiences. The criterion however does not provide any further guidance. When we would apply the doctrine on a national level we can only conclude that every Member State in which the media service would have a direct, substantial and foreseeable effect will be able to apply its national media legislation to that service. Given that media providers from outside the EU at the moment cannot invoke the country of origin principle and Member States are already free to apply their national rules, it becomes clear that applying the competition law principle will lead to the same result, and therefore is not helpful for our case.

### 3.2.2 ...in new bottles: the data protection case

41. In the year 2013, the issue of jurisdiction over services offered by non-EU based companies to European consumers is not only under discussion in the

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[126] N. NIKOLINAKOS, *EU Competition law and regulation in the converging telecommunications, media and IT sectors,* Kluwer law international, 2006, 588-592.

[127] Articles 101 and 102 of the Treaty on the Functioning of the European Union, *Oj.L.*. 83, 30 March 2010, 47-199,err, *0j.L.*. 181, 6 July 2010.

[128] Article 1 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), *Oj.L.* 24, 29 January 2004, 1-22.

[129] A. THEMELIS, "The Internet, jurisdiction and EU competition law: the concept of 'over-territoriality' in addressing jurisdictional implications in the online world", *World Competition* 2012, Volume 35, issue 2, 329.

[130] ECJ C-89/85, *Ahlstrom v. Commission (Wood Pulp*), 27 September 1988; CFI T-102/96, *Gencor Ltd v. Commission*, 25 March 1999, www.curia.eu; A. LAYTON and A.M. PARRY, "Extraterritorial jurisdiction – European responses", *Houston Journal of International Law* 2004, Vol. 26.2, 318-319; For example, the effects doctrine allows applying EU competition law on price fixing agreements concluded outsides the territory of the EU provided that the fixed price is implemented in the European Community.

field of media law. Also in the field of data protection law the topic is heavily discussed.

Under the current Data Protection Directive (hereafter: 'DPD'), the objective is twofold, and similar to the objective of the AVMSD: avoiding gaps where no data protection laws would apply and avoiding the double or multiple application of national data protection laws.[131] This objective is mirrored in the structure of article 4 DPD, which governs the determination of the applicable national law. At the core of this article lays the country of origin principle.

When the processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of one Member State, the data protection law of this Member State applies to the processing.[132] When the same controller is established on the territory of several Member States, each of these establishments must comply with the obligations laid down by the national law applicable. In data protection law, this is not seen as an exception to the country of origin principle but rather as its strict application. If a controller chooses to have several establishments, rather than only one, he cannot benefit from the advantage that complying with one national law is enough for his activities throughout the whole European Union. [133] The application of the country of origin principle is justified in an internal market where national laws are harmonised and offer an equivalent level of protection. That is however not the case when the data controller is established in a third country, of which the national legislation is not harmonised and does not necessarily offer an equivalent level of protection. Hence the country of origin principle can no longer serve its purpose of determining the applicable law, and another connection factor needs to be applied.[134] For that reason article 4 DPD stipulates that when the data controller is not established on Community territory but for purposes of processing personal data makes use of equipment, automated or otherwise, on the territory of a Member State, the national law of that same Member State applies unless such equipment is only used for purposes of transit through the territory of the Community.[135]

42. Similarly to the use of a satellite up-link under the AVMSD, the 'use of equipment' criterion under the DPD may have functioned well in 1995, at the time of adoption of the DPD. In a world characterised by decentralised transmission networks, such as the Internet, the criterion becomes more difficult to apply. On the one hand it could result in applying the DPD to legal entities having no material connection to Europe other than the fact that they

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131 Proposal for a Council Decision in the field of information security, COM (90) 314 final, 13 September 1990, 21-22; Amended Proposal for a Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, COM (92) 422 final.

132 Article 4 (1)(a) DPD.

133 Article 29 WP, "Working document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based web sites", 5035/01/EN/Final WP 56, 6.

134 *Ibid.,* 7.

135 Article 4 (1)(c) DPD.

communicate electronically with European users.[136] On the other hand European consumers may be deprived of the protection by European data protection legislation when non-EU based controllers who are not using equipment in Europe, are processing their personal data.

As the European Commission feared that large US corporates would benefit from the EU's market while not being subject to the European data protection legislation, new extraterritorial provisions have been proposed in the draft Regulation on data protection, which is to replace the current DPD.[137] For data controllers established in the European Union the country of origin principle is maintained.[138] For data controllers not established in the European Union, the draft Regulation introduces extraterritorial effects for the processing of personal data of data subjects residing in the Union, where the processing activities are related to the offering of goods or services to such data subjects in the Union, or to the monitoring of their behaviour ('profiling'). [139] By introducing such extension of the territorial applicability, the draft Regulation tries to ensure that European individuals are not deprived of the protection to which they are entitled under the European legislative framework.[140] As it however may be difficult to enforce the draft Regulation or its sanctions against non-EU based data controllers, the draft Regulation provides for an obligation to designate a representative in the European Union.[141]

43. Although there are substantial differences between the regulation of privacy and data protection and the regulation of audiovisual media services, both are characterised by national traditions.[142] Equally in both domains the protection of the data subject or viewer is one of the key objectives. As has been demonstrated, the country of origin principle as established in the AVMSD does not cover audiovisual media services offered over the Internet from countries outside the EU, but targeting the EU. In order to restore the level playing field between EU-based and non-EU based providers it would be a good idea to include in the AVMSD a provision obliging non-EU based media service providers

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136 A. PATRIKIOS, "Chapter 5: application of the law", in E. USTARAN (ed.), *European privacy: law and practice for data protection professionals*, Portsmouth (USA), International Association of Privacy Professionals, 2011, 71-72.

137 Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 25 January 2012, COM(2012) 11 final, 2012/0011 (COD), {SEC(2012) 72 final} {SEC(2012) 73 final}.

138 Article 3 (1) Draft Regulation on data protection.

139 Article 3 (2) Draft Regulation on data protection; It remains to be seen how the terms 'offering of goods or services to data subjects in the Union' will be interpreted: Will the offering need to be direct or will the mere availability suffice to trigger the applicability of the draft Regulation? The latter would be disproportionate to the purpose of the extraterritorial provisions.

140 Recital 20 Draft Regulation on data protection.

141 Article 25 Draft Regulation on data protection; Important exceptions are foreseen for (a) a controller established in a third country where the Commission has decided that the third country ensures an adequate level of protection in accordance with Article 41; or (b) an enterprise employing fewer than 250 persons; or (c) a public authority or body; or (d) a controller offering only occasionally goods or services to data subjects residing in the Union.

142 The respect for national traditions has also been formalised by article 52 of the Charter of fundamental rights of the European Union (2010/C 83/02), *Oj.L.*83, 30 March 2010, 389-403.

who are offering services to viewers in the European Union to comply with the rules of the AVMSD.

The following question that arises is how to determine which national jurisdiction should apply. Contrary to the draft Regulation on data protection, the material rules are not identical in all Member States. Different solutions are possible. A first solution could consist in allowing the non-EU based providers to designate a representative in the EU, making the Member State in which that representative is established competent for the regulation of that particular media service. In such case there is however a risk of a race to the bottom as all non-EU based countries will choose a representative within the Member State with the less stringent rules.[143] The risk is however minimised by the high protection standards as set out in the AVMSD.[144] A second and already mentioned solution could consist of giving jurisdiction to the Member State that is targeted by the audiovisual media service. Pursuant to recital 42 of the AVMSD elements such as the origin of the television advertising and/or subscription revenues, the main language of the service or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received may be indicators to assess whether an audiovisual media service is wholly or mostly directed to a Member State.[145] Although, this criterion could easily be applied if only one Member State is targeted but, in the case that preference is given to one competent jurisdiction, that criterion could create confusion when several Member States are targeted.

*The application of the aforementioned principles can be clarified on the basis of the Netflix example. If the Over-The-Top(OTT) provider of on-demand video content would be established within the EU, it would need to comply with the AVMSD. As it however is US based it can escape the rules of the AVMSD. Nevertheless it is preparing a broad expansion, and wants to offer its service in several European countries. Assuming that it would not choose for an establishment in the EU, every targeted country could apply its national media legislation (on the condition that there is a legal ground for such jurisdiction). As a consequence Netflix would be confronted with diverging national laws. Pursuant to the proposed solution Netflix could however designate a representative in one Member State, making that Member State competent over its service, and allowing Netflix to benefit from the country of origin principle.*

[143] J. HARRISON and L. WOODS, "Jurisdiction, forum shopping and the race to the bottom' in J. HARRISON and L. WOODS, *European broadcasting law and policy*, Cambridge, Cambridge University Press, 2007, 173-193.

[144] Moreover the AVMSD contains an anti-circumvention procedure in article 4 AVMSD.

[145] In the context of E-Commerce more guidance has been given by the European Court of Justice: ECJ C-585/08 and C-144/09, *Pammer and Hotel Alpenhof*, 7 December 2010, www.curia.eu). The following evidence is capable of demonstrating the existence of an activity 'directed to' a specific Member State: designation of Member States by name, telephone numbers with the international code, use of a specific top-level domain name, use of a specific language, etc; L.E. GILLIES, "Addressing the 'Cyberspace fallacy': Targeting the jurisdiction of an electronic consumer contract", *International journal of law and information technology* 2008, Vol. 16, No. 3, 242-269; G. VAN CALSTER, "Geschillen rond elektronische handel: toepasselijk recht en territoriale bevoegdheid", in P. VAN EECKE (ed.), *Recht en elektronische handel*, Brussels, Larcier, 337-360.

44. Given the controversy surrounding the pending draft regulation on data protection, adopting a similar approach within the field of media law could be considered as very protectionist in respect to the pending discussions on a comprehensive free trade agreement between Europe and the United States. As some countries (in particular France) had voiced their concerns regarding the inclusion of the audiovisual sector into the negotiations of the EU-US free trade agreement, the European Foreign Affairs Council decided to exclude audiovisual services from the mandate for the negotiations.[146] The fear was and still is that by opening up the audiovisual market to trade liberalisation the US dominance over the European market would be reinforced and that the sector, which relies on discriminatory support and regulation policies, would be undermined.

## 4 Conclusion

45. The convergence of the broadcasting, telecom and IT sector has been going on for many decades and is as such not a new phenomenon. However, with connected TV the convergence of technologies reaches a new peak. As connected TV is developing rapidly and allows consumers to have access to a wide variety of audiovisual and other content simultaneously through one screen, these new developments question vital decisions concerning the regulation of media. More particularly, the rise of connected TV puts pressure on the provisions of the AVMSD governing the determination of the territorial jurisdiction competent over a media provider.

46. The concept of editorial responsibility, currently applied to identify the media provider responsible for an audiovisual media service, has become insufficient. While the concept may have worked well in the past, it is not adapted to a converged media environment, in which device manufacturers, platform operators and portal operators are increasingly offering their services to the consumer. The concept of editorial responsibility seems hard to reconcile with the *ex post* control of audiovisual content (instead of the traditional *ex ante* selection), the application of algorithms and automated selection tools and the division of responsibility between multiple entities. As a consequence all aforementioned players, which undeniably take up a gatekeeper position in the content delivery value chain, may operate outside the scope of the AVMSD. Those players nevertheless compete for the same audience and operate in between the content editors and the consumers. Therefore legislative action is required to

[146] Council of the European Union, "Press release on the mandate for the EU-US negotiations on the coming Transatlantic Trade and Investment Partnership", 14 June 2013, 10862/13 PRESSE 250 PR CO 1, www.consilium.europa.eu; CNC, "Why audiovisual services must be excluded from the scope of the EU-US free trade agreement (FTA)", 18 March 2013, http://ukccd.wordpress.com; With the exclusion of the audiovisual sector the '*cultural exception*' is maintained as no commitment can be made concerning the audiovisual sector. The 'cultural exception' is based on the principle that culture is different from any other merchandise because it goes beyond the commercial: cultural goods and services convey ideas, values and ways of life which reflect the plural identities of a country and the creative diversity of its citizens. en.unesco.org.

restore this uneven playing field between traditional media service providers subject to the AVMSD and those who fall outside the scope of the AVMSD.

As the concept of editorial responsibility is one of the keystones of the AVMSD, one could think that a revision and or enlargement of the definition of that concept would provide a solution. That would however tip the scale to the other end of the spectrum. Hence in our opinion preference should be given to the introduction of a new category of actors that would only be subject to some core obligations of the AVMSD (e.g. with respect to the protection of minors and commercial communication).

47. Bringing gatekeepers under the scope of the AVMSD is one thing, applying and enforcing the rules against them is another one. The country of origin principle, which entails that content should only be checked once in the home country, is obviously not adapted to the inclusion of those players. Parallel to the ECD, the establishment of the gatekeeper could however prove to be a viable criterion to determine the competent territorial jurisdiction for players established in the EU.

More problematic is the determination of jurisdiction over content delivered over the Internet from countries outside the EU but targeting the EU. As those services provided by non-EU based providers have an impact on European audiences, it is unquestionable that they should be made subject to the European media legislation. Several solutions to this problem are possible. A first solution could consist in a codification of the current practice on European level by expressly allowing every Member State to apply its own national media legislation. The most pragmatic solution can however be found in the field of data protection law, where the same issue is under discussion. In line with the draft Regulation on data protection and in order to overcome the hurdle of enforcing European legislation on entities that are not established in the EU, those actors should therefore be obliged to designate a local representative in a EU Member State, or to register themselves in the EU.

48. The foregoing exercise only concerns one part of the puzzle, and should be understood in the larger discussion on the convergence of media. Due to new technical developments, this convergence is rapidly evolving and will not stop in the near future. Therefore a modernisation of the AVMSD is needed. Nevertheless, one should be realistic and accept that no single modification to the AVMSD will be perfect. There may always be new players or services that are able to escape the regulatory framework.

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