

The Audiovisual Media Services Directive

I Introduction

Keeping EU law up to date with the technological developments and service innovations in the audiovisual sector has been a persistent policy challenge. The core piece of legislation in this area started out as the Television without Frontiers Directive (TWFD), adopted in 1989, and became the Audiovisual Media Services Directive (AVMSD) in 2007 to reflect the fact that it needed to cover more than just traditional linear television. Each re-opening of the Directive has been surrounded by much debate about expansion of scope. The AVMSD was significantly revised again in 2018 to go even further, bringing into scope online services that were nascent or not even launched yet in 2007. This most recent revision was also the first to include concerns stemming from the member states from Central and Eastern Europe (CEE), which had only just joined the Union in 2005 when the work was being done that led to the AVMSD adoption.

The TWFD defined “television broadcasting” as the transmission of programmes intended for the general public¹. The AVMSD’s definition of an audiovisual media service was the same, with the additional characteristic that service providers carried editorial responsibility.² In more recent discussions, the presence (or not) of editorial responsibility was a crucial characteristic upon which debates about what services should be covered by the legislation were focused. With so much audiovisual content now online, the dividing line between services that fall under the AVMSD and those that enjoy the limited liability for content afforded by the E-Commerce Directive (ECD) is increasingly blurry. Expanding the scope of the AVMSD entailed balancing risks to freedom of expression with important consumer protections and the aim of protecting national media industries vital to the cultural and political life in member states.

The AVMSD is classified as a law of minimum harmonization and aims to create a common European production and distribution market by breaking down barriers to trade and establishing common standards. However, because of the unique cultural and political function of audiovisual content, these common standards also contain positive content regulation to protect European content production from external competition, and sometimes the cross-border dissemination of audiovisual media content leads to conflicts among member states that test the fundamental principles of the Directive. The AVMSD is therefore a unique blend of the barrier lifting liberal market approach typical of the EU’s single market and classic protectionism stemming from a history of concern that American content and media services would dominate European screens, threatening its cultures and industries.

This chapter begins by re-tracing the roots of the AVMSD, which lie in the liberalization that took place in the creation of the common market and can be seen as a response to a perceived threat to European culture. It then examines the core elements of the Directive and the extent to which they have been adapted over time. These two sections demonstrate that encouraging European audiovisual production

¹ Television without Frontiers Directive (1989) 89/552/EEC (Hereafter: ‘TWFD 1989’) [Art. 1(a)]

² Audiovisual Media Services Directive (2007, 2010) 2010/13/EU (Hereafter: ‘AVMSD 2007’) [Art. 1(a)]

and consumer protection have been the main concerns, while freedom of expression has not been central. Finally, it introduces the two main novelties in the 2018 revision³ and shows how these are attempts to level the playing field between audiovisual media services and some online platforms and to provide some protections for media freedom by ensuring independent regulators.

II Foundations of EU Audiovisual Media Policy

The EU's current policy on audiovisual media services is rooted in the regulation of the common market within the European Economic Community (EEC), the precursor to the EU.⁴ Rather than being grounded in commitments to freedom of expression or a cultural policy, it has always been more industrial policy than cultural policy. It developed amidst a general push for liberalization of markets and the encouragement of free trade within the EEC. Nevertheless, tension between the need to regulate the economic function of audiovisual industries within the common market and to recognize their cultural importance for member states has been present since the beginning. The ties between the state and audiovisual media run deep in European countries and broadcast media have been associated with cultural and national identity. Technological developments have been as much, if not more so, the impetus for the breaking down of borders for audiovisual services than the liberalizing approach of European law. Throughout this process consideration for freedom of expression and the role that audiovisual media services play in enabling its exercise has seemed tertiary considerations at best.

a. *Broadcasting as an Economic Activity*

As early as 1974 broadcasting was deemed to be within the purview of the EEC Treaty rules regulating the free movement of goods and services by the judgement in the landmark case *Sacchi v Italy* in which a cable operator sued against the monopoly of the Italian public service broadcaster (PSB).⁵ Although the court did not insist at that time on breaking the PSB monopoly, that of RAI in Italy, "the case gave it the opportunity to define broadcasting signals as an economic activity"⁶. This was an

³ The European Parliament and the Council of the European Union, 'Position of the European Parliament adopted at first reading on 2 October 2018 with a view to the adoption of Directive (EU) 2018/... of the European Parliament and of the Council amending Directive 2010/13/EU 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*) in view of changing market realities' (*European Parliament*, 2 October 2018), art 1

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0364+0+DOC+XML+V0//EN> (Hereafter: 'AVMSD 2018 adopted text').

⁴ The EEC was founded by the Treaty of Rome in 1957 forming a common market for goods and services under a common customs union. The EEC became the European Union in 2007 with the Treaty of Maastricht which strengthened the ties among member states.

⁵ Case 155/73 *Sacchi* [1974] ECR 409 ECJ For full discussion of implications of this case see Eric Barendt and Leslie Hitchens, *Media Law: Cases and Materials* (Pearsons Education Limited 2001) 168

⁶ Alison Harcourt, *The European Union and the regulation of media markets* (S. Bulmer, Humphreys, P. and Moran, M. ed, Manchester University Press 2005) 24. See also David Ward, 'The European Commission's State Aid Regime and Public Service Broadcasting' in David Ward (ed), *The European Union and the culture industries : regulation and the public interest* (Ashgate 2008) 61

important distinction because it placed broadcasting under the auspices of competition rules instead of defining it as a cultural institution exempt from these rules.

This case came at the start of a period in which the spread of satellite and cable brought more channels into people's homes. Until the 1980s, when private television began to take off in Europe, most member states had only a PSB. The role of television and radio in cultural and national identity formation had already been established through these PSBs⁷, many of which had close ties to the state and to government. Cultural policy had always been the domain of member states, but with broadcasting within the EEC defined as an economic activity it was also an EEC issue. This is not to say that European policy makers were blind to the cultural function of broadcasting. In fact, both the 1982 Hahn report and the 1984 Green paper that began the process that culminated in the TWFD emphasized the cultural interest in broadcasting and the potential for furthering European integration and a European identity by opening up broadcasting markets.⁸ Nevertheless, the justification for the TWFD lay in the EEC treaty requirements for freedom of trade within the common market, and the Directive contained little of those documents' focus on culture and the political role of television.

Following the adoption of the TWFD, there was a boom in the number of cases against PSBs from commercial broadcasters and other private interests on the grounds of unfair competition in the broadcasting market. With broadcasting defined as an economic activity and PSBs receiving public funding, the crucial issue was the application of state aid rules⁹ to the funding and other benefits that PSBs received. Early cases upheld the special status of PSB.¹⁰ The Commission did as well, with its 2001 Communication on the application of State Aid to Public Service Broadcasting reinforcing states' rights to support PSB, including their right to define PSB remit beyond traditional television and radio in order to make use of new technology and platforms.¹¹ Without changes in treaties or directives, slowly court cases and Commission competition decisions extended the limitations on states to define and invest in PSB.¹² With its judgment in the *Altmark* case, the Court of Justice of the EU (CJEU) set out a number of conditions that must be met in order for State Aid to be allowed.¹³ The EC's Competition Directorate then took a tougher stance in

⁷ J. Gripsrud, 'Television and the European Public Sphere' 22 *European Journal of Communication* 479 Monroe Edwin Price, *Television, the public sphere, and national identity* (Oxford University Press 1995)

⁸ For analysis see Jackie Harrison and Lorna Woods, *European broadcasting law and policy* (Cambridge University Press 2007) 87

⁹ EEC and then EU law limits the extent to which state funding or resources can be used to support any institution operating in a competitive market.

¹⁰ David Ward, 'State aid or band aid? An evaluation of the European Commission's approach to public service broadcasting' 25 *Media culture and society* 233, 248

¹¹ European Commission, *Communication from the Commission on the application of State aid rules to public service broadcasting (2001/C 320/04)* (Official Journal of the European Communities 2001) para. 34

¹² Maria Michalis, 'EU Broadcasting Governance and PSB: Between a Rock and a Hard Place' in Petros Iosifidis (ed), *Reinventing public service communication : European broadcasters and beyond* (Palgrave Macmillan 2010) Mike Varney, 'European Controls on Member State Promotion and Regulation of Public Service Broadcasting and Broadcasting Standards' 10 *European Public Law* 503

¹³ Case 280/00 *Altmark* [2003] ECR

considering the *fairness* of public funds used for PSB, with Danish and Dutch PSBs required to return millions.¹⁴

Near the end of 2009, the EC issued a new Communication in which it maintained that commercial broadcasters might also fulfill the role for PSB foreseen in the Amsterdam Protocol, and highlighted the need for transparency and avoidance of the abuse of public funds.¹⁵ It also mentions the need to pay special attention to whether individual PSB products are related to the “democratic, social and cultural needs of society” as stated in the Amsterdam protocol.¹⁶ The court had defined broadcasting as an economic activity meaning that it had to be governed by the fair competition rules of the common market, and TWFD further solidified the role of commercial broadcasting. Public broadcasters were increasingly squeezed in favour of ever more powerful commercial players.

b. Protectionism in the Public Interest

The market liberalization in television broadcasting forwarded by the TWFD was part of an overall approach to break down state monopolies and open markets to cross border investment and trade. The preamble of the TWFD stated its aim:

“to permit and ensure a transition from national markets to a common programme production and distribution market and to establish conditions of fair competition without prejudice to the public interest role to be discharged by television broadcasting services;”¹⁷

As with in other industries, in order to establish this fair competition, the Directive established minimum common standards by which all services had to operate and how to determine which member state’s regulator would have jurisdiction for enforcing the standards when services were operating across borders. This was the basic formula for the negative integration favoured by EEC/EU. It broke down barriers based on the idea that there should be free and open competition, with everyone playing by the same rules and special allowances for PSB.¹⁸ The common standards set out by the TWFD contained more than just the minimum consumer protections relevant to the industry however. Where the Directive did echo the concerns for the public interest function of television present in the policy documents that had preceded it was in its concern for the protection of cultural diversity within Europe.

When TWFD was being drafted European content production still relied largely on publicly funded television and the film industry. European countries lagged far behind the US in terms of their capacity to generate content for channels on the new

¹⁴ for account of these decisions see Mark Wheeler, ‘The European Union's Competition Directorate: State Aids and Public Service Broadcasting’ in Petros Iosifidis (ed), *Reinventing public service communication : European broadcasters and beyond* (Palgrave Macmillan 2010)

¹⁵ European Commission, *Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C 257/01)* (Official Journal of the European Communities 2009) paras 15, 16

¹⁶ *Ibid.* para 48

¹⁷ TWFD 1989 preamble

¹⁸ for discussion see Peter Humphreys, ‘The EU, Communications Liberalisation and the Future of Public Service Broadcasting’ 24 *European Studies: A Journal of European Culture, History and Politics* 91

distribution platforms of cable and satellite.¹⁹ The cultural challenge posed by the influx of US content on satellite and cable was clearly acknowledged in the policy documents leading up to the TWFD.²⁰ The liberalisation imposed by the TWFD was intended to give European broadcasters access to larger markets so as to strengthen European producers of content. It also imposed quotas for European content and for content from independent producers aimed at boosting content production and ensuring American programmes did not dominate European screens.

Even as the TWFD was coming into force, there were doubts that the removal of barriers to cross border broadcasting within Europe and content quotas would have a positive effect on cultural diversity. Schlesinger argued it was a faulty attempt to translate national level assumptions about media and culture to the EU level; problematic because “cultural diversity is more than just a set of consumption practices susceptible to rationalization by the policy process”.²¹ Others warned that broadcasters in small states would be vulnerable as their markets were opened up to ones from neighbouring states in which the same or similar languages were used.²² Later it was claimed that the policy was not about protecting cultural diversity, but instead was classic industrial protectionism aimed at preserving jobs overall in the European production sector,²³ rather than the diversity of producers catering to its various cultures. The efforts to create a common market for production and distribution encouraged the growth of European ‘champions’ from the emerging private television sector to compete with American producers.²⁴ Several of the large media groups enabled by the TWFD such as Bertelsmann, Mediaset, and Canal Plus are still big players with holdings in multiple national markets and wide presence in multi-channel subscription services.

c. TWFD to AVMSD

European-level intervention to eliminate barriers in the audiovisual sector was therefore not liberalization for the sake of it but was a response to the expanding cross border distribution of television enabled by cable and satellite technology.²⁵ The TWFD was shortly followed by legislation known as the SatCab Directive²⁶ that regulated copyright licensing in order to facilitate the provision of those cross-border

¹⁹ A. Esser, ‘Trends in Programming: Commercialization, Transnationalization, Convergence’ in Alec Charles (ed), *Media in the enlarged Europe: politics, policy and industry* (Intellect 2009) J. Tunstall and D. Machin, *The Anglo-American Media Connection* (Oxford University Press 1999)

²⁰ For detailed account see Harrison and Woods 87

²¹ Philip Schlesinger, ‘From Cultural Defence to Political Culture: media politic and collective identity in the European Union’ 19 *Media, Culture & Society* 369, 384; see also Philip Schlesinger, ‘Wishful Thinking: Cultural Politics, Media and Collective Identities in Europe’ 43 *Journal of Communication* 6

²² Jean-Claude Burgelman and Caroline Pauwels, ‘Audiovisual policy and cultural identity in small European states: the challenges of a unified market’ 14 *Media, culture and society* 169

²³ Jackie Harrison and Lorna Woods, ‘Television Quotas: protecting European Culture?’ 12 *Entertainment Law Review* 5

²⁴ *ibid.*; see also Harcourt *ibid.*

²⁵ In parallel to the process leading to the TWFD, a Convention on Transfrontier Television (CTT) was drafted and adopted within the Council of Europe with similar provisions, but more based in human rights than economic activity.

²⁶ Council of European Communities, Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

transmission services. These Directives, both grounded in common market fair competition rules, essentially put a legislative framework in place for practices and services that already existed and were expanding rapidly. Despite the concerns raised in relation to smaller linguistic and cultural markets or the commercialization of European broadcasting space, there is little to indicate that any EEC level policy might have stemmed the spread of multi-channel subscription services.

By the end of the 1990s video on demand (VoD) services that made use of the new internet technology began to develop. Their spread ran parallel to negative integration in the telecommunications sector, one that had been dominated by large state-owned or public companies. The Open Networks Provision Directive (ONPD) broke down monopolies in telecommunications provision by installing non-discrimination principles and eliminating exclusivity.²⁷ The process initiated by the ONPD grew into a *Telecomms Package*, which in 2002 was pulled together under the Framework Directive for Electronic Communications Networks and Services.²⁸ This liberalization of telecommunications markets helped make possible the current variety of private companies providing internet and multi-channel subscription and on demand services, often packaged along with mobile telephony. By the mid 2000s policy makers in what had by then become the EU were attempting to define what counted as television.

The Audiovisual Media Service Directive (AVMSD) replaced the TWFD in 2007 after a long period of consultation and debate.²⁹ Introducing the term “television-like”, the AVMSD included on demand services as well as linear television, though the common standards for these differed from those for linear services. As Pauwels and Donders have described, it was an attempt to be “future-proof” by being technology neutral and introducing definitions that cut across delivery platforms.³⁰ The core aims of ensuring fair competition and protecting Europe’s cultural diversity, or audiovisual production, remained unchanged. It was again a delicate balance between the liberal economic approach at the heart of EU competition policy and notion of the public interest centred on the cultural function of audiovisual media services, that, like the TWFD before it,³¹ the Directive acknowledged could not be left to the market alone.

III Key Elements of the AVMSD

²⁷ Council of European Communities, *Directive 98/10/EC on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment* (Council of European Communities 1998)

²⁸ Council of European Communities, *DIRECTIVE 2002/21/EC Framework Directive on a common regulatory framework for electronic communications networks and services* (Official Journal of the European Communities 2002)The Electronic Communications Framework was revised again as of 18 December 2009.

²⁹ Council of European Communities, *DIRECTIVE 2007/65/EC Audiovisual Media Services Directive* (Official Journal of the European Communities 2007)

³⁰ Caroline Pauwels and Karen Donders, ‘From Television without Frontiers to the Digital Big Bang: the EU’s Continuous Efforts to reat a Future-Proof Internal Media Market’ in Robin Mansell and Marc Raboy (eds), *The handbook of global media and communication policy*, vol 6 (John Wiley & Sons 2011)

³¹ This was done in paragraph 3 of the TWFD preamble where it states the need to transition from national markets to a common one and to establish conditions of fair competition, but “without prejudice to the public interest role to be discharged by the television broadcasting services”. Paragraph 2 of the AVMSD preamble repeats this wording.

The major change between the TWFD and AVMSD was in the expansion of scope to non-linear services, which set a two-tiered approach of rules that applied to all services and additional ones that applied only to linear services.³² In this manner it was updated to take into account technological changes and innovations in services, but despite extensive debates, the core elements remained largely the same with only minor changes in relation to commercial communication. The discussions that began in 2015 about revising the AVMSD re-opened these issues, but in a very different geopolitical and economic environment.

a. Country of Origin Principle

At the heart of the AVMSD is the principle that services are regulated in their country of origin, not their country of destination. States are not allowed to block or further regulate services coming from another state that are distributed within their borders. This principle has always been a point of contention, with fierce debate at each revision over how to determine jurisdiction and potential recourse for states with grievances about services coming across their borders.

The TWFD originally contained little guidance as to how to determine jurisdiction, which led to blatant forum shopping as broadcasters established themselves where they found the rules to be most lenient. The European court therefore was left to do the work. The court determined that member states' cultural policy, such as to limit advertising³³ or to maintain a public broadcaster monopoly³⁴, could not be barriers to the free distribution of services from another jurisdiction. It then established two criteria for jurisdiction that were then carried into the AVMSD. Firstly, in the case of *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media*³⁵ the court ruled that Member States did have the right to take measures against clear circumvention of national law by services that set up in one jurisdiction but target another. Secondly, in the 1996 case of *Commission v United Kingdom*,³⁶ the court set out a criterion of establishment, essentially determining that the location in which decisions and programmes were made was important and that services in a single jurisdiction could not operate under different rules.³⁷ A short 1997 revision of the TWFD sought to correct the weakness of the original version by including these, but it was in the AVMSD that the means for determining jurisdiction and for dealing with conflicts between member states was set out in great detail.

³² For discussion and table of the rules see Pauwels and Donders 533

³³ C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR

³⁴ C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR

³⁵ Case C-148/91 *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1996] ECR. In this case the court ruled that the Netherlands could take action against a commercial broadcaster that set up in Luxemburg, but targeted its territory.

³⁶ Case C-222/94 *Commission v United Kingdom* [1996] ECR. In this case the Court decided that the UK could not distinguish between domestic and non-domestic satellite services nor could it regulate those falling under another jurisdiction.

³⁷ For a detailed account of these cases and the implications of the decisions see Irini Katsirea, *Public Broadcasting and European Law: A Comparative Examination of Public Service Obligations in Six Member States* (Kluwer Law International 2008) 195

According to article 2 (3) of the 2007 AVMSD a media service is deemed established in a state if:

- a) *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 Member State;*
- b) *if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If 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;*
- c) *if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State.*
- d) *they use a satellite up-link situated in that Member State;*
- e) *although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.*³⁸

Forum shopping is still possible under these conditions, but Member States have some recourse if they are being specifically targeted by services that have set up outside their jurisdiction. The 2018 amendments added the term “programme related” to points b to ensure that services are regulated where most of their programming is being produced. The 2018 AVMSD also streamlined the process for derogating from the country of origin principle in response to ever more serious concerns in member states about content coming in from outside their borders.

In the TWFD days, most of the cases in which Member States had grievances with services outside their jurisdiction were ones that involved differing standards for the protection of minors or rules aimed at protecting the public interest function of television through restrictions on advertising and programme requirements. For example, the US children’s channel Nickelodeon had a head office in the UK, giving it establishment in the EU, and broadcast into countries that have stricter rules about programming for children such as Sweden and the Netherlands. States had been allowed to restrict the free movement of services for the protection of public morality, public policy, and public security, but as Keller has argued, the Court had been reluctant to accept expansive definitions of these in media cases and had placed strict conditions on their use with an emphasis on proportionality.³⁹ The AVMSD’s Article

³⁸ Council of European Communities, *DIRECTIVE 2010/13/EU Audiovisual Media Services Directive* (Official Journal of the European Communities 2010)

³⁹ Perry Keller, *European and international media law liberal democracy, trade, and the new media* (Oxford University Press 2011) 135

3 contains procedures for cases in which there remains a conflict that allows states to derogate from the ban on restricting cross-border transmission provided certain conditions have been met.⁴⁰ The derogation procedure has been tested in recent years as some Member States' regulators reacted quickly to situations in which they deemed there to be an immediate public security risk.

In 2014 Latvian and Lithuanian regulators blocked Russian language channels for inciting hatred and provoking conflict. As the conflict in Ukraine heightened, the regulators acted to restrict the services before following the steps outlined in the Directive. In the Latvian case the channel in question was under Swedish jurisdiction and in the Lithuanian case the regulator contested the jurisdiction of the channels because there was evidence their establishment in the UK and Sweden respectively was pro forma. These regulators were reacting to perceived potential for incitement to violence in their own countries stemming from Russia's actions in Ukraine. The Commission apparently recognized that the Directive had not been drafted with such urgent situations in mind, and put out a discussion paper with a view to the future revision of the AVMSD.⁴¹ In 2015 the Lithuanian regulator again blocked RTR Planeta, and the Commission determined that the Lithuanian regulator had adhered to the procedures required by the Directive and deemed its restriction of the service to be lawful.⁴² In confirming the legitimacy of the Lithuanian reasons for restricting the transmission of RTR Planeta, the Commission drew on the Court's interpretations of incitement and hatred from the 2011 *Mesopotamia Broadcast* and *Roj TV* case⁴³, which included both animosity and intention to direct behaviour. The judgement in this case found that the intention of the Directive was that the prohibition on incitement to hatred is a public order consideration beyond just the concern for the protection of minors.⁴⁴ In the *Roj TV* judgement and subsequent Commission action regarding the Baltic States' problems with Russian language broadcasts, one can see states being given more room to restrict services in the name of public order or security. In its proposal for revising the AVMSD, the Commission then suggested a more streamlined coordination process for dealing with such cases and expanding the criteria for which derogations could be made.

Reverting to regulation in the country of destination has never seriously been considered feasible, but the country of origin principle has been challenged in the lead up to each revision of the Directive since 1989. Extensive expansion of the conditions in which derogation can be allowed could be detrimental to freedom of expression. In

⁴⁰ These are outlined in Article 3.

⁴¹ See European Commission, *Doc CC AVMSD (2014) 4 rev Discussion Paper on the Application of Articles 3 and 4 AVMSD Case study: Suspension of some Russian-language channels in Latvia and Lithuania* (2014)

⁴² European Commission, *COMMISSION DECISION C(2015) 4609 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of 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* (Brussels, 1072015 2015)

⁴³ C-244/10 *Mesopotamia Broadcast* and C-245/10 *Roj TV* were dealt with jointly. *Mesopotamia* broadcast licensed in Denmark had engaged *Roj TV* in the transmission of Kurdish language broadcasts in Germany. The Court determined that Germany could prohibit the activities of the broadcaster on incitement grounds, even though it could not restrict re-transmission per se. A useful summary of the findings is http://ec.europa.eu/dgs/legal_service/arrets/10c244_en.pdf

⁴⁴ Explained in paragraphs 38-43 of the judgement. C-244/10 *Mesopotamia Broadcast* and C-245/10 *Roj TV* [2011] ECR

the 2007 AVMSD derogations were allowed in relation to linear services only in instance where protection of minors or incitement to hatred were in question, and states could take measures against on-demand services additionally for reasons of national or public security, public health and the protection of consumers. Under the 2007 rules, linear services had to have infringed twice within 12 months, despite warnings, and both the Commission and the member state with jurisdiction have to have been notified. The 2018 procedure simplifies the rules into one set for all services, but in doing so extends the reasons for which states can block or otherwise act against linear services. The new rules also allow states to act only after one previous infringement, essentially making it easier for members states to derogate from the country of origin principle. Depending on how member states choose to use the streamlined processes and how lenient the Commission will be in determining the compatibility of any measures taken by member state, things could move towards de facto regulation at in the country of destination.

b. Protection of Consumers

The audiovisual media services market within the EU is not fully harmonised. The AVMSD sets out minimum rules and states are allowed to place additional requirements on those services within their jurisdiction. The bulk of rules in the AVMSD are aimed at consumer protection. It sets a baseline for what are often referred to as *negative content regulations* aimed at protecting the public, particularly minors. Article 5 sets out some transparency requirements so that viewers have the basic information needed to take any complaints they may have to the appropriate regulator. Aside from the basic requirement that member states ensure all audiovisual media services do not contain incitement to hatred, the other consumer protection rules relate to various aspects of viewer access and television advertising.

Viewer access is dealt with in the AVMSD in two different ways. Firstly, Article 7 asks members states to encourage service providers to make their services accessible to the visually or hearing impaired. The arguably weak language in the Directive on encouraging accessibility was a step towards protecting the fundamental rights of such persons. Secondly, the Directive also addresses the accessibility of certain content for all audiences. It instructs states to produce a list of events of major importance to their societies that must be made available free at the point of reception through live or delayed broadcasts.⁴⁵ This provision ensures that sport or cultural events important for social cohesion are not exclusive to pay platforms. The Directive states that member states must ensure that for the purpose of news reporting all media service providers can use short extracts from events for which exclusive rights might be held by a single or group of providers. It also requires all broadcasters to respect a right of reply or equivalent remedy, which not only protects the rights of those who have been damaged by reporting, but also the rights of the public to information related to those parties. The provisions related to access in the AVMSD have been relatively uncontroversial and remain highly relevant since there is still no overall legislation on accessibility for persons with disabilities and exclusive rights to premium live content continue to be a highly lucrative and competitive market.

⁴⁵ Article 14 paragraph 1

The rules on advertising were relaxed significantly when the TWFD became the AVMSD following pressure from European broadcasters who were trying to adapt to the increased competition from subscription channels and changing habits of audiences increasingly able to skip advertising breaks.⁴⁶ Only in relation to the protection of minors did the AVMSD increase obligations by calling on member states to encourage codes of conduct to limit advertising of unhealthy foods and beverages in and around children's programmes. Advertising in audiovisual media services cannot be subliminal or surreptitious and must be clearly identifiable. Bans on advertising tobacco and prescription medications and transparency requirements in relation to sponsorship have been maintained through all revisions. The time limits on television advertising that restricted it to 15% of daily transmission and 20% in an hour under the TWFD were notably loosened and simplified in 2007, and relaxed even more in 2018, but were not removed entirely. Ad breaks can make up 20% of the total time between 06:00 and 18:00, and then 20% of the total prime time period of 18:00 – 24:00. Films and children's programmes can only be interrupted after 30 minutes, while no advertising is allowed in religious programmes. These quantitative limits restrict the overall ad inventory that audiovisual media services can offer. They can be seen as protecting consumers from too much advertising, but are also an essential intervention in competition among advertising dependent services.

In line with the overall liberalization, the 2007 AVMSD introduced a new category of commercial communication, product placement. Then it banned product placement, except "in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes"⁴⁷. This ban with exceptions for much of the content carried on audiovisual media services essentially opened up important opportunities for income generation. It was an important step towards levelling the playing field for European content producers competing with American and other third country content coming in through subscription multichannel and various on-demand services. It also gave European services the opportunity to be less dependent on the traditional advertising breaks that viewers were increasingly skipping. In the 2018 revision, the ban was reversed to allow product placement with exceptions for children's programming, news and other formats, however the net effect in terms where services can use product placement is essentially unchanged.

The advertising market changed significantly between the 2007 and 2018 revisions. Online advertising grew rapidly while television advertising stagnated, with two online companies, Google and Facebook, garnering as much as 85% of online advertising and 20% of global advertising overall as of 2016.⁴⁸ Viewing moved increasingly to on demand and on mobile devices. Various formats that audiovisual media services might use to compete more effectively for viewers used to online formats and user-generated content, such as advertorials, micro-ads and tele-promotions or direct offers, all must be treated within the advertising limits set in the AVMSD.⁴⁹ During the most recent revision process, commercial broadcasters concerned about the competition for advertising from online platforms carrying user-

⁴⁶ Pauwels and Donders 533

⁴⁷ Article 11

⁴⁸ Francisco Javier Cabrera Blázquez and others, *Commercial communications in the AVMSD revision* (European Audiovisual Observatory, IRIS Plus 2017-2, 2017)

⁴⁹ Judgment of the CJEU in Case C-281/09 *European Commission v Kingdom of Spain* [2011] ECR

generated content had campaigned hard for even greater relaxation of quantitative limits and product placement rules.⁵⁰ The 2018 did not give them the extensive liberalisation they had hoped for, but did go some way towards levelling the playing field between them and on-demand services.

c. *European Works and Independent Production*

Due to the desire of European lawmakers “to protect the European Community, culturally and economically, from US hegemony in the audiovisual sector”⁵¹ described above, the AVMSD also contains *positive content regulations* dating back to the first version of the TWFD. This is the requirement that television stations broadcast 50% *European works* and 10% works from independent European producers.⁵² The Directive defines European works as ones originating in a member state or in a state that is party to the Council of Europe’s Convention on Transfrontier Television, or ones that are co-produced with producers in those state. The conditions defining the acceptable co-productions are all based on location of production aspects rather than the characteristics of the content produced.⁵³ The provisions related to how the quotas should be calculated exclude news, live sports, games, advertising and teleshopping from the total transmission time of which a majority must be European works, but there are no conditions related to the cultural or societal value of the works.

Many scholars have therefore argued that the European works and independent production quotas are more about protecting the audiovisual industry than about European culture and preserving diversity.⁵⁴ The verdict is still out as to whether or not they are successful in either aim, despite there being relatively high levels of compliance.⁵⁵ Nevertheless, these content regulations and the subsidies provided under the MEDIA and then Creative Europe programmes have been thrust of any EU efforts to protect the European audiovisual media sector against foreign competition. Despite some initial opposition to the quotas at the member state level, mainly from the UK and Germany,⁵⁶ and complaints from some broadcasters over the years since they were introduced, there has not been serious consideration of removing or reducing them since they were introduced by the TWFD.

⁵⁰ See for example the position paper of the Association of Commercial Televisions (ACT) on the AVMSD from 9 October, 2016 <https://acte.be/library/download/49/document/act-position-paper---avmsd.pdf>

⁵¹ Tarlach McGonagle, ‘The quota quandary: an assessment of Articles 4-6 of the Television without Frontiers Directive’ in David Ward (ed), *The European Union and the culture industries: Regulation and the public interest* (Ashgate 2008) 208 <<http://search.ebscohost.com/login.aspx?direct=true&db=ioh&AN=3760028&site=ehost-live>>

⁵² Articles 16 & 17

⁵³ Article 1 paragraphs, 1(n), 2,3&4

⁵⁴ e.g. Harrison and Woods, *European broadcasting law and policy* Harrison and Woods, ‘Television Quotas: protecting European Culture?’ Lesley Hitchens, *Broadcasting Pluralism and Diversity* (Hart Publishing 2006) I. Katsirea, ‘Why the European broadcasting quota should be abolished’ 28 *European Law Review* 190

⁵⁵ Sally Broughton Micova, ‘Content Quotas: What and Whom are the Protecting’ in C. Pauwels, J. Loisen and K. Donders (eds), *Private television in Europe: content, markets and policy* (Palgrave 2013)

⁵⁶ For an account see Peter Humphreys, ‘The EU and Audiovisual Regulation: An Agency for De-Regulation’ (3rd European Consortium for Political Research Conference)

Instead, the 2018 revision to the AVMSD has extended these obligations to on-demand services, requiring member states to ensure that on-demand services “secure at least a 30 % share of European works in their *catalogues* and ensure prominence of *those* works”.⁵⁷ This standardizes the variety of measures that states had taken following the 2007 AVMSD, which instructed states to encourage on-demand services to host European works in their catalogues. For example, services in Italy and Slovakia have been obliged to include 20% and the catalogue of French providers must contain 60% European works. French and Italian law also requires on-demand services to contribute a percentage of annual turnover to audiovisual production, whereas some states, such as Belgium, have opted solely for the financial contribution.⁵⁸ There have been two issues with this variety that the 2018 revision attempts to address, effectiveness and forum shopping.

A 2016 study of on-demand catalogues commissioned by the European Audiovisual Observatory found transactional, or pay per view, services contained 27% European films, while subscription services had only 20%, far below that required of the transmission time for linear broadcasters⁵⁹ It also looked specifically at Netflix and iTunes for television-like content and found that when measured by episode the share of European content on Netflix varied from 17-26% and from 28-35% on iTunes depending on the national jurisdiction. Netflix and iTunes were held up in debates as examples of forum shopping, as both established headquarters in Luxembourg for their French services, in part to avoid France’s high contribution obligation and quota for European content. The 2018 AVMSD does not standardise obligations to contribution to national funds for content, it encourages this practice with a provision explicitly allowing states to impose such financial contribution obligations on services targeting their territory based on the revenues generated within that state.⁶⁰ The amounts essentially to an allowable exception to the country of origin principle by allowing the destination state to impose an obligation on a service under the jurisdiction of another.

d. The continuing balancing act

The AVMSD was drafted to be technology neutral and flexible enough to accommodate new types of audiovisual media services. Nevertheless, the AVMSD still reflects a two-tiered approach, with somewhat different rules for linear and on-demand services. In preparation for the 2018 revision, the Commission acknowledged that US companies had been better at taking advantage of the scale and scope of the pan-European market than European ones, and in the initial consultation asked whether or not this two-tiered system still made sense. A majority of the respondents felt that the current rules do not fairly establish a level playing field among services.⁶¹ The scale and reach of on-demand services such as Netflix, Amazon, and iTunes made many think they services enjoyed great advantage over linear services. The two-

⁵⁷ AVMSD 2018 Article 13 paragraph 1

⁵⁸ See country reports in Susanne Nikoltchev (ed), *Video on Demand and the Promotion of European Works* (Strasbourg, European Audiovisual Observatory 2013); see also European Commission, *Promotion of European Works in Practice* (Brussels, 2014)

⁵⁹ Gilles Fontaine and Christian Grece, *Origin of films and TV content in VOD catalogues in the EU & Visibility of films on VOD services* (European Audiovisual Observatory 2016)

⁶⁰ AVMSD 2018 Article 13 paragraphs 2 & 3

⁶¹ European Commission, *Synopsis report of the Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century* (2015)

tiered approach was nevertheless upheld. Forum shopping by on-demand services and heightened tensions around the influence of cross-border content had some member states, especially in CEE, eager to re-assess the country of origin principle. The 2018 AVMSD retains the principle, but those concerns were addressed with more justifications and an easier mechanism for derogation, as well as the exception allowed for imposing financial contributions to national funds. It therefore maintains the delicate balance between a liberalizing economic approach and member states' concerns stemming from the cultural and social function of audiovisual media services.

IV New elements in the 2018 AVMSD

Pauwels and Donders astutely argued already not long after the AVMSD went into force that it was a step in a continual “work in process” due to convergence.⁶² By 2015 when revision came on the agenda there were multiple convergence issues to be addressed. Print media were extensively offering video online, social media platforms enabled live broadcast, and user-generated videos were being consumed in much the same manner as audiovisual media services, much of it on mobile devices. A great deal of audiovisual media content being distributed and consumed by audiences was out of the scope of the Directive. There was pressure from various sides to extend it to cover services carrying user-generated videos that were within the scope of the E-Commerce Directive (ECD).

The other major new issue arose more from the changed political situation in the EU. More than a decade on from the biggest enlargement of the Union, there was increasing evidence that the countries that had been part of that Eastward expansion had not all been on a one-way road to liberal democracy and the rule of law. When political capture of institutions, corruption and clientelism were identified in the media systems of some member states, there was little in EU law that the Commission or forces for change within those countries could call upon. Though it did not directly mention implications for freedom of expression, in explaining its initial proposal for revising the AVMSD, the Commission noted that independence of regulators was “highly relevant for guaranteeing the pluralism of the media”.⁶³ The proposal for detailed standards for national regulators was a tacit acknowledgement that the independent and efficient regulatory bodies required to deal with the ever more complex media environment were not in place in all member states.

a. The You Tube problem

The debates about scope were to some extent narrowed at the outset because questions about the audiovisual content provided by print or text media were resolved by the Court. In the case of *New Media Online GmbH v Bundeskommunikationssenat and Der Bundeskanzler* it ruled that: “assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper must focus on whether that service as such has content and form which is independent of

⁶² Pauwels and Donders 526

⁶³ European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities* (European Commission 2016) p 12

that of the journalistic activity of the operator of the website at issue, and is not merely an indissociable complement to that activity, in particular as a result of the links between the audiovisual offer and the offer in text form.”⁶⁴ The ruling put a portion of audiovisual content distributed online by newspapers and other print media within the scope of the AVMSD. This focused the debate on the issues of online platforms carrying videos, mainly user-generated content.

Online platforms carrying user-generated content fit into the category of “information service providers” that are exempt from liability for the content they carry under the ECD as long as they do not “modify the information”, have no “actual knowledge” or “constructive knowledge” of it and reacts expeditiously to remove or disable upon acquiring knowledge of any illegal content. When the illegality of the content is a matter of copyright this can be straightforward and audiovisual media service providers must also protect copyrights for audiovisual content. Under the AVMSD, however, audiovisual media services must also deal with more grey areas of illegal or inappropriate content to protect consumers, especially minors. The Directive requires member states to ensure the services under their jurisdiction do not contain programmes “which might seriously impair the physical, mental or moral development of minors” and make use of timing and signals or symbols to protect minors from viewing programmes which are likely to impair them.⁶⁵ In response to changing viewing habit particularly among young people, the debates about scope ahead of the 2018 revision revolved around whether the AVMSD should be extended beyond those that have editorial responsibility for content, essentially whether it should cover YouTube and similar services.

After the consultation showed that there was appetite for expanding the scope of the Directive in this direction,⁶⁶ the Commission proposed including video-sharing platforms (VSPs) in the Directive along with requirements that member states engage them in co- or self-regulation to protect minors and prevent the dissemination of hate speech and incitement. This was presented not only as an attempt to provide more protection for consumers, but also as a step towards creating a more level playing field between VSPs and the audiovisual media services already within the scope of the Directive. It was also a controversial move. Under the liability exemption in the ECD, VSPs such as YouTube are only responsible for the content they carry if made aware of illegal content, as it is assumed they do not exercise editorial control and therefore do not otherwise have knowledge of the content they host. Following amendments in the Parliament and the Council,⁶⁷ in the end the 2018 Directive went even further than the original proposal.

The 2018 AVMSD stops short of defining VSPs as having editorial control, but holds them responsible for the organisation on content in the form of hosting, tagging,

⁶⁴ C-347/14 *New Media Online GmbH v Bundeskommunikationssenat and Der Bundeskanzler* (2015) CJEU [38]

⁶⁵ Article 27

⁶⁶ Support for this came particularly from the traditional broadcasters to whom the AVMSD rules apply and from consumer organisations European Commission, *Synopsis report of the Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century*

⁶⁷ Katsarova *Briefing: The Audiovisual Media Services Directive* (European Parliamentary Research Service, 2017)

displaying and sequencing.⁶⁸ It calls upon member states to ensure VSPs take measures, including age verification and parental controls, to protect minors and to protect all citizens from incitement and hate speech. The revised Directive now applies to VSPs the same qualitative rules for advertising, such as transparency and restrictions on advertising harmful products and services, particularly around children's programmes and others that constrain audiovisual media services.⁶⁹ Although co-regulation is prescribed as the means for ensuring VSPs follow through, the 2018 AVMSD provided a radically different framework for YouTube and similar online platforms.

b. Independence of Regulatory Authorities

National regulatory authorities are largely responsible for the implementation and enforcement of the AVMSD. The preamble of the Directive confirms that member states are free to choose the mechanisms of implementation and the form of their "competent independent regulatory bodies".⁷⁰ Unlike in the Electronic Communications Framework,⁷¹ no criteria for national regulatory authorities were included in 1989 or in 2007. In the 10 years after the 2007 AVMSD was adopted, extensive cross-national research⁷² and case studies on developments in some of the newer member states, such as Hungary⁷³ and Romania,⁷⁴ provided evidence of serious threats to the independence of NRAs for audiovisual media services. Such evidence was part of a broader picture of post-accession backsliding in some member states where progress on good governance and rule of law was notably reversed after they gained membership. There were few EU level tools in the area of media with which to encourage fair and independent regulation, pluralism and media freedom in member states.

In early 2014, the Commission formed the European Regulators Group (ERGA) in order to provide direct advice on audiovisual matters and to facilitate co-operation and exchange of best practices among the regulators.⁷⁵ The formation of ERGA also gave the regulators a direct channel to the Commission and the chance to form common positions and voice common concerns. The first report issued by ERGA was on the independence of national regulatory authorities.⁷⁶ This report found that national regulators lacked institutional independence or other elements of autonomy in several states, not all of which were among the newer member states. It also contained specific recommendations, to which all ERGA members had agreed, for amending the AVMSD to include criteria for national regulatory authorities.

⁶⁸ 2018 AVMSD Article 1 paragraph 1(b)

⁶⁹ 2018 AVMSD Articles 9(1) and 28b(2)

⁷⁰ paragraph 94

⁷¹ Several Directives and two Regulations comprise this 2009 Framework and the criteria included are independence, impartiality and transparency, and a right of appeal.

⁷² See the INDIREG study : http://ec.europa.eu/archives/information_society/avpolicy/docs/library/studies/regulators/final_report.pdf or the results from the 2014 Media Plurality Monitor <http://monitor.cmpf.eui.eu/>

⁷³ <http://www.lse.ac.uk/media@lse/documents/MPP/Policy-Paper---G%C3%A1bor%20Poly%C3%A1k-and-Krisztina-Rozgonyi.pdf>

⁷⁴ <http://www.lse.ac.uk/media@lse/documents/MPP/Policy-Paper---Adina-Baya.pdf>

⁷⁵ European Commission, *COMMISSION DECISION C(2014) 462 on establishing the European Regulators Group for Audiovisual Media Services* (Brussels 03022014 2014)

⁷⁶ http://erga-online.eu/wp-content/uploads/2016/10/report_indep_nra_2015.pdf

Despite some resistance from member states concerned that the Directive would get too close to being prescriptive about the form and structure of their regulatory bodies, the 2018 revision was adopted with provisions aimed at ensuring independence of regulators.⁷⁷ The AVMSD now requires member states to ensure that national regulatory bodies are legally and functionally independent, operated transparently and impartially, and are sufficiently resourced. It also sets out criteria for the appointment and dismissal procedures for head or collegiate bodies leading the regulators and calls for there to be appropriate independent appeal mechanisms, which could be courts.

The Directive also now codifies the existence of ERGA⁷⁸ and sets out its specific tasks. Addressing concerns raised by MEPs that ERGA's role not overlap too much with the contact committee,⁷⁹ ERGA will not decide on jurisdiction cases and codes of conduct but serve only as a consultative body. ERGA's tasks will be to provide technical expertise to the Commission, provide technical opinions in relation to cross border issues and jurisdictional dispute, and share best practices among regulators. Though the language around the requirements for national regulators and the role of ERGA was somewhat watered down from the Commission's original proposal, it remained largely intact and can now serve as something upon which watchdog groups or others in member states, or even the regulatory authorities themselves can call upon to help ensure independence.

V Conclusion

The story of the AVMSD has always been one of combining liberalization and protectionism and of balancing liberal market approaches with concerns about the cultural function of media. In its earlier TWFD form the balance was perhaps more on the side of liberalization and the market approach, with the Directive more resembling a minimalist industrial policy. It opened borders and provided minimum standards to protect consumers so as to encourage fair competition, while containing a dose of protectionism related to European works and independent production. When the AVMSD was adopted in 2007 it liberalised in the area of advertising, but also brought more services within the scope of the Directive and made it easier for states to derogate from the country of origin principle. The prevailing interpretation of the public interest seemed focused on consumer protection and cultural production. Though freedom of expression concerns have not been at the forefront, the country of origin principle has ensured freedom of reception and transmission.

With the latest revision, the Directive appears likely move a bit farther from the liberal market approach of minimal regulation. The retreat from border-breaking liberalization is a reaction more to the increasing penetration of powerful global services facilitated by the spread of high speed internet rather than to any notable expansion of cross-border transmission of national players. Rather than relaxing the protectionist provisions on European works and independent production, policy makers extended cultural policy type measures to VoD services as a reaction to rise of Netflix, iTunes and Amazon. The expansion of the Directive to include VSPs will oblige member states to bring online platforms into systems of co-regulation on content. The country of origin principle remains intact but weakened, with member

⁷⁷ 2018 AVMSD Articles 30 & 30a

⁷⁸ Ibid. Article 30b

⁷⁹ <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1489159&t=e&l=en>

states able to require media services targeting their populations to contribute to funds for cultural production and VSPs to set age verifications systems. Depending on how it is used by member states, the principle may further be eroded by the expansion of the possibilities for derogation and a faster more streamlined mechanism for doing so legally. This part of the revision was at least partly a response to concerns from member states whose governments have felt their national security endangered by services coming from outside their borders. If member states are allowed too much leeway to derogate based on interpretations of incitement and what constituted a threat to national security, there could be risks to freedom of expression. Where the 2018 Directive does some important work in the direction of protecting freedom of expression is in the inclusion of relatively detailed criteria for national regulatory authorities and the establishment of ERGA. Having independence and efficiency related criteria set out in law can be an encouragement to member states to maintain regulators better equipped to protect media freedom and pluralism, and importantly will give national level watchdog groups and others something to call upon at the EU level when the independence of regulators in member states is being threatened.

Due to the speed of developments in audiovisual services and technology, the revised AVMSD will probably be slightly out of date already by the time it is transposed and in force. There will be a need to investigate how member states make use of any new powers to impose conditions on or restrict services coming into their territory. There is potential for a great deal of variety in the co-regulatory systems that member states set up to deal with the provisions related to VSPs. Careful monitoring of how these are set up and function will be needed, both to ensure efficiency in relation to the aims of those provisions and for potential threats to freedom of expression. Research will also have to gather evidence on the extent to which the relaxation of advertising rules for linear services and application of consumer protections to all services have helped level the playing field. The next revision process will need it.

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