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Jenny Weinand

Implementing the EU Audiovisual Media Services Directive

Selected issues in the regulation of AVMS by national
media authorities of France, Germany and the UK



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To Marco

Preface

The birth of EU(ropean) Media Law was the “Television without Frontiers”-Directive in 1989, and its further development since still make this Directive the main cornerstone of media law and policy in the European Union. Although a wide range of additional areas of regulation and harmonized approaches followed in the meanwhile, such as in Telecommunication, IT or IP law, the current version of the EU “Audiovisual Media Services Directive” (AVMSD) shows the most advanced level of harmonization with a fundamental impact on the media landscape both in terms of available content for viewers as well as economic opportunities for operators. The introduction of a “country of origin-principle“ already in the original Directive of 1989, which allows providers – first of television and now more extended of audiovisual media content beyond traditional television – to operate according to the legal requirements of the Member State under which jurisdiction they fall, whilst being able to transmit and disseminate all across the EU without having (in principle) to meet further conditions, was crucial for this success.

The Directive was last reformed a decade ago in 2007 and the codified version of that Directive (2010/13/EU) is the topic of this publication which is based on the thesis prepared by Jenny Weinand as Ph.D. candidate at the University of Luxembourg. Not only the sheer volume of this work but also the comparative view on how a EU Directive is applied in practice in different Member States show that the analysis was a huge effort to be undertaken by a junior researcher. In achieving this goal, she could profit from having worked previously and in parallel on the AVMSD I and II-research projects funded by the University of Luxembourg. This project provides English translations of all AVMSD-transposing acts of the 28 EU Member States, has made them available on the website www.medialaw.lu (which was meanwhile expanded and integrated into a database with more functionalities at the European Audiovisual Observatory, available at avmsd.obs.coe.int) and used them to prepare a comparative commentary on the national laws concerning the Directive which will also be published by Nomos in the near future. For now, the Research Unit in Law of the University of Luxembourg is very pleased that the analysis of Jenny Weinand is becoming more widely available through publi-

cation as Volume 13 of the „Luxemburger Juristische Studien – Luxembourg Legal Studies“ with Nomos publisher.

The title of this volume *“Implementing the EU Audiovisual Media Services Directive – Selected issues in the regulation of AVMS by national media authorities of France, Germany and the UK”* shows the two key features in approaching the topic. Firstly, this analysis does not only look at the national transposition of the AVMSD in selected Member States, but focuses on the actual implementation of the national law – and thereby indirectly the Directive – by the competent national regulatory authorities for the media. Secondly, two main issues in regulating audiovisual media services providers are analysed in detail and with a comparative view to the practices in three of the major EU Member States which at the same time host a large number of all relevant transnationally active providers in the sector in Europe. This approach allows a very telling illustration of how complex EU law is even after its creation: initially there is a text, but there may be interpretation issues that need to be resolved in final instance by the Court of Justice of the EU (CJEU) – such as has been the case e.g. for the question of what constitutes an audiovisual media service in the meaning of the Directive. Then there may be national transpositions which are not only diverse but possibly in violation of the Directive or EU law in general, again a question potentially to be decided by the CJEU. And in the actual practical application of the law there is the different regulatory approaches, in which the implementation can again violate EU law standards and ultimately be reviewed by the CJEU, if the Commission takes action or a Member State court requests clarification. Jenny Weinand’s work shows how relevant this last level of diversity is across Europe even in issues, which have seemingly been harmonized in relative detail by EU law.

This publication starts out in chapter 1 with explaining why at all and how audiovisual media services are regulated, after which chapter 2 identifies different regulatory models that are applied. As media regulation is by its nature sensitive in view of the fundamental right to freedom of expression/media freedom, one finds more complex regulatory approaches such as co-regulation in this area. In order to better understand potential differences between the regulatory practices in the three Member States selected for comparison here, the competent media authorities in the United Kingdom, Germany and France are described in chapter 3. Already from this, one can see that administrative structures are diverse, which in turn can impact the administrative work undertaken.

The following two chapters give an in-depth analysis of the regulatory approach for two key sections of the AVMSD. Chapter 4 deals with the actual *materiae* of the Directive, namely what an on-demand audiovisual media service is about and how this actually expands the scope from what was covered previously by reference to television broadcasting. The Directive uses the categories of linear and non-linear services to differentiate and also gives a number of indications both in the recitals and substantive part to be applied when deciding whether or not a specific service is covered by the Directive. These criteria have proven to leave a lot of questions open and therefore it is very valuable to understand how regulators have dealt with the fundamental question of whether or not they can at all monitor a specific service. Chapter 5 deals with one of the substantive areas of regulation: the protection of minors in audiovisual media services. Again, on-demand services are used for illustration. This analysis is important because the provision in the Directive is relatively vague and leaves the details to national transposition and implementation. Although the general approach can build on the experience of protection of minors in television the expectation towards on-demand service providers in ensuring that minors are not confronted with harmful content is somewhat lower, which makes it even more interesting to understand what in practice regulators impose on providers. Already with this explanation and comparison, Jenny Weinand's thesis would be an important contribution to the academic debate because of its thorough analysis. But the author does not only present the challenges in light of the continuing media convergence and changing viewer habits, but uses the comparison to derive best practices from the regulators' approaches and delivers valuable guidance for practice: the work allows comparison with the regulatory monitoring efforts done elsewhere as well as being able to judge which setting or location may be most advantageous for a provider.

The publication does not end here. In addition, the most recent development is also reflected which makes the thesis' publication arrive in a very timely manner: chapter 6 deals with the future regulation of services by the AVMSD. This chapter picks up the current reform debate, launched by the Commission proposal of May 2016. An amended AVMSD as proposed will – if agreed on by European Parliament and Council – inter alia expand some of the rules to so-called video-sharing platforms and update provisions concerning jurisdiction, protection of minors, commercial communication and others. All of this is not only presented in comprehensive form in the final part of the work, but analysed against the backdrop of her

Preface

recommendations on regulatory strategies in view of media convergence. The suggestions she offers for the future EU legal framework in the AVMSD deserve attention already in the current debate and I am convinced that these, together with the analysis of the current practices, offer a fruitful read and deserve to be regarded in any discussion on the AVMSD.

And even if (as is likely) some of the aspects discussed here will not be resolved in the current reform debate, the value of the work will uphold for the coming years, because:

“Nach der Reform ist vor der Reform.”
(literally: “After the reform is before the reform.”)

– in variation of a famous saying attributed to the former coach of the German national football team Sepp Herberger. During the World Cup 1954 in Switzerland, which the German side went on to win, he said this after a match to indicate that nothing was achieved as the next game is around the corner (“Nach dem Spiel ist vor dem Spiel.“). It was one of the matches played in Geneva which is where Jenny Weinand now works for the European Broadcasting Union (EBU) as legal expert on the AVMSD and related issues and can apply her knowledge in practice. With this publication, her theoretical analysis is made available to the public and I am sure readers will share the view that they mark important contributions to discussions about how to regulate audiovisual media services in the future!

Dr. Mark D. Cole

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Abbreviations

Art.	Article
Arts.	Articles
Article 29 WP	Article 29 Data Protection Working Party
ARD	Arbeitsgemeinschaft der öffentlich rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland [Germany]
ARCEP	Autorité de Régulation des Communications Electroniques et des Postes (Authority for the Regulation of Electronic Communications & Postal Services) [France]
ATVOD	Authority for Television On Demand [United Kingdom]
AVMS	Audiovisual media services
AVMSD	Audiovisual Media Services Directive
AVS	Age verification system
BEREC	Body of European Regulators in Electronic Communications
BKS	Bundeskommunikationssenat [Austria]
BGH	Bundesgerichtshof (Federal court of justice) [Germany]
BLM	Bayerische Landeszentrale für neue Medien [Germany]
BPjM	Bundesprüfstelle für Jugendgefährdende Medien (Federal Review Board for Media Harmful to Minors) [Germany]
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court) [Germany]
BverwG	Bundesverwaltungsgericht (Federal Administrative Court) [Germany]
CA	Communications Act [United Kingdom]
CAC	Content access control
Cc	Conseil constitutionnel (Constitutional Council) [France]
CFR	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CNCL	Commission nationale pour la communication et les libertés (National Commission for the Communication & Freedoms) [France]
Commission	Commission of the European Union
Community	European Community
CoE	Council of Europe

Abbreviations

CPC	Consumer Protection Cooperation
CSA	Conseil Supérieur de l'Audiovisuel [France]
CTT	Convention on Trans-frontier Television [Council of Europe]
CULT	Committee on Culture & Education of the European Parliament
DLM	Direktorenkonferenz der Landesmedienanstalten (Conference of Directors of the Media Authorities) [Germany]
DSM	Digital Single Market Strategy of the European Commission
The Court	Court of Justice of the European Union
EAO	European Audiovisual Observatory
EBU	European Broadcasting Union
ECD	E-Commerce Directive
ECHR	European Convention for the Protection of Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
EPRA	European Platform of Regulatory Authorities
ERGA	European Regulators Group for Audiovisual Media Services
EU	European Union
FERG	Fernseh-Exklusivrechtgesetz [Austria]
FSM	Freiwillige Selbstkontrolle Multimedia Dienste e.V. (Voluntary Self-Monitoring of Multimedia Service Providers) [Germany]
GG	Grundgesetz (German Basic Law) [Germany]
GVK	Gremienvorsitzendenkonferenz (Conference of Chairpersons of the Decision-Taking Councils of the Media Authorities) [Germany]
HACA	Haute Autorité de la communication audiovisuelle (High Authority for Communication, HACA) [France]
HRA	Human Rights Act [United Kingdom]
IRIS	Imaginons un réseau Internet solidaire
IWF	Internet Watch Foundation [United Kingdom]
JMSStV	Jugendmedienschutzstaatsvertrag (Interstate Treaty for the Protection of Minors) [Germany]
JSP	Jugendschutzprogramm (Technical System for the Protection of Minors) [Germany]
JSPs	Jugendschutzprogramme [Germany]
JuSchRiL	Jugendschutzrichtlinien (Guidelines for Guaranteeing the Protection of Human Dignity and Young People) [Germany]

KEK	Kommission zur Ermittlung der Konzentration im Medienbereich (Commission on Concentration in the Media) [Germany]
KJM	Kommission für Jugendmedienschutz (Commission for the Protection of Minors) [Germany]
KommAustria	Kommunikationsbehörde Austria [Austria]
LCA	Loi sur la communication audiovisuelle (Law on Audiovisual Communication) [France]
LG	Landgericht (District court) [Germany]
LLC	Loi relative à la liberté de communication (Freedom of Communication Act) [France]
LMA	Landesmedienanstalt (state media authority) [Germany]
LMK	Landeszentrale für Medien und Kommunikation Rheinland-Pfalz [Germany]
MEP	Member of European Parliament
NDR	Norddeutscher Rundfunk
NRA	National regulatory authority
NRA _s	National regulatory authorities
OCA	Office of Communications Act [United Kingdom]
ODPS	On-demand programme service [United Kingdom]
OJ	Official Journal (of the European Union)
OLG	Oberlandesgericht (Appeal court) [Germany]
Para.	Paragraph
PP	Product placement
PSB	Public service broadcasting/er
PSM	Public service media
RStV	Rundfunkstaatsvertrag (Interstate Treaty on Broadcasting & Telemedia) [Germany]
SVOD	Subscription-based video-on-demand service
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TKG	Telekommunikationsgesetz (Telecommunications Act) [Germany]
TMG	Telemediengesetz (Telemedia Services Act) [Germany]
TT	Tiroler Tageszeitung
TWFD	Television Without Frontiers Directive
UCPD	Unfair Commercial Practices Directive
UG	User-generated

Abbreviations

UGC	User-generated content
Union	European Union
UWG	Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act) [Germany]
VG	Verwaltungsgericht (Administrative Court at State Level) [Germany]
VGH	Verwaltungsgerichtshof (Administrative Court) [Austria, Germany]
VOD	Video-on-demand
VSP	Video-sharing platform
VSPs	Video-sharing platforms
ZAK	Kommission für Zulassung und Aufsicht (Commission on Licensing & Supervision) [Germany]

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Introduction

A. *The raison d'être of this study*

I. Context

“The unprecedented variety and virtually infinite quantity of information available, the lack of State borders as significant barriers to the flow of that information, the ease of producing any information on any subject and its reach to a virtually unlimited number of recipients, and, (...) the detachment of the virtual, digital world from the material world – all this calls for new legal instruments, often built on entirely new bases. In addition, that reality is changing at a huge speed, significantly outstripping the legislature’s ability to react to it, in particular in democratic countries. Applying rules devised for an analogue reality in the digital age is causing a number of difficulties.”¹

This quote from Advocate General (AG) Szpunar's opinion in the *New Media Online* case gets to the heart of this study: the convergence of media, which allows for instant, seamless and immersive communication, has radically challenged the current sector-specific approach to regulating various kinds of different media such as the printed press, broadcasting/ audiovisual media services and the Internet. Media convergence therefore constitutes the factual backdrop to this study. However, this phenomenon is neither predictable nor homogeneous across sectors, in particular the audiovisual media services market. Certain trends can nonetheless be identified. The value of the audiovisual market, which includes broadcasting and on-demand services, video and cinema was € 107 billion in 2014. The vast majority of revenues was derived from broadcasting (85 percent), while 8 percent of the revenues were attributed to the on-demand segment.² The market’s potential is further illustrated by the large number of TV channels (about 5,300) on the air in the European Union (EU) in 2015,

1 Opinion of Advocate General Szpunar delivered on 1 June 2015 in case C-347/14 *New Media Online GmbH*, EU:C:2015:434, para. 2.

2 Cabrera Blázquez et al., *Yearbook 2015, Television, Cinema, Video and On-Demand Audiovisual Services – The Pan-European Picture, Key Trends*, ed. European Audiovisual Observatory (Strasbourg, France, 2016), p. 44.

compared to about 3,000 on-demand services.³ It is certainly true that on-demand services have mushroomed over the past five years and mass consumption of simultaneously received content (TV) is dropping, in particular among younger audiences.⁴ Competition is fierce between subscription-based on-demand services (SVOD) provided by the five well-established European brands NowTV (Sky), Maxdome (Pro Sieben/Sat1), CanalPlay (Canal+ Group), Viaplay (MTG), Infinity (Mediaset), and several smaller regional SVOD providers (such as CME's Voyo or Liberty Global's MyPrime). Competition has further been increased by the arrival of three global players on the EU market: Netflix, which is now available throughout Europe and attracted more than 50percent of EU subscribers in 2015; Amazon, which has launched its Amazon video platform in the UK, Germany and Austria; and Time Warner, whose HBO Now is available in the Nordic countries (Finland, Denmark, Norway and Sweden).⁵ The interest of these US heavyweights provides an indication of the markets' potential, which continue to grow. The development of new business models is beneficial for consumers who engage with services and applications "in new ways and on new devices anywhere and anytime".⁶

3 Agnes Schneeberger and Gilles Fontaine, "Linear and on-Demand Services in Europe 2015, Mavise Extra," ed. European Audiovisual Observatory, June 2016, pp. 14, 30, http://www.obs.coe.int/documents/205595/264629/MAVISE+EXTRA_TV+and+ODAS+in+Europe+2015.pdf/6f081c35-b205-4cb2-8214-366f7d5bc500 (accessed 25.9.2016); Cabrera Blázquez et al., *Yearbook 2015*, p. 28.

4 Schneeberger and Fontaine, "Linear and On-Demand Services in Europe 2015," pp. 15–16; Winfried Kluth and Wolfgang Schulz, "Konvergenz und regulatorische Folgen. Gutachten im Auftrag der Rundfunkkommission der Länder, Arbeitspapier Nr. 30" (Hans Bredow Institut, 2014), pp. 80–81, http://www.hans-bredow-institut.de/webfm_send/1049 (accessed 10.2.2015).

5 Media Intelligence Service, "Market Insights SVOD in Europe," ed. European Broadcasting Union, June 2016, pp. 20–22, 23–26, <https://www.ebu.ch/news/2016/06/european-svod-reach-50-mil-2020>. The report is only accessible for EBU Members.

6 Ofcom, "Ofcom Response to the European Commission Green Paper 'Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values'" (European Commission, September 27, 2013), para. 2.7-2.9, pp. 8–11, <http://ec.europa.eu/digital-agenda/en/news/consultation-green-paper-preparing-fully-converged-audiovisual-world-growth-creation-and-values> (accessed 14.10.2013).