

Mobile television: Key regulatory issues for new mobile audiovisual platforms
The EU regulatory approach: A catalyst for a competitive environment?

**Paper submitted for the 17th Biennial Conference of the International
Telecommunications Society, Montreal, Canada, June 24-27, 2008**

David Stevens and Peggy Valcke¹

Summary

In this paper we analyse to what extent the European Union (EU) regulatory frameworks currently in place, concerning the regulation of ..., are contributing to the objectives of the EU i2010-policy, and creating a competitive environment and sufficient legal certainty for the development of new, legally challenging, audiovisual platforms and services such as mobile television. After having set the scene by providing an overview of the key regulatory issues for new mobile audiovisual platforms, this paper describes the current EU regulatory approach and examines the distinction the EU makes between “electronic communications” on the one hand (transmission), and “e-commerce” and “audiovisual media services” on the other hand (content). In this paper, we argue that this approach is not well suited to handle a new role that is arising on the digital media value chain (namely, distribution). In fact, although it is nowadays, from a technological or economic point of view, perfectly possible to independently operate a platform or perform a role as content aggregator (and the importance of the latter role is even increasing), the existing regulatory frameworks do not treat this new role consistently, since they are still characterized by a strict dichotomy between transmission aspects on the one hand, and content related matters on the other.

¹ The authors are media and communications law researchers at the Interdisciplinary Centre for Law and ICT (ICRI-KULeuven-IBBT) of the Katholieke Universiteit Leuven (www.icri.be / www.ibbt.be). David Stevens is the president of the Raadgevend Comité voor Telecommunicatie (www.rct-cct.be) and the sectorraad Media of the Raad voor Cultuur, Jeugd, Sport en Media (www2.vlaanderen.be/media/Media/beleid/VlaamseMediaRaad/), respectively advisory bodies for the Belgian Minister of Telecommunications, and the Flemish Minister of Media. As a post-doctoral researcher of the Fonds voor Wetenschappelijk Onderzoek Vlaanderen (www.fwo.be), Peggy Valcke teaches media and communications law at the Katholieke Universiteit Leuven and the Katholieke Universiteit Brussel. She is also a member of the Vlaamse Regulator voor de Media (www.vlaamseregulatormedia.be).

The changing information and communications landscape and policy objectives

Information and communications technologies are constantly reshaping the broadcasting landscape. In particular, radio and television programmes are being transmitted over or through an increasing number of networks and transmission technologies. Some of them use wired rather than wireless technologies, or radio frequencies that are not traditionally linked to broadcasting allocations in national frequency plans. Traditional forms of broadcasting also face more and more competition from new types of audiovisual media content offered on an on-demand basis and – perhaps more importantly – provided by the users themselves (for example, the exponential popularity of user-generated content based services, such as *YouTube*). These evolutions make it necessary to reconsider the objectives of and basic concepts behind broadcasting policies.

Audiovisual content distribution is currently regulated by a number of different EU frameworks. To indicate the issues at stake, we firstly provide an overview of the key regulatory issues for new mobile audiovisual platforms. The second part of the paper then examines the basic concepts behind the current EU regulatory framework and their application to mobile television networks and services. More precisely, it analyses the relationship between the electronic communications regulatory package, on the one hand (i.e. transmission aspects), and the e-commerce directive and audiovisual media services directive, on the other hand (i.e. content related aspects), and the impact of these frameworks on distributors of mobile television. The conclusions of the paper then address the issue of consistency of the overall EU regulatory framework, and evaluate whether this current framework will succeed in contributing to the objectives of the European i2010-policy² (i.e., the strengthening of investment and innovation in information and communication technology (ICT) research, the provision of better public services and quality of life through the use of ICT, and **establishing a Single European Information Space** offering affordable and secure high-bandwidth communications that are rich and diverse in content and digital services) in general, and in creating a competitive environment and sufficient legal certainty for the development of innovative new services such as mobile television in particular.

² See http://ec.europa.eu/information_society/eeurope/i2010/.

Key regulatory issues for mobile television

This section will now provide a short overview of the most relevant regulatory issues concerning the provision of a flourishing mobile television market in Europe. Today, the consensus seems to be that the most important bottlenecks restricting the offering of mobile television services to the public relate to the following four concerns:

1. Technology issues

- Spectrum availability and allocation: in its paper on convergence,³ the i2010 High-Level-Group pointed out that *“the long term policy goal should be to develop approaches ensuring that spectrum issues related to the growing and evolving variety of radio systems comply with the overall policy goal to develop the European Union internal market and European competitiveness, by ensuring an innovation-friendly and coherent regulatory environment which facilitates rapid access to spectrum for new technologies and leads to the provision of a wide variety of wireless electronic communications services and networks.”*

However, the group also clearly indicated the problems that have to be overcome: *“At present, in the EU, different conditions exist to access radio resources, for example, between mobile operators and broadcasters, while electronic services provided by these operators increasingly overlap. The current divergences in usage constraints and barriers between uses create tensions between rights holders and discrepancies in demand for spectrum and its commercial valuation. The gap between market needs and regulation impairs the efficient use of spectrum and hampers the development of a genuine internal market while the inefficiency in spectrum use creates costs and reduces the take-up of innovative services, to the detriment of consumers and the wider economy.”*

- Standardisation and interoperability: in technology markets, standardisation always presents a difficult challenge for governments; for mobile television in Europe, a significant step was taken by the European Commission on 17 March 2008, when it decided to add the Digital Video

³ i2010 High Level Group, “The Challenges of Convergence”, 12 December 2006, available at: http://ec.europa.eu/information_society/eeurope/i2010/docs/i2010_high_level_group/i2010_hlg_convergence_paper_final.pdf.

Broadcasting Handheld standard (DVB-H) to the EU List of Standards,⁴ which serves as a basis for encouraging the harmonised provision of communications across the EU.

2. Economic issues

- Bottlenecks and access to networks, to conditional access systems (CAS), application programme interfaces (API) and electronic programme guides (EPG): in the electronic communications sector, there is a continuing lack of clarity on the future balance between promoting incentives for long-term investment and ensuring sustainable competition at the access level.
- “Must carry” requirements: the capacity available on the future wireless television network will be limited. A lack of clarity thus also exists on this level: what role should public authorities play in the decision of which content should be made available at which price?
- Handset cross-subsidization: there is no harmonised EU answer to the question of whether operators will be allowed to apply cross-subsidisation of handsets (for example, by sim-lock strategies) in order to speed up the penetration of new mobile devices.
- Advertising rules: the advertising rules listed in the European Commission’s Audiovisual Media Services Directive (AVMS Directive) are not always appropriate for mobile television; the nature of mobile broadcasting may justify the offer of shorter but more frequent advertisements than in the context of traditional broadcasting.

3. Content issues

- Availability of and access to valuable content: access to valuable content (for example, premium rights) and to television schedules is critical for new platforms in order to be able to compete effectively. However, operators of new platforms are likely to encounter difficulties in acquiring content due to:
 - the market power of existing platforms and different levels of vertical integration (economies of scale and scope); and

⁴ See

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/451&format=PDF&aged=0&language=NL&guiLanguage=en>.

- long-term exclusivity contracts limiting the commercial availability of interesting content.
- Copyright concerns: copyright issues exist for content mainly because of the territoriality and technology focus of

4. Consumer related issues

- The protection of minors: this issue requires particular attention because of the mobility of the receiving device.
- Protection of personal data: a fair balance has to be found between the need to harvest the potential of interactivity for all parties, and the need to protect the personal data of the viewer.

Furthermore, in addition to these four groups of concerns, the business case for providing mobile television is also unclear because of the lack of transparency concerning the role public service broadcasters will take: will they be obliged to offer their content at reasonable terms to providers of mobile television, or will they be operator of a platform or a network themselves?

The EU regulatory frameworks for mobile television

This part of the paper will provide an overview of the relevant regulatory frameworks for the provision of mobile television in the EU. The first section provides an overview of a number of regulatory frameworks that are applicable in all economic sectors and that are not specifically aiming at regulating the mobile television sector. In the second part, we more closely examine the sector-specific regulation for the information and communications sectors.

A. General EU legislation

Since they are applicable to all economic sectors, a number of general pieces of EU legislation also have an impact on the provision of mobile television. However, because of their limited relevance in view of the objective of this paper, they are only briefly listed according to subject matter below:

- Competition law (in particular Articles 81-82 ECT: cartels, abuse of dominant position, state aid,).
- Unfair commercial practices (Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and

amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 (Unfair Commercial Practices Directive)).

- General data protection principles (Directive 95/46/EC 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)).
- Directives on copyright and related rights:
 - Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes;
 - Directive 98/84/EC of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access;
 - Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases;
 - 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission;
 - Directive 92/100/EEC of 19 November 1992 on rental and lending rights and on certain rights related to copyright in the field of intellectual property;
 - Directive 2001/84/EC of the European Parliament and the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art;
 - Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights; and
 - Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the “information society”.
- Advertising rules:
 - Directive 2006/114/EC of the European Parliament and the Council of 12 December 2006 on misleading and comparative advertising;
 - Directive 2003/33/EC of the European Parliament and the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.

B. The EU ICT framework

As indicated above, the current regulatory framework for the information and communications sectors in the EU is essentially characterized by a strict dichotomy between aspects relating to transmission of electromagnetic signals (“electronic communications networks and services”) on the one hand, and aspects relating to the content provided (“audiovisual media services” and “information society services”) on the other hand. In this section we analyse the basic concepts behind these different regulatory frameworks and evaluate their application in the mobile television environment.

We also argue that this regulatory approach is no longer well suited to handle the challenges of the new media value chain (i.e., promoting competition, consolidating the internal market, favouring cultural diversity, and benefiting users and citizens). These sector specific regulations are no longer able to provide sufficient legal certainty to market players because they do not take into account rapid technological and economic changes in the media sector. By so strictly separating transmission related aspects on the one hand, and content related aspects on the other, the current regulatory framework neglects the new role that has emerged: audiovisual media distribution.

B1. The electronic communications regulatory framework

a) Background

The EU legal framework for regulating telecoms services has been developed with the aim of developing a better-functioning internal market for telecommunications networks and services. In 2002, it was considered that since, in the information society, the boundaries between telephone, internet, television broadcast and mobile phone services are becoming blurred, or even irrelevant, the regulatory approach to the different services also had to converge. Therefore, the EU adopted a new regulatory framework for electronic communications networks and services, covering all forms of fixed and wireless telecoms, data transmission and broadcasting. The regulation of the content carried by such services is, however, dealt with under separate rules. Last revised in 2002, this framework is currently being updated (see below) to take account a number of developments in this fast-moving field.

b) Framework objectives and elements

Today, the EU regulatory framework for electronic communications is made up of a package of six directives and one regulation:

- Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive);
- Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive);
- Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive);
- Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive);
- Directive 2002/58/EC of the European Parliament and the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications (Directive on privacy and electronic communications) sector;
- Directive (2002/77/EC) of the European Commission of 16 September 2002 on competition in the markets for electronic communications services; and
- Regulation (2000/2887/EC) on unbundled access to the local loop,

This framework has mainly economic objectives (except for the directives on universal service and on the protection of privacy). It aims to enhance competition to stimulate innovation and investment. Its flexibility implies that ex-ante obligations imposed on strong operators have to be rolled back as soon as a market has been defined and found competitive by the national regulatory authorities (Articles 14-16 of the Framework Directive).

The same principles apply regardless of which kind of existing or potentially new technology is involved (“technological neutrality”). Obligations may be imposed on all operators providing communication services (Universal Service Directive) and/or only operators enjoying significant market power in specified markets (Access Directive for wholesale markets and Universal Service Directive for retail markets). Regulation must

be withdrawn once there is effective competition in a specific market. Deployment of new services will create emerging markets and may be exempt from ex-ante regulation.

c) Basic concepts

Most of the basic concepts of the regulatory framework for electronic communications can be found in Article 2 of the Framework Directive, which states, *inter alia*:

(a) "electronic communications network" means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

[...]

(c) "electronic communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

[...]

(e) "associated facilities" means those facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service. It includes conditional access systems and electronic programme guides;

(f) "conditional access system" means any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation;

[...]

(o) "enhanced digital television equipment" means set-top boxes intended for connection to television sets or integrated digital television sets, able to receive digital interactive television services;

(p) "application program interface (API)" means the software interfaces between applications, made available by broadcasters or service providers, and the resources in the enhanced digital television equipment for digital television and radio services.

Contrary to the directives it replaced (which used the terms "telecommunications services" and "telecommunications networks"), this directive takes into account the convergence phenomenon by bringing together under one single definition **all electronic communications services and/or networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means** (i.e., fixed, wireless, cable television, and satellite networks). Thus, the transmission and broadcasting of radio and television programmes should be considered as an electronic communication service and all networks used for such transmission and broadcasting should likewise be considered as electronic communications networks.

d) To what degree are audiovisual services included?

More guidance on the precise scope of the application of the Framework Directive is provided by its explanatory memorandum:

(5) The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. [...] It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism.

[...]

The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.

[...]

(10) The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.

The Authorisation Directive further elaborates on this issue, stating in its recital 20 that *“The same undertaking, for example a cable operator, can offer both an electronic communications service, such as the conveyance of television signals, and services not covered under this Directive, such as the commercialisation of an offer of sound or television broadcasting content services, and therefore additional obligations can be imposed on this undertaking in relation to its activity as a content provider or distributor, according to provisions other than those of this Directive, without prejudice to the list of conditions laid in the Annex to this Directive.”*

However, the “taking into account” of the links between content and transmission is in the current directives largely limited to:

1. The issue of “must carry”

Article 31 of the Universal Service Directive states that Member States may impose reasonable "must carry" obligations on network operators where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts.

The explanatory memorandum of the Universal Service Directive provides again more information about the precise impact of this provision, by explaining that must carry is an obligation which can only be imposed on network operators:

(44) Networks used for the distribution of radio or television broadcasts to the public include cable, satellite and terrestrial broadcasting networks. They might also include other networks to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts.

(45) Services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services. Providers of such services should not be subject to universal service obligations in respect of these activities.

2. Frequency allocation

Under the EU electronic communications framework, frequencies are normally allocated within the framework of a general authorisation (Articles 3-5 of the

Authorisation Directive). Member states can deviate from this principle only if harmful interference is expected. Even in this case, however, member states have to assign frequencies based on open, transparent and non-discriminatory procedures. However, Article 5, §2 of the Authorisation Directive formulates a specific exception for the broadcasting sector, in that the principles in the directive are stated *“without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law, such rights of use shall be granted through open, transparent and non-discriminatory procedures.”*

3. Conditional access, EPG and API and standardisation

The regulatory framework contains a number of specific rules on the issue of access to conditional access systems, to application programme interfaces and electronic programme guides. The actual application of these provisions remains however quite problematic.

4. Standardization

Articles 17-18 of the Framework Directive relate to standardisation. In principle standardisation is left to the market, since Member States can only *encourage the use of the standards and/or specifications* and the European Commission can only make implementation of the relevant standards compulsory when the standards and/or specifications have not been adequately implemented. Specific rules exist for:

- Digital interactive television services (Article 18 of the Framework Directive);
- Consumer digital TV equipment (article 24 of the Universal Service Directive); and
- Wide-screen TV (Article 4 of the Access Directive).

e) Summary of EU e-communications regulation

It seems reasonable to state that the EU's electronic communications framework applies to:

- All networks, even those used for broadcasting, (these are regulated as “electronic communications networks”);

- The majority of “traditional” telecommunications services, voice telephony, and internet access services (these are considered as “electronic communications services”); and
- The transmission of broadcasting signals over an electronic communications network, referred to as “transmission services in networks used for broadcasting” (however, the framework does not contain relevant provisions on the distribution of audiovisual services).

However, the regulation of content is not in the scope of the electronic communications regime since electronic communication services do not include “services [...] exercising editorial control over, content transmitted using electronic communications networks and services.” (Article 2c Framework Directive)

B2. The electronic content regulatory framework

The European regulatory framework for content is also characterized by a strict dichotomy between audiovisual media services on the one hand, and information society services on the other hand.

a) *Audiovisual media services*

a1. Background and objectives

What is often referred to as the “new audiovisual media services directive” (directive 2007/65/EC) is in fact a directive amending the existing Television without Frontiers Directive and renaming it the “Audiovisual Media Services Directive” (AVMS Directive). The amending directive was adopted on 11 December 2007 and entered into force on 19 December 2007, one day after its publication. Member States were given two years to transpose the new provisions into national law, so that the modernised legal framework for audiovisual media services will be fully applicable by the end of 2009.

The AVMS Directive offers a comprehensive EU legal framework that covers all audiovisual media services (including on-demand audiovisual media services), provides less detailed and more flexible regulation, and modernises rules concerning television advertising in order to improve the financial strength of the European audiovisual sector. By doing so, the directive creates a new level-playing field in the EU for emerging audiovisual media services. It also reaffirms the pillars of the EU's audiovisual model, which are cultural diversity, the protection of minors, consumer protection, media

pluralism, and the fight against racial and religious hatred. In addition to that, the AVMS Directive also aims to ensure the independence of national media regulators.

a2. Basic concepts

Article 1 of the AVMS Directive states that, for the purpose of this directive, an "audiovisual media service" means:

a service as defined by Articles 49 and 50 of the Treaty 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 Article 2(a) of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point(e) of this Article or an on-demand audiovisual media service as defined in point (g) of this Article; and/or audiovisual commercial communication.

The most important criteria in determining the scope of the AVMS Directive are:

- First of all, an Audiovisual Media Service (AVMS) must have an economic character. Thus, private websites and non-commercial blogs which are not in competition with television broadcasting are excluded from the scope of the new directive.⁵ Video blogs that carry advertisements as their major source of income, however, are classified as an AVMS and thus have to meet the obligations of the Directive.
- Second, a media service provider must have editorial responsibility. Editorial responsibility means 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. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.⁶ Service providers who do not have influence over content, and only give the possibility to users to upload content on their platform, are excluded from the AVMS Directive's scope. The notion of editorial responsibility means that the service provided by *YouTube*, for instance, cannot be considered as an AVMS, because *YouTube* does not

⁵ Recital 16 AVMS Directive.

⁶ Article .1(c) AVMS Directive.

exercise editorial control over the audiovisual images on its website. This is despite the fact that *YouTube* provides a platform where moving images are shown to entertain a general public, and that the purpose of *YouTube* is to gain income from the advertising on its website (which means that it meets the economic criterion as well).

Third, the principal purpose of the service should be the provision of programmes. Services whose principal purpose is not to distribute audiovisual content, even where such services contain some audiovisual content, are excluded from the scope of the AVMS Directive. Examples are images on websites that are only provided incidentally to that service, such as animated graphical elements, and small advertising spots or information related to a product or non-audiovisual service.⁷ An advertising spot on the website of car manufacturers, for instance, does not have to comply with the requirements of the AVMS Directive, because the distribution of the audiovisual content is not the principal purpose of the website. A travel agency showing a clip of a holiday resort on its website would also not be covered. Looking at websites of newspapers where news bulletin videos are shown, it could be argued that the news on the website is the main service and that the few seconds of video footage are part of this service, but are only ancillary to it. Therefore, such a website may not be a AVMS within the meaning of Article 1(a) of the AVMS Directive and thus is not within its scope. Gambling websites, which show audiovisual content, also do not meet the third condition, because the principal purpose of a gambling website is not to provide moving images in order to inform, entertain or educate. These services therefore fall outside the scope of the AVMS Directive. The definition of an AVMS also excludes online games and search engines, as long as the “principal purpose condition” is not reached.⁸

- Fourth, the service has to distribute programmes. A programme is a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama.⁹ Blogs that do not primarily provide moving images but mainly

⁷ Recital 18 AVMS Directive.

⁸ Recital 18 AVMS Directive.

⁹ Article 1(b) AVMS Directive.

offer text or pictures are not considered to be AVMS. A blog put up by the local village football team, even if it is sponsored by a local firm, would thus not have to comply with the obligations of the Directive. Because the term “audiovisual” refers to moving images with or without sound, it includes silent films but does not cover audio transmission or radio. The AVMS Directive only covers “TV-like” services and therefore will not cover electronic versions of newspapers, magazines and websites without audiovisual media content. The definition of AVMS also covers text-based content which accompanies programmes, such as subtitling services and electronic programme guides.¹⁰ Finally, the AVMS Directive states that the notion of “programme” should be interpreted in a dynamic way, taking into account developments in television broadcasting.¹¹

- Fifth, an AVMS should inform, entertain and educate the general public. Because of the fact that images have to be delivered to the general public, audiovisual services offered only to persons present on the premises of certain companies or other legal entities (such as a department store or metro station) were not intended to be included as they are not provided to the general public. Furthermore, any form of private correspondence, such as e-mails sent to a limited number of recipients, is excluded from the Directive’s scope.¹² Finally, commercial websites featuring audiovisual content using webcams (for example, snow conditions or road traffic) would not be considered as informing, entertaining or educating because there would be no editorial control over the audiovisual content.

a3. Summary of the audiovisual media services framework

The audiovisual media services framework applies to economic services aiming at providing audiovisual content to the public. In order to fall within the scope of the directive, the provider should have editorial responsibility over the content distributed. Editorial responsibility refers to the actual exercise of effective control both over the selection and the organisation of the distributed content. It does not refer to legal liability. This definition excludes owners or private websites or services consisting of the provision or distribution of audiovisual content generated by private users for the

¹⁰ Recital 21-22 AVMS Directive.

¹¹ Recital 17 AVMS Directive.

¹² Recital 18 AVMS Directive.

purposes of sharing and exchange within communities of interest. Finally, this framework is not applicable to “carriers”, since natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties are excluded (Recital 19 AVMS Directive).

b) Information society services

b1. Background and objectives

Information society services are covered by Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal European Market (Directive on Electronic Commerce).

This directive establishes harmonised rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers. As for audiovisual services, the Directive on Electronic Commerce ensures the proper functioning of the Internal European Market by the “internal market clause”, which means that information society services are, in principle, subject to the law of the Member State in which the service provider is established. In turn, the Member State in which the information society service is received cannot restrict incoming services.

Examples of services covered by the Directive on Electronic Commerce include online information services (such as online newspapers), the online selling of products and services (for example, books, financial services and travel services), online advertising, professional services (for example, lawyers, doctors and estate agents), entertainment services and basic intermediary services (such as access to the Internet and the transmission and hosting of information). These services also include services provided free of charge to the recipient and funded, for example, by advertising or sponsorship.

b2. Basic concepts

The definition of "information society service" in Article 1 of Directive 98/34/EC of the European Parliament and the Council of 22 June 1998 (laying down a procedure for the provision of information in the field of technical standards and regulations, and of rules governing information society services) spans a wide range of economic activities which

take place on-line. Most of these activities are not covered by the scope of Directive 98/34/EC because they do not consist wholly or mainly of the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are, however, covered by Directive 98/34/EC. Therefore, the same undertaking – such as an Internet service provider – can offer both an electronic communications service, such as access to the Internet, and services not covered under Directive 98/34/EC, such as the provision of web-based content. These principles are further illustrated by a number of Recitals of the Directive:

(17) The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services(21) and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access(22); this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition.

(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or

profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

Towards a more consistent regulatory approach of the distribution of mobile television?

The current rules which govern network-related aspects of mobile television (as “electronic communications networks and services”) in the EU were agreed to in 2002. In this quickly-evolving sector, the regulatory framework now needs to be revised, to ensure it continues to meet efficiently its objectives in today’s markets. On 13 November 2007, the European Commission proposed a number of changes to the framework, which will involve amending a number of the directives. The main proposed amendments to the Framework Directive relate to:

- Reforming spectrum management, applying the European Commission’s policy approach on spectrum management as set out in the Communication of September 2005. Technological development and convergence underline the importance of spectrum, but its management within the EU has not kept pace with this evolution. A more flexible approach is therefore proposed in order to exploit the economic potential and realise the societal and environmental benefits of improved spectrum usage.
- Improving the consistency of regulation of the internal market in electronic communications. To this end, the European Commission proposes a stronger role for itself in the field of remedies imposed by national regulatory authorities (NRAs), and the establishing of a new “Electronic Communications Market Authority” (EECMA).
- Strengthening security and integrity, for the benefit of users of electronic communications. This is essential in order to reinforce the trust and confidence of business and citizens using electronic communications.

As regards to the Authorisation Directive, the main changes are to be as follows:

- Aligning the Directive to the new policy for spectrum;
- Creating an efficient procedure for firms that need rights of use to provide cross-EU services; and

- Ensuring a smooth transition to the introduction of spectrum trading.

As regards to the Access Directive, the main change will be the introduction of functional separation as a new remedy which could be imposed by national regulatory authorities, subject to approval by the European Commission.

Particularly relevant to the purpose of this paper are the proposed modifications to Articles 8 and 20 of the Framework Directive, and to the definition of “access” in Article 2 of the Access Directive, since they are concerned with the relationship between “content” and “transmission”.

In Article 8 of the Framework Directive, the European Commission proposes to add the principle that national regulatory authorities should promote competition in the electronic communications sector by ensuring that there is no distortion or restriction of competition in the electronic communications sector, in particular concerning the delivery of content. By proposing to add a new point g) to the fourth paragraph of this article, the Commission intends to require the national regulatory authorities to promote the interests of citizens by applying the principle that end-users should be able to access and distribute any lawful content and use any lawful applications and/or services of their choice.

Furthermore, the Commission proposes to change the wording of Article 20 of the Framework Directive in order to clarify that disputes between content providers (e.g. broadcasters) and providers of electronic communications services fall within the scope of that article.

(21) Article 20(1) is replaced by the following:

‘1. In the event of a dispute between service providers arising in connection with existing obligations imposed under this Directive or the Specific Directives where one of the parties is an undertaking providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible timeframe and in any case within four months, except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.’

In practice, this would mean that national regulatory authorities would have the task of resolving such disputes. This is remarkable, since in principle, content providers do not fall within the scope of the Framework Directive (and the whole regulatory framework for electronic communications).

Moreover; the European Commission also proposes an amendment to Article 2 of the Access Directive. In fact, this amendment provides a further indication of what the Commission is actually most likely envisaging, since the definition of access is broadened to include direct access to networks by content providers:

Proposed amendment to article 2 of the Access Directive:

‘(a) “access” means the making available of facilities and/or services to another undertaking, under defined conditions, on either an exclusive or nonexclusive basis, for the purpose of providing electronic communications services or delivering information society services or broadcast content services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop); access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems; access to number translation or systems offering equivalent functionality; access to fixed and mobile networks, in particular for roaming; access to conditional access systems for digital television services; access to virtual network services.’

However, the precise objective of the European Commission remains quite unclear. To the authors, it seems that the European Commission mainly wanted to be in a position to answer tricky questions on “net neutrality” during the adoption process of its new proposals. Since preferential transmission agreements between content providers and network operators could raise serious concerns in a world of limited distribution channels, it seems fair to provide national regulatory authorities some extra tools to handle these kinds of agreements.¹³

However, because of the limited scope and impact of the amendments to the framework, it seems unreasonable to believe that this would be the start of a more consistent

¹³ And to answer the same tricky questions of their national parliaments...

approach to regulating the new intermediate function of “content aggregation” on the value chain of the (future?) digital media environment. We therefore believe something is missing in the current EU frameworks which distinguish between providers bearing editorial responsibility for audiovisual content (“content editors”) who are subject to the AVMS Directive, and network operators providing technical transmission services regulated by the electronic communications directives.

What about this third category of actors in the communications value chain, namely, the “content distributors” that deliver the audiovisual media services (usually edited by third parties) to the end-users? The question is all the more pressing because of the removing of market 18 (“wholesale broadcasting transmission services”) from the recommendation of the European Commission. A typical example of this category is the undertaking offering mobile television services. Although they take a central role in the provision of media services (offering packages of channels and services edited by broadcasters, production houses or other media companies) both EU frameworks on content and transmission are not applicable to them.

By separating so strictly the transmission aspects from the content related aspects (and not sufficiently taking into account the links between them, or the importance of this new intermediate role of both “transmission” and/or “content”), the regulatory framework does not sufficiently take into account the “content aggregator” or the “information intermediate” as a new, separate role in the media and communications value chain. Because these actors largely escape from regulation, we believe governments run the risk of no longer being able to efficiently realise their competition- or content- related policy objectives.

More questions can also be raised regarding other new intermediary actors, such as *YouTube*, personalized internet radio services like *pandora.com*, *Google Video* and *Zattoo*, which fulfill the role of a portal by providing a forum for citizens to make personal audiovisual content publicly available and guiding people with a specific profile to content of possible interest (activities which do not qualify these actors as network operators). Since the new AVMS Directive does not seem to apply to them: will they merely be “information society service providers”, falling under the (very light) regime of the Electronic Commerce Directive? Will they not, in the future, play (at least partly) a critical role in the provision of audiovisual and other media services? If so, is it acceptable that these actors be subject to so light a regime?

How will the EU frameworks cope with all players that are somehow “in between” these frameworks? How will those companies or platforms, which are in a way opening the gateway to content edited by others, be regulated? The answer to this question is currently problematic, as the services offered by these actors are neither electronic communications services, nor audiovisual media ones. Despite this problem, it does indeed seem clear that services like these are determining, to a growing extent, what information will reach the end-user. We therefore propose to re-evaluate the conceptual frameworks, taking into account the changes that are taking place on the media and communications value chain. Access to the different layers of this chain is vital to stimulating competition. Competition is paramount in realising the Single European Information Space and is in the best interest of the EU’s media and communications users.
