results and thus have an overall subsequent adverse effect on the functioning of these markets.\textsuperscript{134}

Whether functioning market structures and competition already exist to an extent which is sufficient to ensure these central values of the content industry—a basic supply of the population with content, freedom of information and diversity of opinion—respectively whether the market under the conditions of competition alone at all is capable to achieve these values, is a complex question, which requires a broad political debate firstly, on the social and cultural objectives that are to be pursued on these markets by 'public interest' regulation and secondly, on the extent to which these objectives are to be pursued at EC level. And this debate needs to go hand-on-hand with an in-depth economic analysis of the structures of the content markets as to find out to what extent the market alone is capable to fulfil these objectives. Especially in the quickly changing sector of the electronic content industry this debate and analysis have to be subjected to a continuous re-evaluation as well.

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\textsuperscript{134} For an economic analysis on market regulation see Phillips C.F., The Regulation of Public Utilities. Theory and Practice (Virginia, Public Utilities Reports, Inc, 1985) p. 35 et seq.

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Chapter 4
Sector-specific Regulation at Content Level

Christoph Bezemei\textsuperscript{1}Gregor Ribarov

I. PRELIMINARY REMARKS
A. OBJECTS AND SYSTEMIZATION OF SECTOR-SPECIFIC REGULATION AT CONTENT LEVEL

Sector-specific regulation at content level deals with legal provisions that directly regulate the service content itself, in other words the act of producing and distributing content. This includes all sector-specific provisions that unlike the regulations described in the preceding chapter,\textsuperscript{1} do not address the market structures of the content industry, but rather directly concern the good produced for this market by regulating either the content itself or the means used to distribute it. Such regulations for content broadcast via television are contained in the Television without Frontiers Directive,\textsuperscript{2} as regulations for so-called information society services\textsuperscript{3} are enclosed in the E-Commerce Directive. In addition, Community Law also features a few individual product-related regulations, which, due to the specific properties of the product in question, may have, also standardize corresponding advertisement. As these contain subject-matter regulations governing the performance of content—see

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1. See D. Damjanovic in Chapter 3 above.
3. For a definition of information society services see Section I.C.

M. Holoubek, D. Damjanovic and M. Traimer (eds), Regulating Content – European Regulatory Framework for the Media and Related Creative Sectors, pp. 119–149
for example the Tobacco Directive\(^5\) – they are to be considered in the given framework as well.

Differentiations between the regulations addressed in this Section can be made according to whether they are sector-specific, or ‘vertical’ (i.e. they are addressed to a specific medium or a specific content category) or ‘horizontal’ (i.e. they cut across the boundaries of specific media) (see Fig. 1).

**Figure 1: Regulatory Approaches**

Furthermore, depending on whether subject-matter provisions regarding content or merely the distribution method (limiting the hours in which it may be broadcast, etc.) are stipulated, regulations can also be broken down into qualitative and quantitative regulatory measures (see Fig. 2).

**Figure 2: Sector-specific regulation at content level**

Taking this contrast one step further, the qualitative content regulation that is subject-matter-related can be differentiated into commercial content or other kinds of content, and, within the latter, into content for informative purposes or content for entertainment purposes. Commercial content is generally defined as content that serves to promote a product, a service or a brand. This definition covers all forms of advertising and sponsoring for which financial consideration is made (see Fig. 3).\(^6\)

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**Figure 3: Subject-matter-related Content Regulation**

B.

**Development of Sector-Specific Regulation at Content Level**

The evolution of technology, including the concomitant media trends towards uniformity (the keyword being ‘multi-media’), has forced content regulation to rethink out-dated differentiations focusing on a particular medium, and instead aim at global solution models.\(^7\) This has already taken place on the infrastructural level with the creation of a uniform space for all communication networks and services.\(^8\) This step has yet to be taken with respect to the legal framework governing content itself. The reworking of the Television Directive\(^9\) is focussing on doing just that – as its current scope of application,\(^10\) limited only to television broadcasts, certainly is too narrow. Although the services outside of the directive’s scope are not left unregulated, they are not subject to its special regulatory regime pursuing cultural, socio-political and democratic objectives. Instead the E-Commerce and Universal Service Directive, with their solely economic oriented approach concentrating on commercial communication will apply. This shows that regarding the future audiovisual media service directive the question of its scope of application is important, because that is how the principle direction of European regulation for audiovisual media services will be determined.

The consultations concerning the future of the Television Directive entered their final phase at the Liverpool Conference held in October 2005.\(^11\) The regulations contained in the Directive have been analysed and reviewed at many stages. In its Communication on the future of European regulatory audiovisual
policy, which draws its conclusions from public consultation, the Commission took the position that a thorough revision would be necessary. Furthermore, it initiated the work of focus groups which were to investigate the need for specific modifications of the regulations governing audiovisual content over the last two years. So-called Issue Papers were the product of the focus groups: Rules applicable to Audiovisual Content Services, Cultural Diversity and Promotion of European and Independent Audiovisual Production, Commercial Communication and Protection of Minors and Human Dignity, Right of Reply, which formed the foundation for adapting the Television Directive.

Recently the Commission has submitted a corresponding draft amendment. The purpose of the new Directive (the so-called Audiovisual Media Services Directive), as stated by the Commission in its Communication '1-2010', is to build towards an integrated approach to information society and audiovisual media policies in the EU. It will therefore focus on regulating audiovisual media content in general instead of merely television, thereby also applying to services aside from classic television programmes.

Audiovisual media services are defined as services, which have the principal purpose of providing moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks. This definition now provides for a basic stock of norms applicable to every audiovisual media service. Such cross-media regulation, however, does not preclude specialized and more specific rules where they are needed. According to different types of distribution, the audiovisual media services are to be broken down into linear and non-linear services. Regardless of the broadcast platform used, all on-demand services will probably be included among non-linear content (such as video-on-demand). This way the commission wants to bypass the demarcation problems with the already mentioned e-Commerce Directive and its definition of information society services.

The difference between these 'non-linear' media services and the 'linear' services is the fact that the former offer viewers the option of deciding for themselves what they want to see and when they want to see it. This shows the necessity to also differentiate in regulation: whereas for the non-linear service a basic framework of general rules may suffice, for linear ones - those for which the responsible organizers compile a fixed programming schedule for the day (e.g. traditional television programming or the so-called near video-on-demand formats) - additional rules of regulation will apply.

II. THE PROTECTION OF THIRD PARTIES
AND FURTHER PUBLIC INTERESTS

A. REVIEW OF STATUS QUO

I. Regulation of content for the protection of human dignity, as well as the protection of other fundamental values of a democratic society

The specifications for the protection of human dignity and fundamental values are all of a qualitative nature, in other words regulating content with subject-matter specific regulations. Regarding commercial content broadcast during television programmes, Article 12(a) of the Television Directive stipulates that television advertising and teleshopping are not to prejudice respect for human dignity. Furthermore, according to Article 12(b) of the Directive, television advertising and teleshopping may also not include any discrimination on grounds of race, sex or nationality. The article also prohibits television advertising and teleshopping from being offensive to religious or political beliefs (c), encouraging behaviour prejudicial to health or to safety (d) or to the environment (e).

As concerns other types of content – like broadcasts – Article 22a of the Television Directive instructs the Member States to also ensure that those do not contain any incitement to hatred on grounds of race, sex, religion or nationality.

For television advertisement, Article 12a of the Television Directive provides for absolute protection of human dignity; however, it does not with regards to other kinds of content. In matters of religion and nationality, there is a clear gap between commercial and other kinds of content as well. While commercial content must refrain from being discriminating or prejudicial, restrictions on other content are made only on a more invasive degree of incitement.

15. Meaning services as laid out in the Articles 49 and 50 of the EC Treaty.
16. This formulation has already met criticisms as being too vague not determining when the criteria of 'principal purpose' are met. Recital number 14 of the Proposal for the directive however indicates that all those services are to be excluded, where any audiovisual content is merely incidental to the service and not its principal purpose. An example stated in the same recital is a website containing audiovisual elements only in an ancillary manner, like e.g. elements with graphic animation, short advertising spots, etc...
20. For existing 'soft law' cf. in particular the Recommendation on the Protection of Minors and Human Dignity, OJ 1998 L 270/49. For the implementation, see the Decision on Combating Illegal and Harmful Content on Global Networks, OJ 2003 L 162/1.
21. The term used in the given context of fundamental values of a democratic society follows the guarantees and objectives of the Charter of Fundamental Rights – Article II 61 et seq. in Part II of the treaty establishing a Constitution for Europe.
to hatred. The problem areas health, safety and protection of the environment are completely left by the wayside in terms of other content. This supposed contradiction in values can be explained by the different level of protection that commercial and other content enjoy in the context of Article 10 of the European Convention on Human Rights.\(^{23}\)

2. **Regulation of Content for the Protection of Minors\(^{24}\)**

As already indicated by the Commission in its 1996 ‘Green Paper on the Legal Protection of Minors and Human Dignity in Audiovisual and Information Services\(^{25}\) the advent of new audiovisual and information services requires the adaptation of current regulations for the protection of minors.

In several Member States general statues cover the principle of the protection of minors regardless of media, prohibiting minors the access to materials detrimental to their development but whose use by adults is not subject to sanctions. Then again other Member States have media-specific statutes. However, the problem remains the same in every case: implementing measures for the protection of minors in such a way, so as to prevent them from obtaining materials posing a danger to them without completely impeding access to these materials for adults\(^{26}\). Although special software that filters out undesirable content is already available and various initiatives try to classify content in the Internet,\(^{27}\) this goal still is hard to achieve. Specific regulations governing all audiovisual content and information services on the European level are lacking, as to date regulations for protecting the physical, mental and moral development of minors are only provided for with regard to the medium television.\(^{28}\) There is no clear regulatory mandate, however, from the Community applicable to other media and information services concerning the protection of minors.\(^{29}\) The foundation for the measures ensuring the protection of minors regarding audiovisual and information services was laid in a Council Recommendation\(^{30}\) in 1998, however, these first steps have not yet evolved into specific regulations. The currently applicable E-Commerce Directive merely mentions the issue in Article 16 (1) which only includes a call for the Commission and Member States to encourage the drawing up of codes of conduct regarding the protection of minors and human dignity. As efforts are being made to extend the scope of the Television Directive\(^{31}\) basic regulatory framework to audiovisual media services,\(^{32}\) this would also mean to apply the requirements to protecting minors to non-linear services, right now only being subject to the rules in the E-Commerce Directive.

The requirements for protecting minors currently mandated by the Television Directive are primarily of a qualitative or substantive nature.\(^{33}\) B: this token, television advertisement and teleshopping may not, according to Article 15(1) of the Television Directive, be specifically aimed at minors, and in particular depict minors consuming alcoholic beverages. Article 16(1) of the Directive stipulates that television advertising may not directly exhort minor to buy a product or a service by exploiting their inexperience or credulity (a) nor directly encourage minors to persuade their parents or others to purchase the goods or services being advertised (b), nor exploit the special trust minor place in parents or teachers or other persons (c), nor unreasonably show minor in dangerous situations (d). Paragraph 2 of this article applies the requirement enumerated in paragraph 1 to teleshopping, with the additional stipulation that teleshopping may not exhort minors to contract for the sale or rental of goods and services.\(^{34}\)

With regard to other content, Article 22(1) of the Television Directive obligates the Member States to take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography.

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24. With regard to existing ‘soft law’ cf. fn. 19.
26. In this context Spoerl/Sellmann speak of a ‘system that takes interests into account’ which should guarantee the protection of minors that is as comprehensive as possible, but may also note allowed to restrict too severely the interests of the users and provider with regard to freedom of information. W. Spoerl and C. Sellmann, ‘Informations- und Kommunikationsfreiheit im Internet’ [2004] Kommunikation & Recht, 372. Cf. also Recital 32 in the Proposal for a directive amending the Television without Frontiers Directive 89/552/EEC, COM (2005) 646 final.
27. M. Bock and J. Wölke, [1997] *Betriebs-Berater*, 16. For instance, databases of websites that contain objectionable content can be set up; the PICS (Platform for Internet Content Selection Initiative) is relatively far along in the classification based on voluntary self-regulation. See <http://www.pics.org/PICS/>., 23 June 2006.
28. The general necessity of such rules is expressly stated in the 22nd Recital of the Television without Frontiers Directive 97/36/EC, OJ 1997 L 202/60.
29. W. Berka, ‘Conent-Regulierung im Lichte der Konvergenz’ [2000] Journal für Rechtspolitik, 197. For Berka ensuring a certain fundamental standard in the protection of minors for fields that do not come under the scope of the Television without Frontiers Directive on constitutional law grounds (considerations under equality law or in any case with regard to fundamental legal obligations to protect) is necessary.
34. Based on the country of transmission principle (see Section IV.A in this Chapter), in this context receiving states are forbidden to subject television advertising from other Member States under their jurisdiction as this would amount to a double regulation. *De Agostini v. Case No. C-34/95, C-35/95, C-36/95, [1997] ECR I-03843.*
or gratuitous violence. The measures provided for in paragraph 1 are also applicable to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any other technical measure, that minors in the transmission area will not normally hear or see such broadcasts. When such programmes are broadcast in uncoded form, Article 22(3) obligates the Member States to ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration. The measures the Member States take against broadcasts likely to cause development impairment are differentiated by considering the gravity of the potential impairment, a necessarily vague term. Pornography and gratuitous violence are explicitly mentioned in the demonstrative framework of Article 22(1) of the Television Directive as indicated above. The challenge of achieving an adequate differentiation is made abundantly clear against the backdrop of these two terms alone. In any case, the provisions contained in paragraph 1 cover so-called splatter or hardcore formats. Considering the stringency of the intervening measures with regard to such broadcasts, merely potentially (i.e. not seriously) impairing depictions, such as usual erotic or action films, are subject to the provisions contained in paragraph 2. Regarding these programmes it is therefore to block them either by using technical means or by selecting the time of broadcast. By systematically, and especially teleologically interpreting these provisions, it can be inferred that Article 22(3) of the Directive only applies -- in this sense -- to programmes that do not cause serious impairment.

From a quantitative point of view, Article 11(5) of the Television Directive stipulates that the broadcast of children’s programmes with a scheduled duration of less than 30 minutes is not to be interrupted by advertising or teleshopping. For the future, this duration will likely be extended slightly due to the harmonization of relative time spans.

3. Regulation of Content for the Protection of Health

Although regulatory provisions for protecting health are, according to their very nature, to be included under the heading of consumer protection norms, their objectives are clearly distinct. These provisions therefore shall be dealt with separately.

Unlike any other group of regulations, those governing the protection of health are characterized by media-related as well as cross-media regulatory provisions. The media-related or sector-specific provisions are laid down in the Television Directive. Cross-media provisions, or those which apply to all content, can be found in the Directive on Tobacco Advertising and the Medicinal Products Directive.

As for content regarding television advertisement and teleshopping of alcoholic beverages, Article 15 of the Television Directive contains subject matter provisions governing the protection of health. In particular, they may not link the consumption of alcohol to enhanced performance or to driving nor may they create the impression that the consumption of alcohol contribute to social or sexual success, and in general, moderation in alcohol consumption may not be presented in a negative light.

Furthermore, the Medicinal Products Directive contains qualitative restrictions on the advertisement of medicinal products relevant not only for television advertisement, but also for commercial advertising in general irrespective of its media platform. Accordingly, advertisements for medicinal products must present the properties of the medicinal product objectively and without exaggeration and may not be misleading (Article 87(3)). Advertising medicinal products that are available on medical prescription only is prohibited (Article 88 1st bullet point). Certain elements, such as those that apply either exclusively or mainly to children, are prohibited per se in the advertisement of medical products (cf. the catalogue under Article 90).

Quantitatively speaking, Article 13 of the Television Directive generally prohibits any kind of television advertising and teleshopping for cigarettes and other tobacco products. Television advertising for medicinal products and medical treatments that are only available on medical prescription are barred pursuant to Article 14(1) of the Television Directive. The same applies with regard to teleshopping for certain medicinal products, as well as for medical treatments. Article 17(2) of the Television Directive also forbids the sponsoring of television programmes by companies whose main activities are manufacturing cigarettes and other tobacco products. Within the meaning of Article 14(1) of the Television Directive, sponsoring is also prohibited for certain medicinal products and medical treatments.

Administrative provisions in the individual Member States are to be approximated pursuant to Article 1(1) of the Tobacco Directive in terms of the press, other printed publications, radio broadcasting and the information

41. In the future these provisions will be extended in general to audiovisual commercial communication. Cf. Article 1(1) in conjunction with Article 3(e) as amended by the Proposal for a directive amending the Television without Frontiers directive 89/552/EEC, COM (2005) 646 final.
43. In the future this rule will be applicable to all audiovisual media services. Cf. Article 3(2) and 3 as amended by the Proposal for a directive amending the Television without Frontiers directive 89/552/EEC, COM (2005) 646 final.
society services. The permissibility of advertising for tobacco products is clearly restricted,
44 pursuant to Article 3(1) of the Tobacco Directive with regard to printed publications. This kind of advertising is also not permitted in information society services (Article 3(2) of the Tobacco Directive). Prohibitive regulations are also in place for advertising or sponsoring in radio broadcasting (Article 4 of the Tobacco Directive).

4. Regulation of Content for the Protection of Consumers

It is certainly no surprise that in consumer protection detailed regulations are in place. Aside from special issues (such as tobacco advertising), in which qualitative intervention can be adapted to the specific regulatory subject-matter, the objective in the abstract area of consumer protection, aside from the possible deception of consumers, is to prevent them from being permanently bombarded by advertising messages of whatever kind. Qualitative intervention means, in essence, mandatory identification and prohibitions on execution, while quantitative provisions restrict broadcasting times.

The regulations relevant to television advertising and teleshopping content can be found in the Television Directive; pursuant to Article 10 of this Directive, television advertising and teleshopping must be readily recognizable as such and kept quite separate from other parts of the programme by optical and/or acoustic means (paragraph 1); isolated advertising spots are to remain the exception; (paragraph 2); advertising is not to use subliminal techniques (paragraph 3); and surreptitious advertising is prohibited (paragraph 4). Pursuant to Article 17(a) of the Television Directive, the content and scheduling of sponsored programmes may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster in respect of programmes. Article 17(b) of the Television Directive states that sponsored programmes must be clearly identified as such by the name and/or logo of the sponsor at the beginning and/or the end of the programmes. This regulation, however, is to be interpreted so as to ensure that this information as regards the sponsor is not prohibited in other places. In accordance with Article(c) of the Television Directive, sponsored programmes must not encourage the purchase or rental of the products or services of the sponsor or a third party. Article 17(3) states that news and current affairs programmes may not be sponsored. In the future the mandatory identification of sponsored

50. Cf. 3h as amended by the Proposal for a directive amending the Television without Frontier directive 89/552/EEC, COM (2005) 646 final. What has been subject to discussion here is mainly the difficulty of differentiating between product placement, surreptitious advertising and sponsoring.
52. With the exception of serials, series, light entertainment programmes and documentary films. Made-for-television films which were designed to include breaks for inserting advertising spots come under the term 'films made for television' in the text. With regard to the frequency of the interruptions, these therefore are entitled to increased protection. RTL Case No. C-245/01 [2003] ECR 1-12489.
53. This duration also includes the time allotted to advertising, the so-called 'gross principle' Cf. ARD-ProSieben, Case No. C-698/99 [1999] ECR 1-07599. Pursuant to Article 3 the opinion of the ECLI authorizes the Member States to take stricter measures and introduce the net principle (without calculating the time allotted to advertising).
54. The provisions contained in the above-mentioned paragraphs apply to a programme broadcasting time of at least 30 minutes.
those which claim to present information objectively, must not be exploited for commercial purposes. In all likelihood, future regulations will be based on comparative provisions (minimal changes to the time intervals as they pertain to interruptions may be possible), however, simplifications are on the horizon with the proposal for a new directive.

Regarding the upper limit of the amount of broadcast time allotted to advertising and teleshopping spots, Article 18(1) of the Television Directive sets a total limit of 20 per cent of the daily transmission time. Transmission time for advertising alone may not exceed 15 per cent of the daily transmission time. The amount of spot advertising within a given one-hour period is not to exceed 20 per cent (paragraph 2). In future this rather complex regulation will most likely make way for a unified limit applicable regardless of the advertising format.

Furthermore, in view of the current legal situation, one peculiarity should be pointed out, namely that teleshopping windows dedicated to teleshopping broadcast by a channel not exclusively devoted to teleshopping are to be of a minimum uninterrupted duration of 15 minutes. (Article 18a(1) of the Television Directive). The maximum number of windows per day is eight. Their overall duration may not exceed three hours per day. They must be clearly identifiable as teleshopping windows by optical and acoustic means (paragraph 2). In the context of this regulation, the setting of a minimum duration pursues a quasi 'reverse regulatory approach'. With additional mandatory identification, qualitative and quantitative elements are present. It remains to be seen whether this approach will be included in the framework of the new regulations or whether it will fall victim to the trend toward simplification.

Apart from television other audiovisual media content is not left unregulated but may fall under the definition of information services becoming subject to the E-Commerce Directive's regulatory regime. In the same directive Article 6 et seq regulates information and other legal requirements with regard to commercial communication. It must be clearly identifiable as such

(Article 6(4)), the natural or legal person on whose behalf the commercial communication is made must be clearly identifiable (Article 6(4)), promotions offers, (discounts, premiums, etc.) if permitted in the Member State where the service provider is established, must be clearly identifiable as such, and the conditions which are to be met to qualify for them are to be easily accessible and presented clearly and unambiguously (Article 6(5)), and the same applies analogously to promotional competitions or games, (Article 6(6)).

As far as an unsolicited commercial communication is concerned (so-called spamming), Article 7 of the E-commerce Directive – presuming its permissibility in the respective Member State – contains comparative requirements. Such commercial communication is to be identifiable clearly and unambiguously as soon as it is received by the recipient (paragraph 1). Furthermore, the Member States are obligated to ensure that service providers undertaking unsolicited commercial communication by electronic mail regularly consult and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves (so-called Robinson lists) (paragraph 2). Member States are also to ensure that the use of commercial communications which are part of, or constitute, an information society service provided under a regulation profession (e.g. doctors) is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession (Article 8(1) of the E-Commerce Directive).

Provisions for combating misleading advertisements are used to conduct consumer protection objectives. Pursuant to Article 4(1) of Directive 84/450/EEC as amended by Directive 97/55/EC mandating in the interest of the consumer, competitor and the general public to create suitable and effective tools for combating misleading advertising. According to Article 2(2) misleading advertising is defined as "any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to

57. Pursuant to Article 18(3) of the Television without Frontiers Directive 97/36/EC, OJ 1997 L 202/60, announcements made by the television broadcaster in connection to its own programmes and ancillary products directly derived from these programmes, as well as public service announcements and charity appeals are not considered advertising within the meaning of Article 18 of the Television without Frontiers Directive.
60. Ibid. The Proposal deletes Article 18a of the old version.
61. Article 20(1) defines commercial communication as any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. Pursuant to Article 2(1) bullet points 1 and 2, the mere fact of having a domain

63. Register of those persons who desire no access to commercial communication.
65. These regulations definitely pertain to further interests, such as those of competitors.
5. **Regulation of Content for the Protection of Personal Rights**

Regarding content broadcast via television, Article 23 of the Television Directive regulates a right of reply for every natural or legal person whose legitimate interests have been damaged by an assertion of incorrect facts in a television programme. The reply must take place within a reasonable time period after the receipt of a legitimate application for the exercise of the right of reply in a timely, objective and adequate manner in relation to the programme for which the application applies. The Directive on Privacy and Electronic Communications also serves to protect fundamental rights and freedoms, in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector (Article 11). The right to privacy and personal communication is protected from unsolicited communications ('spamming') cited in Article 13 – these include communications in which automated calling systems, facsimile machines or electronic mail for the purposes of direct marketing are used. Article 13 stipulates that such methods may only be used if consent has been given. In any event, the practice of sending electronic mail for purposes of direct marketing disguising or concealing the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request that such communications cease, is prohibited. Regarding the processing of personal data, Article 5 requires Member States to prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data. This represents an attempt to guarantee the right to the protection of personal data as enshrined in the Charter of Fundamental Rights.

Article 7 of the Charter of Fundamental Rights (Article II-67 of the European Constitution) and Article 8 of the European Convention on Human Rights provide the foundation for regulating fundamental rights in this context. Relying on the prevailing interpretation, at least for the Charter of Fundamental Rights, that precedents of the European Court of Human Rights represent an imminent component of the European Community's code of fundamental rights, far-reaching possibilities for restricting the freedom of the press can be assumed with regard to respect for personal privacy and family life based on recent developments. The ECHR also assumed a restrictive interpretation of the term 'public figure' in the ruling it handed down in Hannover/Germany 2004. The weighing of the fundamental rights of freedom of speech on one hand and the protection of privacy on the other must, according to the court, take into account the question of whether the publication of articles of photographs contributes to a debate of general public interest. Reporting about the purely private activities of a merely 'relative person of contemporary history' does not meet this requirement. Primarily the above-mentioned narrow term of 'absolute person of contemporary history' seems to be problematic in this context. Should the restrictive track taken by the ECHR in actuality lead to subsuming only political functionaries under this term, this would constitute an attack on the media's perception of its core responsibility, namely as 'public watchdog'.

B. **Analysis of the Problem**

The objective of the new Audiovisual Media Services Directive is to cover the classic linear television programme, as well as the non-linear media services, in other words services where users decide for themselves which programme they want to see. This way the demarcation problems with information society services regulated by the E-Commerce Directive could be solved in favour of a more comprehensive regulation, which makes the most sense. If no guarantees for certain minimum standards are in place for all content services, users could undermine protections of the rights of third parties simply by switching to a different medium and that should not be the case. In expanding the regulatory scope, naturally the question of possible regulatory options arises. In principle, there are two antithetical positions. The first represents comprehensive control by the state, while the other represents self-regulation by society. According to Schmid-Preuß, self-regulation by society represents the 'individual or collective pursuit of private interests in the enjoyment of fundamental freedoms to 69. Directive 2002/58/EC, OJ 2002 L 201/37.
70. With regard to the general recognition of the fundamental right to the protection of privacy, regardless of the function of the Charter of Fundamental Rights as a source of recognition of rights, cf. recent precedents, e.g. KPN Telekom, Case No. C-109/03, [2004], ECR I-11273, as well as Commission v. Netherlands, Case No. C-350/02, [2004], ECR I-6213.
72. ECHR, Von Hannover, Case No. 59320/00 [2004].
for one's own legitimate benefit. Regulation by the state, however, shapes the framework in which we live, in the broader sense, by exercising public powers. The situation naturally becomes interesting when trying to establish a position between these two extremes. That's where we find the model that strikes the best balance between the 'state and the private sphere', namely the model of regulated self-regulation or also co-regulation. The state, or in our case the European Union, regulating more and more through 'soft law' and promotional instruments has encouraged voluntary, private initiatives as a contribution toward meeting public responsibilities.

While the usual regulatory measures can be seen as sufficient for 'classic' television formats, its applicability for other audiovisual media is widely questioned. At first glance it can be seen as an alternative to require providers to label content and filter it through positive and negative lists. However, positive lists have the potential to strongly limit the access to information, perhaps too strongly. On the other hand recording all illegal content on negative lists is currently technically impossible and will most likely remain so in the near future as well. This is because content cannot be blocked precisely from a central location. Filters can be circumvented by users and drawing up negative lists is also very expensive, a factor that should not be underestimated. Further, classic regulation cannot keep up with arduous decision-making processes as a rule, given the fast pace of development in the multimedia sector. In other words, the limits of detailed regulation have been reached. Regarding the regulation of non-linear services, the possibilities are therefore limited to co-regulation and thereby to provisions that have the character of a recommendation and to incentives for private initiatives, as is already visible in current Community regulations. As for the Community, there is a trend to let these models play a greater role.

Another problem is compliance with regulations under constitutional law, based on which care must be taken that other fundamental rights, in particular the freedom of speech, the press and information, are not left by the wayside in favour of protecting the rights of third parties. Regulating certain content too narrowly for the protection of persons, for example minors, entails the danger of having an unintentional impact, in this case on adults. As far as the user is concerned, this thus results in a kind of 'information blocking' and may make it unduly difficult for providers to disseminate content. The reason for this problem is seen, among others, in the flood of technology and in the resulting overburdening of state structures. Co-regulation could possibly minimize the dangers of 'overregulation', as those involved have to be in agreement with each other on the scope and the government's implementation and can apply the experiences they have gained from day-to-day practice.

As experience with the co-regulation model is lacking, it is as yet somewhat unclear how this approach would develop in detail. It is therefore difficult to say to what extent co-regulation should actually be implemented in the interplay between state-control versus private initiative without further analysis.

C. SUMMARY

In the related secondary legal framework, numerous regulations already exist that directly limit content in both a qualitative and quantitative manner for the protection of third parties. Content is regulated in varying degrees depending on its nature for the protection of human dignity. The Television Directive differentiates between advertising and other kinds of content, thereby definitively prohibiting only the commercialized depiction of violations of human dignity. Qualitative regulations can be found in the protection of minors, for example as indicated in Article 22 of the Television Directive which ties into the endangerment of physical, mental and moral development; there are also quantitative regulations which prohibit advertising interruption during children's programmes up to a certain duration. Protection of the consumer and health also number among the factors worthy of protection for which content is regulated. The Television Directive furthermore wholly prohibits, for instance, advertising for specific goods that are dangerous to human health, such as tobacco products in Article 13, and Article 10 demands that advertising and televising be clearly indicated as such. Regarding personal rights, Article 23 of the Directive stipulates a right of reply that any person is entitled to whose legitimate interests have been prejudiced by assertions of false information in a television programme. The above-mentioned Television Directive regulates content according to specific sectors; its regulations are limited to television programme and television advertising.

The protection of fundamental and personal rights, in particular the rights of minors, furthermore the protection of health, consumer interests and the

78. Cf. the Recommendation on the Protection of Minors and Human Dignity, Of 1998 L 270/48. Unlike Directives, Recommendations are not legally binding and serve merely to urge the Member States to adopt a particular behaviour (see Article 249(5) of the EC Treaty).
80. For this reason Recital 32 in the Proposal for a directive amending the Television without Frontiers directive 89/552/EEC, COM (2005) 646 final, also states that all measures taken to protect minors and human dignity must be carefully balanced with the fundamental right to freedom of expression.
interest of rights-holders are all relevant outside of the medium of television as well. For this reason, provisions inspired by these regulations contained in the Television Directive can also be found in other directives. Relevant in this context are the E-Commerce and Data Protection Directives. The latter protects privacy and personal communication from unsolicited communications ("spamming") in Article 13. The E-Commerce Directive stipulates in principle standards for individually accessible electronic commercial communication. The Tobacco and Medicinal Products Directives contain provisions for protecting the rights of third parties as well. These regulations pursue their objective in protecting health in a cross-media approach, unlike the Television Directive.

The future Audiovisual Media Services Directive is intended to pursue a comprehensive concept that at least cuts across audiovisual media in order to include the non-linear services that are not addressed by many regulations. The expansion of these regulatory efforts cannot take place on the basis of a classic, state-controlled approach for several reasons but should rather take place with the help of private initiatives. The extent, to which the relatively new approach of so-called co-regulation can really be used to pursue these objectives in cooperation with various interest groups and with the goodwill of the content industry, is difficult to judge at the moment due to a lack of experience with these kinds of models. Unlike state control, co-regulation can potentially minimize the danger of overregulation. Overregulation indeed poses a threat to certain fundamental rights and freedoms, as the overzealous restriction of content for the protection of third parties may impact the rights of those who were not the target of the regulation. It is not easy to identify the reasons for this. Among other things, the flood of technology and the resulting overburdening of state structures have been cited in the discussion. Co-regulation may help to avoid this kind of situation, as those involved have to agree on the scope and the implementation of the government, and can apply the experiences they have gained from day-to-day practice.

III. PROMOTING PRODUCTION AND DISSEMINATION OF CONTENT

A. REVIEW OF STATUS QUO

1. Direct Promotion of Content

In addition to various European action and funding programmes – principally the MEDIA-Plus and MEDIA-Training, the EU’s cultural programme, as well as the funding programmes in the framework of Initiative i2010 –

the Television Directive also directly promotes the production and the dissemination of content, in particular by prescribing quotas. Article 4 of the Television Directive requires Member States to ensure, where practicable and by appropriate means, that broadcasters reserve a majority proportion of their transmission time for European works, excluding the time appointed to news, sports events, games, advertising and teletext services. Article 5 of the Television Directive demands that Member States ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 per cent of their transmission time, excluding the time appointed to broadcasts within the meaning of Article 4 (supra) or alternately at least 10 per cent of their programming budget for European works created by producers who are independent of broadcasters. This percentage is to be achieved gradually – newer works are to receive an appropriate percentage, including those which are broadcast within five years after being produced.

These regulations refer primarily to television programmes only. Indirectly, however, they naturally have a positive impact on the production of European audiovisual works, in particular on feature films, as well, as the latter are regularly also broadcast within the context of television programmes.

2. Indirect Promotion of Content

a. Promotion through tax breaks for film and television

This kind of promotion primarily takes a two-pronged approach. On one hand, using the classic means of depreciation and amortisation where procurement and production can be written off over a short time period. The other approach entails using a system of tax credits that originated in Canada. Here, a producer receives a state grant depending on the sum of the taxes that the employees of the production company are required to pay, amounting to, for example, up to 20 per cent of sum total of taxes to be paid by the employees.

b. Promotion by limiting regulatory possibilities

A fundamental norm that places restrictions on the regulation of content both quantitatively and qualitatively is Article 10 of the European Convention of Human Rights. This regulation guarantees the fundamental right of freedom of expression. By its wording this article also applies in a addition to the freedom
to receive and impart information and ideas without interference by public authority and regardless of frontiers. These freedoms can be subject to restriction under the conditions listed under Article 10(2) of the European Convention of Human Rights.

The possibility of restrictions varies according to degree depending on the area in question. Also the European Court of Human Rights gives the Member States – for example as regards freedom of the press, since, as the ECHR described it, the press plays a special role within a democracy as ‘public watchdog’ only limited leeway in their judgement whether the criteria as contained in paragraph 2 are given. Restrictions on disseminating content in the form of commercial communication are subject to less strict control by the ECHR. For this reason, the advertisement is given even more leeway in assessment, as it does not have the same essential significance for a democratic society as non-commercial communication does. Thus the ECHR has restricted itself when interfering with the freedom to advertise to efforts verifying whether the interference is fundamentally justified and proportionate. According to the criterion of contributing to a democratic society, a differentiation between commercial and non-commercial communication is made. The logical conclusion of this is that advertising fundamentally enjoys less protection under Article 10 of the European Convention of Human Rights; in other words more profound state intervention is permissible in commercial communication as compared to other kinds of content. However, this line cannot be drawn very clearly every time, and it is not expressly regulated. Rather, it has developed over a longer period of time based on case law of fundamental rights. It becomes even more delicate when making a further distinction among non-commercial communication between information and entertainment. Here as well, a varying significance for the state of a democratic society must fundamentally be presupposed; however, in individual cases it quickly becomes questionable whether a piece of information is significant for the public or serves purely to entertain, as for example the Hannover/Germany case has shown recently.

Radio broadcasting has a special status with regard to content. In the cases GROPPERA, LENTIA and TELE 1 the ECHR found that any restriction on the freedom of broadcasting constituted an infringement of Article 10 of the European Convention on Human Rights. However, for a long time it was unclear whether and how such infringements could be justified. Article 10 of the European Convention on Human Rights presupposes a certain special status for broadcasting as compared to other mass media outlets, inasmuch as

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86. ECHR. *Lingen*. Series A Case No. 103, para. 42. Cf. ECHR *Sunday Times*, Series A Case No. 30 in which the ECHR stressed the significance of the press for the freedom of expression.

87. ECHR. *Bashford*. Series A Case No. 90 and *Markt Intern*. Series A Case No. 165.

88. ECHR. *von Hannover*. Case No. 59320/00 [2004].

89. ECHR. *Groppera Radio AG et al*. Series A Case No. 173.

90. ECHR. *Informationsverein Lentinia*. Series A Case No. 276.

91. ECHR. *Tele 1 Privatfernsehsellschaft mbH*. Case No. 32240/96 [2000].

92. Digital video broadcasting is the transmission standard for digital television in Europe which has prevailed. The addition ‘-T’ stands for ‘terrestrial’, whereas the variants ‘-S’ for ‘satellite’ or ‘-C’ for ‘cable’ are also possible. For an introduction to the issue cf. S. Himberger, ‘Digitales terrestrisches Fernsehen in Österreich’ [2005] *Medien & Recht* 159 et seq.
media is directly linked to the fundamental definition of freedom of expression for the democratic society. Mass media have a special significance for guaranteeing the public communication process, which, in turn, is essential in a democracy. Ensuring pluralism is, however, not an objective that can justify any restriction whatsoever, as a democratic society has also to guarantee additional fundamental and personal rights that must be weighed against the freedom of expression and pluralism in the media.

B. ANALYSIS OF THE PROBLEM

The quota regulation contained in the Television Directive points to numerous problematic aspects. Even the legal foundation of this regulation is questionable as the quota regulation can be seen as a culture policy measure over which the Community has no competence. The fact that the European Union primarily regulates the subject-matter of programmes, an economic matter presupposed for regulatory competence, is not at stake, and the quota regulation can therefore not be based on Article 47(2) in conjunction with Article 66 of the EC Treaty. This is, however, mistaken, inasmuch as the quota regulation at least indirectly improves the use of European production and therefore competitiveness of the European programming industry. This qualifies the regulation apart from the cultural policy aspect as an economic policy measure as well and justifies the use of Article 47(2) of the EC Treaty as a foundation. Article 47(2) in conjunction with Article 66 of the EC Treaty is also aimed at easing the free movement of services. It remains to be seen whether this freedom will rather be restricted by the subject-matter provisions of the quota regulation. This hypothesis has found at least partial support. On the other hand television broadcasters are favoured inasmuch as the cited European works are often produced by the broadcasters themselves. A further objection refers to the criterion of proportionality: The quota regulation's aim is to eliminate national restrictions that favour national cultural identity and work to the detriment of the free movement of services. But such restrictions can only be in place where a priori a criterion for the permissibility of such restrictions is met. This criterion is an interest of the general public, primarily to protect one's own cultural identity. The problem now is that cultural identity is not only affected by the broadcasting of programming from within but at least to the same extent from outside of Europe, which is why national restrictions still remain justified due to the rising market share of programming mainly from the USA.

A further interest of the general public could also be seen in upholding certain quality standards in programming. Here, on the other hand, the quota regulation does not act directly, as the quota addresses quantitative, rather than qualitative characteristics. In light of this consideration, the question of proportionality of the quota regulation arises, because it seems rather inefficient in its impact compared to its strong regulatory interventions.

Indeed, attention must be given to the fact that the Council has significant leeway for evaluation in examining the suitability and necessity of a legal act of the EC. The ECI has again and again allowed the Council this leeway, which is why it would appear improbable that the ECI would cast doubt on the quota regulation according to the criterion of proportionality.

Additional unanswered questions also concern the obligated parties according to the quota regulation (Are these the broadcasters all together or is it each broadcasting corporation individually?), the definition of a 'European work', or even and 'independent producer'.

Little is likely to change with regard to the promotion of European and independent audiovisual production in the future, as the majority of the Member States have supported maintaining the status quo. According to the Issue Paper, producers, scriptwriters and unions proposed raising the minimum quota for European works; however, several Member States and private broadcasters opposed the quota and disproportionate interference in programming freedom.

According to the data in the study on the impact of measures for promoting the dissemination and production of television programmes pursuant to

93. Article 10 protects not just the opinion of the majority, but also that of the minority, be it wrong or injurious. '...Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no 'democratic society' ECHR HANDYSIDE, Series A Case No. 24.
98. See fn. 95.
Article 25a of the ‘Television without Frontiers’103 Directives, the broadcast timeshare of European works has increased significantly. The authors of the above-mentioned issue paper presumed that these regulations have strengthened the European audiovisual industry as a whole, which is why the broadcast timeshare was described in the paper as thoroughly appropriate. Still it remains unanswered by whom the gain of European works in market shares is borne by. If it were mostly national programmes that are affected, the shares of e.g. US American programmes could have risen as well, which would indicate that the success proclaimed by the paper is only a relative one. In this context it is clear that the role of non-linear services, which have gained potential regarding market share and profits, is growing. For several medium-sized television broadcasters this may mean stiffer competition with online services and telecommunication service providers who also wish to transmit e-content. These facts actually speak in favour of approximating the conditions for all distribution platforms and expanding the quota regulation in order to keep from distorting competition in favour of the new ‘non-linear’ services. It would be incomprehensible why despite their potential for making a large contribution toward promoting European works in the new media, should be exempted. For this reason Recital 35 of the proposal for an Audiovisual Media Services Directive states that non-linear audiovisual services should also advance the production and distribution of European works. Article 4, which contains the quota regulation, remains unchanged.

This also indicates the need for regulation in a new Audiovisual Media Services Directive, whereby there has been a lively discussion on how to do it. Several stakeholders wanted to impose a binding contribution for non-linear services to promote European productions, while others thought it premature, that there would be the risk of impeding the development of new programming. The aforementioned Issue Paper vacillated between advocating a review clause and a middle-of-the-road option in the form of a non-binding instrument which would send a positive signal to European producers of content, while at the same time would achieve an approximation of the competitive conditions between the various platforms.104 In the proposal for the new directive Article 3f is referring to media service providers urging the Member States to ensure that such providers promote production of and access to European works.105 Article 4 however is not amended leaving non-linear services outside the scope of the quota regulation.

C. SUMMARY

In principle, it is possible to promote content directly with regulatory measures, such as the quota regulation contained in the Television Directive or via political programmes, or indirectly with tax breaks for content. Indirect regulations that place certain limitations on content regulation to minimize the danger of overregulation as explained in VI.B.2 also have served to promote content. It is achieved primarily by regulating the fundamental right to freedom of expression and the freedoms of the press and information as described in Article 10 of the European Convention on Human Rights. This means that limits are placed on content regulation in the media for the protection of fundamental and personal rights of third parties. Article 10 of the European Convention on Human Rights guarantees a minimum of protection from infringements in order to also ensure the dissemination of content in terms of freedom of information, as is vital in a democratic society.

After this overview the potential of these various promotional approaches to have an impact seems to be quite diverse and difficult to put a value on. The direct promotion of content using the quota regulation is certainly the most controversial from a law policy perspective. It is easy to cast doubt on the criterion of proportionality, although, considering the above-mentioned significant leeway allowed to the Council in determining necessity, it has prevailed against all objections to date. It remains questionable what the reaction to the shift on the dissemination of content from linear to increasingly non-linear services will be. Will we see demands for quotas for providers of these new services and for the approximation of the various transmission channels, analogous to the regulations for the protection of the rights of third parties? This is a question that has not yet been decided, as is obvious in light of the discussions in the focus groups and beyond.

IV. MAINTAINING THE SINGLE MARKET

A. REVIEW OF THE STATUS QUO

 Naturally, what all of the above-mentioned regulations have in common is that they contribute to maintaining the single market by legal approximation. The following remarks deal in particular with the provisions of sector-specific regulation at content level whose objective is to directly and constitutionally harmonize the market. These include in particular the various principles developed for the harmonization of legal norms; the affected market principle and the country of transmission principle (country of origin principle).


104. Cf. fn. 98.

105. Also the recitals in the Proposal for a directive amending the Television without Frontiers Directive 89/552/EEC. COM (2005) 646 final mention the issue. Recital 35 says: ‘Non-linear services have the potential to partially replace linear services. Accordingly they should where practicable promote the production and distribution of European works and thus actively contribute to the promotion of cultural diversity. It will be important to regularly re-examine the application of the provisions relating to the promotion of European works by audiovisual media services.’

In terms of the collision of laws, the application of the market rule, at least in international private law, can be presumed based on the majority of regulations of the individual Member States. An application of this kind also corresponds to the supposition contained in Article 3 of the draft for the Rome II Regulation that in the case of unfair competition the closest connection exists to the State in which the damaging action has an impact. In so-called multi-state competition applying the affected market rule is, however, of little practicability. The larger the number of competent legal systems, the more difficult it becomes to assess the lawfulness of competitive acts for each market according to its market laws. Within the scope of application of the Television Directive — meaning content broadcast during television programmes — the country of origin principle (country of transmission principle) applies pursuant to Article 2 for this reason. Television broadcasters are therefore primarily subject to the jurisdiction of the Member State in which they are deemed established. The criteria for determining which country is that of the head office, the place of employment of the majority of the staff and in which Member State the key decisions are made with regard to programming (paragraph 3). If the above-listed criteria are insufficient to determine the Member State of the head office, the following additional criteria come into play: they use a frequency granted by that Member State, they use satellite capacity appertaining to that Member State, they do use a satellite up-link situated in that Member State. If it is still not possible to determine which Member State has jurisdiction, jurisdiction is to be exercised by the Member State in which the broadcaster is established pursuant to Article 52 et seq of the EC Treaty.

Within the scope of the E-Commerce Directive, i.e. for information society services, Article 3 of the Directive regulates the country of origin principle as a fundamental principle. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State (paragraph 2). Deviating measures must be taken with regard to a particular information society service on grounds such as public security, health, and safety or consumer protection. A service provider is deemed established if it effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not themselves, constitute an establishment of the provider (Article 2(c)). T regulations enacted within the meaning of the country of origin principle with the meaning of paragraph 2 are not applicable to certain fields listed in the Annex of the Directive (paragraph 3). Worth highlighting are in particular are copyright, neighbouring rights, the freedom of the parties to choose the law applicable to their contract, contractual obligations concerning consumer contacts and the permissibility of unsolicited commercial communications or electronic mail.

B. ANALYSIS OF THE PROBLEM

In this specific context the different treatment of content that is transmitted electronically and of content that is not when applying the principles of harmonization may be problematic. As regulations of other kinds of content are taken horizontally (such as in the Medicinal Products Directive and the Tobacco Directive) in contrast to information society services or television and are therefore oriented toward the affected market principle, in this field differing regulatory regimes could end up being applied to the same content only because its distribution via different media. Advertisement on the Internet would therefore be subject to other standards based on the jurisdictional basis of the country of origin principle than the advertisement disseminated in a cross-border printed medium. This has evoked fears of an ‘online-offline chaos’ which has not entirely been dispelled as yet. Perhaps printed media aimed at being distributed in several countries having separate national editorial desks in most cases can be reasonably required to adhere to respective intrastate laws; however, it seems questionable whether it can be seen as appropriate


109. Competition action impacts on several markets, which is inherent to the nature of cross-border television and the Internet.


112. Pursuant to Article 2(h) of the E-Commerce Directive 'requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically design for them.' The coordinated field concerns requirements with which the service provider has to comply in respect of the taking up of the activity of an information society service or the pursuit of the activity of an information society service.


the Internet site of a printed medium containing the same content should be subject to regulations that are different than those imposed on the printed medium itself.\textsuperscript{115} It is possible that new ground must be broken with regard to cross-media congruency of content in order to contribute adequately to the realization of a Single Market.

In any case, the establishment criterion seems to be a suitable instrument for television and information society services. This is evident as the discussions of experts which formed the basis for the issue papers present issued a clear appeal for adherence to the country of transmission principle to form the core of the Television Directive and the future Audiovisual Media Services Directive.\textsuperscript{116} Expanding the regulations in the Television Directive relevant to this specific context to include 'audiovisual media services' or institutionalizing the 'media services provider' seems probable with the further development of the prevailing regulations. However, problems could arise in applying this principle, namely in constellations where the respective broadcaster is not established in any Member State. Furthermore, the question of the jurisdiction of individual Member States, if non-linear audiovisual services are included in the Draft Audiovisual Media Services Directive also arises. It was also those issues in particular that were touched on in the issue paper,\textsuperscript{117} whereby the following perspectives can be summarized as follows.

In the case of linear audiovisual services, the country of origin principle is to be maintained as an essential principle. In light of experiences with broadcasts containing incitement to hatred a reversal of the order of the accountability criteria could be possible in favour of the use of broadcasting facilities. The ability to apply this to so-called multiplex operators\textsuperscript{118} still seems questionable.

With regard to non-linear services, the location at which the editorial decisions concerning the non-linear services are made, as well as the location of establishment of the non-linear services provider (analogously applying the establishment criterion under the E-Commerce Directive) could be used for the purpose of determining legal jurisdiction. All in all, it seems likely that the criteria contained in the Television Directive will be adapted comprehensively, and therefore based primarily on the accumulation of the above-mentioned elements.\textsuperscript{119} Concerning providers who are not established in any EU Member State, in particular the setting up of a registration procedure, similar to the

\textsuperscript{115} Cf. also specifically the 15th Recital of the Proposal for a directive amending the Television without Frontiers Directive 89/525/ECC, COM (2005) 646 final.


\textsuperscript{117} Ibid.

\textsuperscript{118} The method bundles signals from various sources for satellite transmission.


one in the VAT Directive,\textsuperscript{120} has been mentioned. These providers could register accordingly in a Member State and would then be subject to the relevant laws of that country. In the case of providers that do not register, any country in which the respective service is available would have the authority to take action; the provider would then be subject to multiple regulations.

A partial deviation from the principle of establishment could also be introduced to the future Audiovisual Media Services Directive as a new regulatory aspect. The idea is to subject media services providers who pursue the majority of their activities in a Member State other than the Member States where they are deemed established, with the intent to circumvent national laws within the regulatory framework of the directive, to the legal sovereignty of the respective Member State. So as to avoid undermining the objectives of the Directive such an action taken by a Member State should be tied to additional criteria, such as a primary application to the state of establishment, notifying the Commission, etc.\textsuperscript{121}

C. SUMMARY

The country of origin principle (country of transmission principle) applies to the scope of application of the Television Directive and the E-Commerce Directive. Accordingly, the laws of the Member State in which the service provider or the television broadcaster is established are to be applied. For media not distributed electronically, the affected market principle will still prevail, meaning that the laws of the Member State will apply whose market is affected by the respective action. As a result of this incongruence, the same content can also be subject to other laws that apply to specific media. Overall, the practical problems can be eliminated from the resulting constellations perhaps. In any case, there does seem to be a need for action for maintaining legal stringency.

V. CONCLUSIONS

Sector-specific regulation at content level encompasses legal provisions that directly regulate the performance of content, i.e. the activities of producing and disseminating content. These regulations place qualitative (pertaining to the subject matter) and quantitative (pertaining to the method used in dissemination) restrictions on content primarily for the protection of third parties. Corresponding legal provisions also exist, however, to promote production and distribute content directly


\textsuperscript{121} Cf. Article 2(7) et seq. as amended by the Proposal for a directive amending the Television without Frontiers Directive 89/525/ECC, COM (2005) 646 final.
and indirectly) as well. By deliberately determining the country of origin principle for particular content – mainly for e-content – content regulation in the narrower sense is used to maintain the Single Market. On the other hand, securing functioning market structures does not play a major role in sector-specific regulation at content level.

Regulations for the protection of third parties can be found primarily in the Television Directive and refer predominantly to content, that is transmitted during television broadcasts. Concerning other audiovisual media, sector-specific regulation for the protection of third parties for information society services can be found in the E-Commerce Directive. Since the latter follows a different, mainly economically focused regulatory approach, until now there is no so-called ‘level-playing-field’. However, the proposal for a directive amending the Television Directive is extending the scope of application generally to audiovisual content services. The Medicinal Products and the Tobacco Directives also contain provisions that regulate on a horizontal basis (meaning all content, in particular content not transmitted electronically) – these regulations primarily serve to protect consumer health. The data Protection Directive also has similar provisions aimed at protecting personal rights.

Directly regulating measures are used to regulate content for promoting the production and distribution of content; this includes the quota regulation contained in the Television Directive, as direct and indirect measures, such as tax breaks. Regulations that limit restrictions in content also serve to promote content regulation indirectly. Here, the focus of Article 10 of the European Convention on Human Rights restricts content regulation with the aim of protecting particular public interests. Although the quota regulation may have achieved the desired effects, it still poses a great deal of, as yet, unanswered questions. Above all, however, the lack (due to competence issues) of related qualitative regulations is also mentioned with regard to deficiencies in its construction. In particular, the regulation’s lack of efficiency, cited as a result, has been criticized. Furthermore the legal foundation and the proportionality of the provision have additionally been the subject of much debate.

The country of origin principle was enshrined in the Television Directive and the E-Commerce Directive with the aim of preserving the Single Market, according to which, television broadcasters come under the jurisdiction of the Member State in which they are established. In the case of the linear audiovisual services within the scope of the Television Directive, the establishment criteria are based on the head office, the place of employment of the majority of the staff and on the question in which Member State the key programming decisions are made. Within the scope of the E-Commerce Directive a service provider is deemed established if it effectively pursues an economic activity using a fixed establishment for an indefinite period. As a result, the Member States are prohibited from restricting the distribution of the content referred to by the above-mentioned Directives on grounds that pertain to their field of regulation. The affected market principle applies to other kinds of content, i.e. content disseminated offline in particular, if no regulation to the opposite effect exists. The law to be applied is determined according to the Member State in which the content has a specific effect. The consequence is that the content transmitted via different media can be subject to differing legal treatment. remains to be seen just how relevant this will turn out to be in practice. In order to avoid any contradiction in interpretation further legal approximation appears desirable.

Concerning sector-specific regulation at content level the main goal is to overcome the difficulties that arise in light of the broad coherence of content against the backdrop of existing albeit gradually diminishing difference between the media transmitting the content. In conclusion, with regard to future regulation, the question of how far-reaching it will have to be and which services it will cover, is going to be central. Subsequently, given the wide scope of application, the practical enforcement of the regulatory measures (in particular with regard to the protection of minors) will most certainly raise concomitant problems.
EUROPEAN MONOGRAPHS

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In this series European Monographs this book Regulating Content – European Regulatory Framework for the Media and Related Creative Sectors is the fifty-third title.

Regulating Content – European Regulatory Framework for the Media and Related Creative Sectors

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